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THE
SUPREME COURT REPORTER

VOLUME 43

PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1922

WITH KEY-NUMBER ANNOTATIONS

NOVEMBER, 1922 — JULY, 1923

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(43 Sup.Ct.)

JUSTICES
OF THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1922

CHIEF JUSTICE:

HON. WILLIAM HOWARD TAFT.

ASSOCIATES:

HON. JOSEPH McKENNA.

HON. OLIVER WENDELL HOLMES.

HON. WILLIS VAN DEVANTER.

HON. JAMES C. McREYNOLDS.

HON. LOUIS D. BRANDEIS.

HON. GEORGE SUTHERLAND.

HON. PIERCE BUTLER.

HON. EDWARD T. SANFORD.

ATTORNEY GENERAL:

HON. HARRY M. DAUGHERTY.

SOLICITOR GENERAL:

HON. JAMES M. BECK.

ALLOTMENT OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

FIRST CIRCUIT.

Comprising Maine, Massachusetts, New Hampshire, Rhode Island, and Porto Rico.

JUSTICE OLIVER WENDELL HOLMES, of Massachusetts. Appointed December 4, 1902, by President Roosevelt.

SECOND CIRCUIT.

Comprising Connecticut, New York, and Vermont.

JUSTICE LOUIS D. BRANDEIS, of Massachusetts. Appointed June 1, 1916, by President Wilson.

THIRD CIRCUIT.

Comprising Delaware, New Jersey, and Pennsylvania.

JUSTICE PIERCE BUTLER, of Minnesota. Appointed December 21, 1922, by President Harding.

FOURTH CIRCUIT.

Comprising Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

JUSTICE WILLIAM HOWARD TAFT, of Connecticut. Appointed June 30, 1921, by President Harding.

FIFTH CIRCUIT.

Comprising Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, and Canal Zone.

JUSTICE EDWARD T. SANFORD, of Tennessee. Appointed January 29, 1923, by President Harding.

SIXTH CIRCUIT.

Comprising Kentucky, Michigan, Ohio, and Tennessee.

JUSTICE JAMES C. McREYNOLDS, of Tennessee. Appointed August 29, 1914, by President Wilson.

SEVENTH CIRCUIT.

Comprising Illinois, Indiana, and Wisconsin.

JUSTICE GEORGE SUTHERLAND, of Utah. Appointed September 18, 1922, by President Harding.

EIGHTH CIRCUIT.

Comprising Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.

JUSTICE WILLIS VAN DEVANTER, of Wyoming. Appointed December 16, 1910, by President Taft.

NINTH CIRCUIT.

Comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

JUSTICE JOSEPH McKENNA, of California. Appointed January 21, 1898, by President McKinley.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1922

(260 U. S. 12)

KNIGHTS v. JACKSON, Treasurer, etc.

(Argued Oct. 3, 1922. Decided Oct. 16, 1922.)

No. 167.

1. Constitutional law ⇨283—Using proceeds of state income tax for educational purposes does not violate due process clause.

The income tax imposed by St. Mass. 1916, c. 269, § 5(b), is a general tax, and the proceeds thereof are a part of the general funds of the state, and their expenditure for educational purposes does not impose a public charge on a special class of property and persons not specially benefited, thereby taking property without due process of law, in violation of Const. U. S. Amend. 14.

2. Constitutional law ⇨47—Statute providing for use of income tax cannot be connected with one increasing the tax to attribute unconstitutional purpose to Legislature.

St. Mass. 1919, c. 324, increasing the income tax imposed by St. 1916, c. 269, § 5 (b), cannot be connected with St. 1919, c. 363, directing payment from the proceeds of the income tax to cities and towns of a sum sufficient to reimburse them for increases of salaries of school teachers, etc., for the purpose of attributing to the Legislature an attempt to impose a public charge on a special class of property and persons not specially benefited.

In Error to the Supreme Judicial Court of the State of Massachusetts.

Mandamus proceeding by William W. Knights against James Jackson, Treasurer and Receiver General of Massachusetts. The petition was dismissed by the Supreme Judicial Court of Massachusetts (237 Mass. 493, 130 N. E. 60), and petitioner brings error. Affirmed.

Mr. Philip Nichols, of Boston, Mass., for plaintiff in error.

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*Mr. Edwin H. Abbot, Jr., of Boston, Mass., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

[1] In Massachusetts taxes of a kind that used to be imposed by the cities and towns now are imposed and collected by the Commonwealth and afterwards distributed to the cities and towns to be expended for various public purposes. In this way are collected and distributed, with necessary exceptions, taxes upon the interest from debts, dividends from stock and from partnerships, Gen. Acts 1916, c. 269, § 2, and upon the excess over \$2,000 per annum of income derived from professions and business, again with necessary exceptions, Id. § 5 (b), both as amended. *Dane v. Jackson*, 256 U. S. 589, 41 Sup. Ct. 566, 65 L. Ed. 1107. The latter tax, under section 5(b), was increased 1 per cent. for the years 1918 and 1919 by an Act of 1919, c. 324, § 1. The validity of these taxes per se is not disputed. They make a comprehensive income tax. But by an Act of 1919, c. 363, the Treasurer and Receiver General

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is directed to set aside and pay over to the cities and towns from the proceeds of the income tax a sum sufficient to reimburse them for specified increases of salaries of school teachers, supervisors, superintendents and the like. Thereupon the plaintiff in error, a taxpayer, brought this suit, a petition for mandamus, to prevent the respondent from paying over as directed, contending that the Act of 1919, c. 363, imposed a public charge upon a special class of property and persons not specially benefited by the services and for that reason was a taking of property without due process of law in violation of the Fourteenth Amendment. The Supreme Judicial Court, waiving questions of procedure, held that the income tax was a general tax; that the proceeds of the tax became part of the general funds of the State; that these funds could be expended for education, and that there was no appropriation of such a character as to make the tax a special tax

for a special purpose or use. The petition was dismissed.

[2] We see no reason for not accepting the views taken by the Supreme Judicial Court. The plaintiff in error asks us to connect the increase of the tax for two years by the Act of 1919, c. 324, with the reimbursement directed by chapter 363, which he assails. This cannot be done, especially not for the purpose of attributing to the Legislature an attempt to achieve by indirection a result supposed to be beyond its power. The reimbursement from the general funds of the Commonwealth was lawful and to make it the funds must be provided. The fact that the end was contemplated, if it was, in this particular increase, is no more than was necessary in some form to bring about the result.

Judgment affirmed.

(260 U. S. 1)

STATE OF WYOMING v. STATE OF COLORADO et al.

(Decided Oct. 9, 1922.)

No. 3, Original.

On petition for rehearing. Decree modified, and rehearing denied.

For former opinion, see 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999.

PER CURIAM. 1. On consideration of the defendants' petition for a rehearing heretofore presented by leave of the court, it is considered, ordered, and decreed that the decree entered herein on June 5, 1922,¹ be modified to read as follows:

This cause having been heretofore submitted on the pleadings and the evidence taken before and reported by the commissioners appointed for the purpose, and the Court being now fully advised in the premises:

It is considered, ordered, and decreed that the defendants, their officers, agents, and servants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie river and its tributaries in the state

^{*2} of Colorado more than 15,500 *acre-feet of water per annum in virtue of or through what is designated in the pleadings and evidence as the Laramie-Poudre Tunnel appropriation in that state.

Provided that this decree shall not prejudice the right of the state of Colorado, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that state 18,000 acre-feet of water per annum in virtue of and through what is designated in the pleadings and evidence as the Skyline Ditch appropriation in that state, nor prejudice the right of that state, or of

any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that state 4,250 acre-feet of water per annum in virtue of and through the meadow land appropriations in that state which are named in the pleadings and evidence, nor prejudice the right of the state of Colorado, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from the headwaters of Deadman creek, a Colorado tributary of the Laramie river, the relatively small amount of water appropriated therefrom prior to the year 1902 by and through what is designated in the evidence as the Wilson Supply Ditch, nor prejudice or affect the right of the state of Colorado or the state of Wyoming, or of any one recognized by either state as duly entitled thereto, to continue to exercise the right to divert and use water from Sand creek, sometimes spoken of as a tributary of the Laramie river, in virtue of any existing and lawful appropriation of the waters of such creek.

And it is also considered, ordered, and decreed that the costs of this suit be apportion-

^{*3} ed among and paid by the *parties thereto as follows: The state of Wyoming one-third, the state of Colorado, one-third, and the two corporate defendants jointly one-third.

And it is further considered, ordered, and decreed that the clerk of this court do transmit to the chief magistrates of the states of Colorado and Wyoming copies of this decree duly authenticated under the seal of this court.

2. In view of the modifications hereby made in the decree of June 5, 1922, the petition for rehearing in this cause is hereby denied.

(260 U. S. 16)

NORTH CAROLINA R. CO. v. LEE.

(Argued Oct. 6, 1922. Decided Oct. 16, 1922.)

No. 33.

1. Railroads $\S$ 5½, New, vol. 6A Key-No. Series—Lessor not liable for death of employee during federal control.

A lessor of a railroad, liable under local law for the negligence of the lessee in its operation, is not liable under Federal Control Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½j), for the death of an employee while the railroad was operated by the government.

2. Railroads $\S$ 5½, New, vol. 6A Key-No. Series—Leased road not operated by government as lessee.

Where a leased railroad was taken over and operated by the government as part of the les-

¹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ 259 U. S. 496, 42 Sup. Ct. 594.

see's system, it did not operate the railroad as lessee, but under a right in the nature of eminent domain.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

Action by Evelyn K. Lee, administratrix of Hugh Scott Lee, deceased, against the North Carolina Railroad Company. Judgment for plaintiff was affirmed by the Supreme Court of North Carolina, and defendant brings certiorari. Reversed.

Mr. S. R. Prince, of Washington, D. C., for petitioner.

Mr. R. C. Strudwick, of Greensboro, N. C., for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

[1] The Southern Railway includes a line in North Carolina which is held under a 99-year lease. On that line an employee was killed in March, 1919—apparently while engaged in intrastate commerce. His administratrix brought, in a court of the state, this action for damages, alleging that the line

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was then being operated *by the Southern as lessee, and that the lessee's negligence in operation caused the injury. Only the lessor, the North Carolina Railroad Company, was made defendant. Its liability was asserted under a local rule by which a railroad corporation is liable for injuries resulting from a lessee's negligence in operation. *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959. The defendant set up the fact that, at the time of the accident, the Southern System was being operated solely by the Director General of Railroads under the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451. (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½p). On that ground it requested a ruling that the plaintiff could not recover. This request was refused; and the court instructed the jury that, if the government was operating the railroad, it was doing so in the capacity of a lessee and that the defendant "would still be responsible for the acts and conduct of the government at the time it was operating" the same. The verdict was for the plaintiff; and the judgment entered thereon was affirmed by the Supreme Court of North Carolina without opinion. This court granted a writ of certiorari, 255 U. S. 567, 41 Sup. Ct. 447, 65 L. Ed. 790. Thereafter, the liability of carriers during federal control was considered in *Missouri Pacific R. Co. v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087.

[2] The government operated this railroad not as lessee, but under a right in the nature of eminent domain. It operated through the Director General, not through the Southern Company as agent. The *Ault* Case holds that the Director General alone was made subject, by section 10 of the Federal Control Act to

the "liabilities as common carriers, whether arising under state or federal laws or at common law." To permit an action for injuries suffered during federal control to be brought either against the Southern Company as lessee, or against the North Carolina Company as lessor, would be inconsistent with the provisions of that act. This is now recognized

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by the *Supreme Court of North Carolina. *Lane v. Southern R. Co.*, 182 N. C. 774, 109 S. E. 87; *Barbee v. North Carolina R. Co.*, 182 N. C. 775, 109 S. E. 87.

Reversed.

(260 U. S. 8)

CHARLOTTE HARBOR & N. RY. CO. v. WELLES et al., Board of Com'rs of De Soto County, Fla.

(Argued Oct. 4, 1922. Decided Oct. 16, 1922.)

No. 4.

1. Constitutional law ☞291—Highways ☞90, 122—Statute legalizing creation of special road and bridge district and assessments therein does not violate federal Constitution, as denying due process.

Acts Fla. 1919, c. 8024, legalizing the proceedings of county commissioners in creating a special road and bridge district, and validating the assessments made in such district and the indebtedness incurred, does not take the property of taxpayers without due process of law, in violation of Const. U. S. Amend. 14.

2. Constitutional law ☞193—Legislature may ratify what it might have authorized.

As a general proposition, what the Legislature could have authorized it can ratify, if it can authorize at the time of ratification.

In Error to the Supreme Court of the State of Florida.

Suit by the Charlotte Harbor & Northern Railway Company against W. G. Welles and others, as and constituting the Board of County Commissioners of De Soto County, Fla. A decree dismissing the bill on demurrer was affirmed by the Supreme Court of Florida (78 Fla. 227, 82 South. 770), and plaintiff brings error. Affirmed.

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*Mr. Kenneth I. McKay, of Tampa, Fla., for plaintiff in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Bill in equity to declare illegal the creation of a special road and bridge district, designated as the Charlotte Harbor special road and bridge district, in De Soto county, Fla., and to restrain the defendants in error, as and constituting the board of county commissioners, from paying out any funds in settlement of any supposed obligations contracted for work done in pursuance of the plan proposed, and, further, to enjoin the

commissioners until the final hearing in this cause from contracting any further obligations or paying out any further moneys on account of the construction of roads and bridges under the plan proposed, and for such other and further relief as equity may require.

The ground of the suit and the relief prayed is that the district was constituted of territory which overlapped territory included in another district theretofore created, and that therefore the board of commissioners to which the creation of the district was committed by the law of the state, as the law then existed, was without power to establish the district.

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*The board of commissioners demurred to the bill, and alleged as the grounds thereof the insufficiency of the bill to authorize equitable relief, and besides alleged that complainant was estopped by not complaining earlier, and by its delay had permitted the expenditures of money by the board of commissioners.

The demurrer was sustained, and a decree entered dismissing the bill. The decree was affirmed by the Supreme Court of the state, and to its decision this writ of error is directed.

The opinion of the court considers and disposes of all state questions, including the one pertinent to our consideration; that is, that the Legislature had power to create special road and bridge districts which overlapped, and having that power, it also had the power "to pass an act curing or validating the action of the county commissioners in creating a special road and bridge district partly lying in another special road and bridge district." "This," the court said, "seems to be the general ruling. 8 Cyc. 1023, and numerous authorities cited in the footnote."

The court, therefore, sustained the act which is attacked, taking judicial notice of it; it having been passed pending the suit (chapter 8024, Laws of Florida, Acts of 1919). The court said it was passed for the special purpose of validating the action of the commissioners, "and legalizing and validating the assessments made for the construction of the roads and bridges" in the newly created district, the indebtedness incurred and the warrants issued for the payment of the expenses incident thereto, or which should thereafter issue, and also validated and legalized the assessments and levy of taxes in the district.

The court further said that that doctrine had theretofore been recognized in the state. Cases were adduced, and, adopting the language of one of them, the conclusion was expressed that, in consequence of such legisla-

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*tion, the complainant had no standing in court or right to any relief by reason of the matters complained of in its bill.

[1] In a petition for rehearing, plaintiff in error attacked the reasoning and conclusion of the court, and asserted against them the inhibition of the Fourteenth Amendment of the Constitution of the United States, which precludes a state from a taking of property without due process of law. The specification of the grounds is that:

"The said bill [to quote from it] attempts to legalize a proceeding of the county commissioners of De Soto county, Fla., who were mere administrative officers, and which proceeding was void ab initio and without jurisdiction, and under which proceeding certain taxes were levied against the property of your petitioner, prior to the passage of said act of the Legislature, and therefore the said act of the Legislature, in so far as it purports to create a liability on your orator for taxes previously assessed against your orator under a proceeding of said administrative officers, is void ab initio and without jurisdiction."

The court considered the petition for rehearing and denied it.

In support of the contention of the petition, plaintiff in error makes a distinction between a *cure* statute, which it is conceded a Legislature has the power to pass, and a *creative* statute, which, it is the assertion, a Legislature has not the power to pass. The argument in support of the distinction is ingenious and attractive, but we are not disposed to review it in detail.

[2] The general and established proposition is that what the Legislature could have authorized, it can ratify if it can authorize at the time of ratification. *United States v. Heinzen*, 206 U. S. 370, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688; *Wagner v. Baltimore*, 239 U. S. 207, 36 Sup. Ct. 66, 60 L. Ed. 230; *Stockdale v. Insurance Co.*, 20 Wall. 323, 22 L. Ed. 348. And the power is necessary that government may not be defeated by omissions or inaccuracies in the

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exercise of functions necessary to its administration. To this accommodation, *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades District*, 258 U. S. 338, 42 Sup. Ct. 325, 66 L. Ed. 647,¹ is not militant. The case concedes the power of ratification and declares the principle upon which it is based, and necessarily recognized the subjection and obligation of persons and property to government, and for government, and its continuation for the purposes of government. And the recognition precludes a misunderstanding of the case and its extension beyond its facts. It was concerned with an attempt to impose a charge for the use of a government canal, for which use, at the time availed of, there was no charge—an attempt, therefore, to turn a gratuity conferred and enjoyed into a legal obligation and subject it to a toll.

Decree affirmed.

¹ No. 183 of last term, decided April 10.

(260 U. S. 3)

**LEDERER, Collector of Internal Revenue for
First District of Pennsylvania, v.
STOCKTON.**

(Argued Oct. 5, 1922. Decided Oct. 16, 1922.)

No. 16.

Internal revenue — Income received by hospital from property devised to it subject to annuities and loaned to it by the trustee held not taxable.

Under Income Tax Law Sept. 8, 1916, § 2b (Comp. St. § 6336b), relative to income from property held in trust, and section 11a (Comp. St. § 6336k), exempting charitable corporations, where property was devised to a hospital subject to the payment of certain annuities, and the trustee loaned the property to the hospital, taking security for the payment of sufficient interest to satisfy the administrative charges and the last remaining annuity, the hospital's income therefrom is not taxable.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Action by Alexander D. Stockton, sole surviving trustee under the will of Alexander J. Derbyshire, deceased, against Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (266 Fed. 676), and defendant brings error. Affirmed.

*4

*Mr. Assistant Attorney General Ottinger, for petitioner.

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*Mr. Maurice Bower Saul, of Philadelphia, Pa., for respondent.

Mr. Chief Justice TAFT delivered the opinion of the Court.

The question in this case is whether the Income Tax Law of September 8, 1916 (39 Stat. 756), as amended by the Act of October 3, 1917 (40 Stat. 300), requires the Contributors to the Pennsylvania Hospital, a corporation of Pennsylvania, created for charitable uses and purposes, no part of whose net income is for the benefit of any private stockholder or individual, to pay a tax on the income of a residuary estate devised to it by the will of Alexander J. Derbyshire in 1879 and inuring to its benefit under the following circumstances: The devise was subject to the payment of certain annuities. All of the annuitants are dead save one. The Supreme Court of that state decided that the income could not be paid outright to the Hospital until the death of all the annuitants, and until then must remain in control of the trustee appointed under the will. Derbyshire's Estate, 239 Pa. 389, 86 Atl. 878. The

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trustee transferred the whole residuary fund as a loan for 15 years to the Hospital, and secured himself by mortgage on property of

the Hospital. Under the terms of the loan and mortgage, the Hospital only pays interest enough to satisfy the administrative charges and the annuity. It uses the remainder of the income from the fund for its expenses. It is thus actually receiving the full benefit of the income of \$15,000 from the residuary fund, reduced only by the annuity of \$800.

Section 2b of the Income Tax Law of 1916, supra (Comp. St. § 6336b), is as follows:

"Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: Provided, that where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed."

Section 11 (a) of the same act (Comp. St. § 6336k) provides:

"That there shall not be taxed under this title any income received by any * * * corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

Upon these facts, Lederer, the internal revenue collector, assessed Stockton, the

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trustee, on the income from *the residuary estate for the years 1916 and 1917, under section 2b, and collected the same. The trustee brought suit in the United States District Court against the collector to recover the sums so paid as illegally collected. The District Court gave judgment for the trustee, and this was affirmed by the Circuit Court of Appeals for the Third Circuit, 266 Fed. 676.

This residuary fund was vested in the Hospital. The death of the annuitant would completely end the trust. For this reason, the trustee was able safely to make the arrangement by which the Hospital has really received the benefit of the income subject to the annuity. As the Hospital is admitted to be a corporation, whose income when received is exempted from taxation under section 11 (a), we see no reason why the exemption should not be given effect under the circumstances. To allow the technical formality of the trust, which does not prevent the Hospital from really enjoying the in-

come would be to defeat the beneficent purpose of Congress.

The judgment of the Circuit Court of Appeals is

Affirmed.

(260 U. S. 32)

**INTERSTATE COMMERCE COMMISSION
v. UNITED STATES ex rel. MEMBERS
OF WASTE MERCHANTS' ASS'N OF NEW
YORK.**

(Argued October 9 and 10, 1922. Decided
Oct. 23, 1922.)

No. 245.

Mandamus — 73(1)—Error to compel decision by Interstate Commerce Commission in parties' favor.

Where the Interstate Commerce Commission did not dismiss a complaint seeking reparation and an order that carriers perform the duty of loading paper stock for lack of jurisdiction, but because it held that the petitioners were not entitled to relief, mandamus sought for the purpose of compelling a decision in petitioners' favor was erroneously granted, as mandamus cannot be had to compel a particular exercise of judgment or discretion, or be used as a writ of error.

In Error to the Court of Appeals of the District of Columbia.

Mandamus by the United States, on relation of members of the Waste Merchants' Association of New York, against the Interstate Commerce Commission. A judgment dismissing the petition was reversed by the Court of Appeals of the District of Columbia (277 Fed. 538), and defendant brings error. Reversed.

Mr. P. J. Farrell, of Washington, D. C., for plaintiff in error.

Mr. P. H. Marshall, of Washington, D. C., for defendant in error.

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*Mr. Justice BRANDEIS delivered the opinion of the Court.

In March, 1919, the Waste Merchants' Association of New York filed in the Interstate Commerce Commission a complaint under section 13 of the Act to Regulate Commerce of February 9, 1887, c. 104, 24 Stat. 379, 384, as amended (Comp. St. § 8581). It alleged that existing tariffs on paper stock shipped in carload lots from New York Harbor imposed upon carriers the duty of loading cars; that the carriers had failed to perform this duty on shipments made by complainants' members; that these had been obliged to perform the service at their own expense; and that they were entitled, under section 15 of the act (Comp. St. § 8583), to allowances therefor. The prayer was that the carriers be ordered to pay, by way of reparation, al-

lowances for the loading service and also other damages for violation of law and that the carriers be ordered to observe the law in the future. The Director General of Railroads and 184 transportation companies were made respondents; extensive hearings were had; the Commission filed a report embodying its findings of fact and conclusions, entered an order dismissing the complaint, and on August 7, 1920, overruled a petition for rehearing based on alleged errors in conclusions of fact and of law and newly discovered evidence. Then, on behalf of the association members, this petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia. It prayed that the Commission be directed to take jurisdiction of the claims, to allow damages and to fix the amount thereof. Upon a rule to show cause, objection was made to the jurisdiction of the court over the subject-matter; and the case was heard upon demurrer to the answer, which set up more fully the proceedings before the Commission. The Supreme Court of the District dismissed the petition, on the ground that the relators, having par-

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*ticipated in and obtained benefits from the alleged violations of law, were not in a position to complain. Its judgment was reversed by the Court of Appeals of the District, on the ground that upon the facts found by the Commission complainants were clearly entitled to relief. The case was remanded, with directions to issue the mandamus. 51 App. D. C. 136, 277 Fed. 538. It is here on writ of error.

We have no occasion to consider the merits of the controversy before the Commission. That it did not dismiss the complaint for lack of jurisdiction is clear. It heard the case fully. It found that the rates charged were not unreasonable or discriminatory in violation of the Commerce Act, nor unreasonable for the service actually performed in violation of the Federal Control Act. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¼a-3115¼p. It found that the conditions complained of were an incident of the World War; that the arrangement for loading was a voluntary one beneficial to complainants' members; that there was no provision in the tariffs for allowance to shippers who load cars; and that therefore such allowance could not legally be made by the carriers. The Commission dismissed the complaint because it held that the petitioners were not entitled to relief. *Waste Merchants' Association v. Director General*, 57 Int. Com. Com'n R. 686.

Petitioners sought in the proceeding to set aside the adverse decision of the Commission on the merits and to compel a decision in their favor. The Court of Appeals granted the writ. This was error. Mandamus cannot be had to compel a particular exercise

of judgment or discretion, *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074; *Ness v. Fisher*, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610; *Hall v. Payne*, 254 U. S. 343, 41 Sup. Ct. 131, 65 L. Ed. 295; or be used as a writ of error, *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335. The case at bar is not like *Interstate Commerce Commission v. Humbolt Steamship Co.*, 224 U. S. 474, 32 Sup. Ct. 556, 56 L. Ed. 849, and *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 38 Sup. Ct. 408, 62 L. Ed.

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914, where the Commission had wrongly held that it did not have jurisdiction to adjudicate the controversy; nor is it like *Kansas City Southern Railway Co. v. Interstate Commerce Commission*, 252 U. S. 178, 40 Sup. Ct. 187, 64 L. Ed. 517, where the Commission wrongly refused to perform a specific, peremptory duty prescribed by Congress.

Whether a judicial review can be had by some other form of proceeding, we need not inquire. Compare *Louisiana & Pine Bluff Railway Co. v. United States*, 257 U. S. 114, 116, 42 Sup. Ct. 25; *Philadelphia & Reading Railway Co. v. United States*, 240 U. S. 334, 336, 36 Sup. Ct. 354, 60 L. Ed. 675; *Proctor & Gamble Co. v. United States*, 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091.

Reversed.

(260 U. S. 18)

UNITED STATES v. WONG SING.

(Argued Oct. 11, 1922. Decided Oct. 23, 1922.)

No. 44.

1. Poisons — Provision against purchase of narcotic drugs, except in stamped paper, not limited to those required to register and pay special tax.

Act Feb. 24, 1919, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g), making it unlawful for any person to purchase, sell, etc., certain narcotic drugs, except in or from the original stamped package, is not limited to importers, manufacturers, dealers, etc., required thereby to register and pay a special tax.

2. Poisons — Statute as to purchase of narcotic drugs in unstamped paper held constitutional.

Act Feb. 24, 1919, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g) construed as making it unlawful for persons other than those required thereby to register and pay a special tax to purchase the narcotic drugs therein specified in unstamped paper, is not unconstitutional.

In Error to the District Court of the United States for the District of Utah.

Wong Sing was indicted for offenses, and a demurrer was sustained to the indictment, and the United States brings error. Reversed and remanded.

Mr. Alfred A. Wheat, of New York City, for plaintiff in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Error to review the action of the District Court in dismissing an indictment against defendant in error. The indictment was in two counts. The first count charged that Wong Sing feloniously had in his possession and under his control, at a specified date, certain derivatives and preparations of morphine and cocaine for the purpose of sale and distribution; he not being registered under the provisions of the act of Congress ap-

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proved *December 17, 1914, and its amendments (Comp. St. § 6287 et seq.), and not having paid the special tax required by the Act.¹

The second count charged that Wong Sing, at a specified date and time on such date, and at a specified place in Salt Lake City, within the jurisdiction of the court, knowingly, willfully, unlawfully, and feloniously purchased, from a person or persons unknown to the grand jurors, morphine and cocaine, the exact quantity being unknown to the grand jurors; the said drugs not being in the original stamped packages, or from the original stamped packages; he not having then and there obtained the drugs from a registered dealer in pursuance of a prescription written for legitimate medical uses by a practitioner registered under the act of December, 17, 1914, and its amendments; and the purchase not being by a patient from a registered practitioner in the course of his professional practice, and he, Wong Sing, not being then and there registered under the provisions of the act of Congress, and not having then and there, or theretofore, or at all, paid the special tax provided by the act—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Wong Sing, upon being arraigned, pleaded not guilty, but subsequently withdrew the plea and demurred to the indictment "for failure to state an offense, and being insufficient." The demurrer was sustained, and he was discharged from all liability thereon.

The court made a certificate, to be part of the record and proceedings, that the first count of the indictment was based upon section 8 of the Act of Congress of December 17, 1914, commonly called the Harrison An-

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ti-Narcotic *Act, and that he sustained the demurrer to that count upon the authority of *United States v. Jin Fuey Moy*, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann.

¹ Counsel for the United States say that only the second count is material on this writ of error. The first count, however, is a part of the representation of the case.

Cas. 1917D, 854. And the court further certified that the second count of the indictment was based upon the amended Harrison Anti-Narcotic Act contained in section 1006 of the Revenue Act of February 24, 1919, c. 18 (40 Stat. 1130; Comp. St. Ann. Supp. 1919, § 6287g), and that the count was predicated upon the following provisions: "It shall be unlawful for any person to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package * * *"—and that he construed "the word 'persons' in the foregoing language to mean the persons enumerated in the first paragraph of section 1006, namely, 'Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium, or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district, his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided.'"

The demurrer was sustained, it was further certified, because the second count contained no appropriate allegation giving effect to the word "person," and hence fell within the ruling in the *Jin Fuey Moy* Case, otherwise, it was said, the amendment would be unconstitutional; and, further, that the demurrer was treated as presenting that question of construction, and was sustained only for that reason.

The construction by the court of section 1006 constitutes the question in the case. It is attacked by the United States as not justified, and *United States v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, and *Webb v. United States*, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497, are cited.

[1] We are unable to concur with the District Court. The provisions quoted by the

court have a certain relation but they have

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also a certain independence. The first *makes it "unlawful for any person to purchase" the drugs; the second enumerates other persons who have a larger connection with the drugs, and requires them to register the fact and pay the tax prescribed. There could be no object in requiring a purchaser of the drugs to register, but it fulfilled the purpose of the law to forbid a purchase "except in the original stamped package or from the original stamped package." The requirement fortifies the other injunctions of the statute.

[2] In *Doremus v. United States* and *Webb et al. v. United States*, it was decided that the power of Congress, exerted through the act of 1914, though the act might be denominated a revenue measure, could, as a complement to it, make criminally unlawful the sale, barter or exchange of narcotic drugs, except under certain prescribed conditions designed to make effective as a revenue measure. The principle of the decision applies to the act of 1919 upon which count 2 is based. If the law can put conditions upon sellers, it can put conditions with a like purpose upon purchasers which is done here. Therefore the apprehension of the District Court, if it should be so held, that the act would be unconstitutional under the decision in *United States v. Jin Fuey Moy*, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, was not justified. There is another distinction between the *Jin Fuey Moy* Case and this. In that case, which was under the act of 1914, it was intimated that the persons affected by the act received definition from the requirement of registration. This case is under the act of 1919, and it, as we have said, does not require registration.

It follows that the judgment of the District Court must be and it is—

Reversed, and cause remanded for further proceedings in accordance with this opinion.

(260 U. S. 22)

JACKMAN v. ROSENBAUM CO.

(Argued Oct. 4, 1922. Decided Oct. 23, 1922.)

No. 3.

1. Constitutional law 92—Party walls 3
—Statute merely embodying common understanding that ownership of land is subject to right of adjoining owner to build party wall is valid.

Where the custom of party walls was introduced in Pennsylvania at an early date, and has prevailed for over 200 years, a statute embodying the common understanding that the ownership of land is subject to the right of the adjoining owner to erect a party wall is valid, under the Fourteenth Amendment, without invoking the police power in its support.

2. Party walls 8(1)—Owner building up to line does so with knowledge that wall will have to come down, if not suitable for incorporation in party wall.

A lot owner in Pennsylvania, building up to his division line, does so with knowledge that, in case of the erection of a party wall, that part of his building encroaching on the portion of the land subject to the easement will have to come down, if not suitable for incorporation into the new wall.

In Error to the Supreme Court of the State of Pennsylvania.

Action by Edward F. Jackman against the Rosenbaum Company. A judgment for defendant non obstante veredicto was affirmed by the Supreme Court of Pennsylvania (263 Pa. 158, 106 Atl. 238), and plaintiff brings error. Affirmed.

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*Mr. H. F. Stambaugh, of Pittsburgh, Pa., for plaintiff in error.

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*Mr. A. Leo Weil, of Pittsburgh, Pa., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

The plaintiff in error, the original plaintiff, owned a theatre building in Pittsburgh, Pennsylvania, a wall of which went to the edge of his line. Proceeding under a statute of Pennsylvania the defendant, owner of the adjoining land began to build a party wall, intending to incorporate the plaintiff's wall. The city authorities decided that the latter was not safe and ordered its removal, which was done by the contractor employed by the defendant. The plaintiff later brought this suit. The declaration did not set up that the entry upon the plaintiff's land was unlawful, but alleged wrongful delay in completing the wall and the use of improper methods. It claimed damages for the failure to restore the plaintiff's building to the equivalent of its former condition, and for the delay, which, it was alleged, caused the plaintiff to lose the rental for a theatrical season. At

the trial the plaintiff asked for a ruling that the statute relating to party walls, if interpreted to exclude the recovery of damages without proof of negligence, was contrary to the Fourteenth Amendment. This was refused, the Court ruling that the defendant

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was not liable for damages *necessarily resulting from the exercise of the right given by the statute to build a party wall upon the line, and, more specifically, was not liable for the removal of the plaintiff's old wall. There were further questions as to whether the work was done by an independent contractor and as to negligence, on which the jury brought in a verdict for the plaintiff for \$25,000; but the Court of Common Pleas held that the party employed was an independent contractor and that the defendant was entitled to judgment non obstante veredicto. The Supreme Court affirmed the judgment, holding among other things that the statute imposed no liability for damages necessarily caused by building such a party wall as it permitted, and that so construed, it did not encounter the Fourteenth Amendment of the Constitution of the United States. 263 Pa. 158, 106 Atl. 238.

[1] In the State Court the judgment was justified by reference to the power of the State to impose burdens upon property or to cut down its value in various ways without compensation, as a branch of what is called the police power. The exercise of this has been held warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case. *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. The Supreme Court of the State adverted also to increased safety against fire and traced the origin to the great fire in London in 1666. It is unnecessary to decide upon the adequacy of these grounds. It is enough to refer to the fact also brought out and relied upon in the opinion below, that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn and has prevailed in the State ever since. It is illustrated by statutes concerning Philadelphia going back to 1721, 1 Dallas, Laws of Pennsylvania, 152; and by

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an *Act of 1794 for Pittsburgh, 3 Dallas, Laws, 588, 591, referring to the Act incorporating the borough of Reading, 2 Dallas, Laws, 124, 129.

The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred

years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey v. Morgan*, 256 U. S. 94, 104, 112, 41 Sup. Ct. 433, 65 L. Ed. 837, 17 A. L. R. 873. See *Louisville & Nashville R. R. Co. v. Barber Asphalt Co.*, 197 U. S. 430, 434, 25 Sup. Ct. 466, 49 L. Ed. 819. Such words as "right" are a constant solicitation to fallacy. We say a man has a right to the land that he has bought and that to subject a strip six inches or a foot wide to liability to use for a party wall therefore takes his right to that extent. It might be so and we might be driven to the economic and social considerations that we have mentioned if the law were an innovation, now heard of for the first time. But if, from what we may call time immemorial, it has been the understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke the police power.

[2] Of course a case could be imagined where the modest mutualities of simple

townspeople might become something very different when extended to buildings like those of modern New York. There was a suggestion of such a difference in this case. But although the foundations spread wide, the wall above the surface of the ground was only thirteen inches thick, or six and a half on the plaintiff's land, and as the damage complained of was a necessary incident to any such building, the question how far the liability might be extended does not arise. It follows, as stated by the Supreme Court of Pennsylvania that "when either lot

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holder builds upon his own prop*erty up to the division line, he does so with the knowledge that, in case of the erection of a party wall, that part of his building which encroaches upon the portion of the land subject to the easement will have to come down, if not suitable for incorporation into the new wall." In a case involving local history as this does we should be slow to overrule the decision of Courts steeped in the local tradition even if we saw reasons for doubting it, which in this case we do not.

Judgment affirmed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1922

(260 U. S. 751)

No. 90. *Edward J. BRUNDAGE*, Attorney General of Illinois, appellant, v. *The UNITED STATES of America et al.* Oct. 3, 1922. Appeal from the District Court of the United States for the Northern District of Illinois. See, also, 260 U. S. 751, 43 Sup. Ct. 10, 67 L. Ed. —. Dismissed, per stipulation.

(260 U. S. 751)

No. 91. *Edward J. BRUNDAGE*, Attorney General of Illinois, appellant, v. *The UNITED STATES of America et al.* Oct. 3, 1922. Appeal from the District Court of the United States for the Northern District of Illinois. See, also, 260 U. S. 751, 43 Sup. Ct. 10, 67 L. Ed. —. Dismissed, per stipulation.

(260 U. S. 752)

No. 211. *E. C. EDDY*, as Treasurer, etc., et al., appellants, v. *The FIRST NATIONAL BANK OF FARGO.* Oct. 3, 1922. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 275 Fed. 550. Dismissed with costs, per stipulation.

(260 U. S. 752)

No. 254. *WORLD PUBLISHING COMPANY*, appellant, v. *The UNITED STATES.* Oct. 3, 1922. Appeal from the Court of Claims. For opinion below, see 57 Ct. Cl. 1. Dismissed, per stipulation.

(260 U. S. 752)

No. 390. *NEW ORLEANS & NORTH-EASTERN RAILROAD COMPANY et al.*, petitioners, v. *Thomas E. BEARD.* Oct. 3, 1922. On petition for writ of certiorari to the Supreme Court of the State of Mississippi. For opinion below, see 90 South. 727. Messrs. J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La., A. S. Bozeman, of Meridian, Miss., and Walter J. Suthon, Jr., of New Orleans, La. (Messrs. L. E. Jeffries and H. O. B. Cooper, both of Washington, D. C., of counsel), for petitioners. Mr. J. W. Cassedy, of Brookhaven, Miss. (Messrs. Currie & Currie, of Hattiesburg, Miss., of counsel), for respondent. Dismissed, on motion of counsel for the petitioners.

(260 U. S. 752)

No. 525. *William S. FLEMING*, petitioner, v. *The UNITED STATES of America.* Oct. 3, 1922. On petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 279 Fed. 613. Mr. Andrew F. Burke, of San Francisco, Cal., for petitioner. Dismissed, on motion of counsel for the petitioner.

(260 U. S. 696)

No. —, original. Ex parte In the matter of *BACON BROS. COMPANY*, petitioner. Oct. 9, 1922. Messrs. Tracy, Chapman & Welles, of Toledo, Ohio (Messrs. Thos. H.

Tracy, and Geo. D. Welles, both of Toledo, Ohio, of counsel), for petitioner. Messrs. H. W. Fraser, of Toledo, Ohio, and U. S. Bratton and George E. Brand, both of Detroit, Mich., for defendants. Motion for leave to file petition for writ of mandamus or writ of prohibition herein denied.

(260 U. S. 695)

No. 6. John CONNORS, plaintiff in error, v. The PEOPLE OF the STATE OF ILLINOIS;

No. 7. Edward O'DONNELL, plaintiff in error, v. The PEOPLE OF the STATE OF ILLINOIS;

No. 8. Leonard BANKS et al., plaintiff in error, v. The PEOPLE OF the STATE OF ILLINOIS;

No. 9. Frank BENDER, plaintiff in error, v. The PEOPLE OF the STATE OF ILLINOIS;

No. 10. John BOONE, plaintiff in error, v. The PEOPLE OF the STATE OF ILLINOIS;

No. 11. William TAGLIA, plaintiff in error, v. The PEOPLE OF the STATE OF ILLINOIS;

No. 23. Abe SCHAFFNER, plaintiff in error, v. The PEOPLE OF the STATE OF ILLINOIS; and

No. 57. George MORAN, plaintiff in error, v. The PEOPLE OF the STATE OF ILLINOIS. Oct. 9, 1922. In error to the Supreme Court of the State of Illinois. For opinions below, see 291 Ill. 178, 125 N. E. 723; 291 Ill. 614, 126 N. E. 595; 294 Ill. 256, 128 N. E. 462. Mr. Rush B. Johnson, of Chicago, Ill., for plaintiff in error Connors. Messrs. Edward J. Brundage, Atty. Gen., Edward C. Fitch, Asst. Atty. Gen., and Robert E. Crowe, State's Atty., of Chicago, Ill., for the People of State of Illinois.

PER CURIAM. Affirmed upon the authority of *Dreyer v. Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79; *Ughbanks v. Armstrong*, 208 U. S. 481, 485, 28 Sup. Ct. 372, 52 L. Ed. 582.

(260 U. S. 753)

No. 42. George F. PONDER, plaintiff in error, v. The STATE OF GEORGIA. Oct. 9, 1922. In error to the Court of Appeals of the State of Georgia. For opinion below, see 25 Ga. App. 768, 105 S. E. 318. Messrs. Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State of Georgia. Dismissed with costs, on motion of counsel for the plaintiff in error.

(260 U. S. 693)

No. 183. Seth GETTYS et al., etc., plaintiffs in error, v. Silvan NEWBURGER, Joseph Newburger, et al. Oct. 9, 1922. In error to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 272 Fed. 209. Messrs. W. A. Ledbetter, H. L. Stuart and R. R. Bell, all of Oklahoma City, Okl., for plaintiffs in error. Messrs. Henry E. Asp, Henry G. Snyder, Frederick B. Owen, and Walter A. Lybrand, all of Oklahoma City, Okl., and Bernard Titcher, of New Orleans, La., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 530;¹ *Shulthis v. McDougal*, 225 U. S. 561, 569;² *Hull v. Burr*, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed.

1557; *Norton v. Whiteside*, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60 L. Ed. 186.

(260 U. S. 695)

No. 304. The PEOPLES DEVELOPMENT COMPANY, appellant, v. SOUTHERN PACIFIC COMPANY et al., etc. Oct. 9, 1922. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 277 Fed. 794. Messrs. T. C. West and Powell & Dow, all of San Francisco, Cal., for appellant. Messrs. C. F. R. Ogilby, of Washington, D. C., and Guy V. Shoup, W. M. Singer, and Frank Thunen, all of San Francisco, Cal., for appellees.

PER CURIAM. Affirmed upon the authority of *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527.

(260 U. S. 693)

No. 312. The ALTITUDE OIL COMPANY, plaintiff in error, v. The PEOPLE OF the STATE OF COLORADO. Oct. 9, 1922. In error to the Supreme Court of the State of Colorado. For opinion below, see 70 Colo. 452, 202 Pac. 180. Mr. Norton Montgomery, of Denver, Colo. (Mr. Thomas H. Gibson, of Laramie, Wyo., of counsel), for plaintiff in error. Messrs. Victor E. Keyes, Atty. Gen., and J. J. Laton, Sp. Asst. Atty. Gen., for the People of State of Colorado. Dismissed for want of jurisdiction upon the authority of (1) *Equitable Life Assurance Co. v. Brown*, 187 U. S. 308, 23 Sup. Ct. 123, 47 L. Ed. 190; *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U. S. 20, 24, 38 Sup. Ct. 35, 62 L. Ed. 124; (2) *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688; *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 315, 34 Sup. Ct. 493, 58 L. Ed. 974; *Lake Shore & Michigan Southern Ry. Co. v. Clough*, 242 U. S. 375, 385, 37 Sup. Ct. 144, 61 L. Ed. 374.

(260 U. S. 694)

No. 323. TRUSTEES OF THE UNITED STATES-MEXICO OIL COMPANY, plaintiffs in error, v. T. W. HARRIS. Oct. 9, 1922. In error to the Supreme Court of the State of Kansas. For opinion below, see 110 Kan. 532, 204 Pac. 754. Messrs. William W. Fry, of St. Paul, Minn., and W. F. Jackson, of Fort Scott, Kan., for plaintiffs in error. Messrs. Charles F. Newman and James G. Sheppard, both of Ft. Scott, Kan., for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 303, 37 Sup. Ct. 643, 61 L. Ed. 1153; *Municipal Securities Corporation v. Kansas City*, 246 U. S. 63, 69, 38 Sup. Ct. 224, 62 L. Ed. 579; *Bilby v. Stewart*, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; *Farson, Son & Co. v. Bird*, 248 U. S. 268, 271, 39 Sup. Ct. 111, 63 L. Ed. 233.

(260 U. S. 720)

No. 323. TRUSTEES OF THE UNITED STATES-MEXICO OIL COMPANY, plaintiff in error, v. T. W. HARRIS. Oct. 9, 1922. For opinion below, see 110 Kan. 532, 204 Pac.

¹ 24 Sup. Ct. 174, 48 L. Ed. 287.

² 32 Sup. Ct. 704, 56 L. Ed. 1205.

754. Messrs. William W. Fry, of St. Paul, Minn., and W. F. Jackson, of Fort Scott, Kan., for plaintiff in error. Messrs. Charles F. Newman and James G. Sheppard, both of Ft. Scott, Kan., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied.

(260 U. S. 724)

No. 337. Mrs. Eugenia BROOKS, Administratrix, etc., petitioner, v. SEABOARD AIR LINE COMPANY. Oct. 9, 1922. For opinions below, see 27 Ga. App. 274, 108 S. E. 166; 110 S. E. 328. Messrs. Geo. Westmoreland, J. Caleb Clarke, Jno. L. Westmoreland, and Sidney Smith, all of Atlanta, Ga., for petitioner. Messrs. Hollins N. Randolph and Robert S. Parker, both of Atlanta, Ga., for respondent. Petition for a writ of certiorari to the Court of Appeals of the State of Georgia denied because of failure to submit the petition within the time prescribed by the rule.

(260 U. S. 694)

No. 376. Henry F. MUELLER et al., etc., appellants, v. Samuel W. ADLER et al. Oct. 9, 1922. Appeal from the District Court of the United States for the Eastern District of Missouri. Messrs. Wm. J. Hughes, of Washington, D. C., and Ephrim Caplan, of St. Louis, Mo., for appellants. Mr. Edward W. Foristel, of St. Louis, Mo., for appellee Adler.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Bogart v. Southern Pacific R. Co.*, 228 U. S. 137, 144, 33 Sup. Ct. 497, 57 L. Ed. 768; *Apapas v. United States*, 233 U. S. 587, 589, 34 Sup. Ct. 502, 58 L. Ed. 1104; (2) *Louisville & Nashville R. Co. v. Western Union Tel. Co.*, 234 U. S. 369, 372, 34 Sup. Ct. 810, 58 L. Ed. 1356; *Public Service Co. v. Corboy*, 250 U. S. 153, 162, 39 Sup. Ct. 440, 63 L. Ed. 905; *De Rees v. Costaguta*, 254 U. S. 166, 173, 41 Sup. Ct. 69, 65 L. Ed. 202.

(260 U. S. 694)

No. 386. Mildred McINTOSH, plaintiff in error, v. W. H. DILL et al. Oct. 9, 1922. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 205 Pac. 917. Messrs. Thos. H. Owen, of Oklahoma City, Okl., and George C. Crump, of Holdenville, Okl., for petitioner. Messrs. Nathan A. Gibson and Joseph L. Hull, both of Muskogee, Okl., and Thomas H. Wren and Thomas Hazlewood, both of Okemah, Okl., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); *Jett Bros. Distilling Company v. City of Carrollton*, 252 U. S. 1, 5-6, 40 Sup. Ct. 255, 64 L. Ed. 421.

(260 U. S. 721)

No. 386. Mildred McINTOSH, plaintiff in error, v. W. H. DILL et al. Oct. 9, 1922. For opinion below, see 205 Pac. 917. Messrs. Thos. H. Owen, of Oklahoma City, Okl., and George C. Crump, of Holdenville, Okl., for petitioner. Messrs. Nathan A. Gibson and Joseph L. Hull, both of Muskogee, Okl., and Thomas H. Wren and Thomas Hazlewood, both of Okemah, Okl.,

for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(260 U. S. 721)

No. 397. Ludwig WOLFGRAM, petitioner, v. Ritchie T. MARSH, Trustee, etc. Oct. 9, 1922. For opinion below, see 280 Fed. 865. Mr. Lowrie C. Barton, of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(260 U. S. 721)

No. 398. Albert ROWAN et al., petitioners, v. The UNITED STATES of America. Oct. 9, 1922. For opinion below, see 281 Fed. 137. Mr. Jed C. Adams, of Dallas, Tex., for petitioners. Messrs. James M. Beck, Sol. Gen., of Washington, D. C., and John W. H. Crim, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 721)

No. 399. James C. DAVIS, Director General of Railroads, petitioner, v. William R. COYLE, Trustee, etc. Oct. 9, 1922. For opinion below, see 280 Fed. 648. Messrs. John F. Finerty, of Washington, D. C. (James M. Beck, Sol. Gen., of Washington, D. C., of counsel), for petitioner. Messrs. James F. Curtis, and Emory R. Buckner, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 721)

No. 401. William S. LIVEZEY, petitioner, v. The UNITED STATES of America. Oct. 9, 1922. For opinion below, see 279 Fed. 496. Mr. Jed C. Adams, of Dallas, Tex., for petitioner. Messrs. James M. Beck, Sol. Gen., of Washington, D. C., John W. H. Crim, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 722)

No. 405. Morris REINSTEIN et al., petitioners, v. The UNITED STATES of America. Oct. 9, 1922. For opinion below, see 282 Fed. 214. Mr. Elijah N. Zoline, of New York City, for petitioners. Messrs. James M. Beck, Sol. Gen., and W. C. Herron, both of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 722)

No. 411. AMERICAN CAN COMPANY, petitioner, v. Frank FUNKHOUSER;
No. 412. AMERICAN CAN COMPANY, petitioner, v. M. T. McGOLDRICK;
No. 413. AMERICAN CAN COMPANY, petitioner, v. Samuel J. WILSON;
No. 414. AMERICAN CAN COMPANY, petitioner, v. R. B. RICE et al.;
No. 415. AMERICAN CAN COMPANY, petitioner, v. P. J. GARNETT;

No. 416. **AMERICAN CAN COMPANY**, petitioner, v. **Ralph ROBINSON**; and

No. 417. **AMERICAN CAN COMPANY**, petitioner, v. **J. W. BURGAN**. Oct. 9, 1922. For opinions below, see 279 Fed. 722, 727. Messrs. Horace Kent Tenney, of Chicago, Ill., and Allen L. Chickering and Warren Gregory, both of San Francisco, Cal. (Messrs. R. J. Danson and James A. Williams, both of Spokane, Wash., and Andrew D. Collins, of Chicago, Ill., of counsel), for petitioner. Mr. William G. Graves, of Spokane, Wash. (Messrs. F. H. Graves and B. H. Kizer, both of Spokane, Wash., of counsel), for respondent Garnett. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 722)

No. 420. **R. D. JAMES**, petitioner, v. **The UNITED STATES of America**. Oct. 9, 1922. For opinion below, see 279 Fed. 111. Mr. A. S. Baskett, of Dallas, Tex., for plaintiff. Messrs. James M. Beck, Sol Gen., of Washington, D. C., John W. H. Crim, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 711)

No. 423. **W. TRINIDAD**, as Insular Collector of Internal Revenue of the Philippine Islands, petitioner, v. **SAGRADA ORDEN DE PREDICADORES DE LA PROVINCIA DEL SANTISSIMO ROSARIO DE FILIPINAS**. Oct. 9, 1922. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted.

(260 U. S. 712)

No. 424. **AMERICAN RAILWAY EXPRESS COMPANY**, petitioner, v. **Lucius P. LEVEE**. Oct. 9, 1922. Petition for a writ of certiorari to the Court of Appeal, First Circuit, of the State of Louisiana, granted.

(260 U. S. 722)

No. 425. **James C. DAVIS**, Director General of Railroads, etc., petitioner, v. **Ellis R. HYDE**. Oct. 9, 1922. For opinion below, see Chicago, R. I. & P. R. Co. v. Hyde, 204 Pac. 125. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(260 U. S. 723)

No. 427. **WESTERN MACHINERY COMPANY** et al., petitioners, v. **RICHFIELD OIL COMPANY**. Oct. 9, 1922. For opinion below, see 279 Fed. 852. Mr. Nathan Newby, of Los Angeles, Cal., for petitioners. Messrs. Troy Pace and James, Pace & Smith, all of Los Angeles, Cal., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 712)

No. 431. **The PUSEY & JONES COMPANY**, petitioner, v. **Hans Karluf HANSSEN**. Oct. 9, 1922. For opinion below, see 279 Fed. 488. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(260 U. S. 724)

No. 433. **The NEW YORK CENTRAL RAILROAD COMPANY**, petitioner, v. **MIDLEPORT GAS & ELECTRIC LIGHT COMPANY**. Oct. 9, 1922. For opinion below, see 232 N. Y. 622, 134 N. E. 597, which affirmed the judgment of 193 App. Div. 273, 184 N. Y. Supp. 221. Mr. Maurice C. Spratt, of Buffalo, N. Y. (Mr. Herbert W. Huntington, of Buffalo, N. Y., of counsel), for petitioner. Mr. Edward H. Letchworth, of Buffalo, N. Y., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of New York denied because of failure to file the petition within the time prescribed by the statute.

(260 U. S. 723)

No. 434. **KING LUMBER COMPANY**, petitioner, v. **P. H. FAULCONER**. Oct. 9, 1922. Messrs. George E. Walker, R. C. Walker, and A. L. Pitts, Jr., all of Charlottesville, Va., for petitioner. Messrs. Duke & Duke, McNutt & Rinehart and Allen & Walsh, all of Charlottesville, Va., for respondent. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied.

(260 U. S. 723)

No. 437. **PHILADELPHIA & READING RAILWAY COMPANY**, petitioner, v. **Samuel D. EISENHART**. Oct. 9, 1922. For opinion below, see 280 Fed. 271. Mr. Wm. Clarke Mason, of Philadelphia, Pa., for petitioner. Messrs. Frank F. Davis and John C. Oldmixon, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(260 U. S. 723)

No. 438. **Albert HIRSHHEIMER**, petitioner, v. **Ralph B. HARTSOUGH** et al. Oct. 9, 1922. For opinion below, see 283 Fed. 759. Messrs. Frank M. Hoyt, of Milwaukee, Wis., and Charles H. Aldrich, of Chicago, Ill., for petitioner. Messrs. Amasa C. Paul and Frank J. Morley, both of Minneapolis, Minn., and Harry L. Butler, of Madison, Wis., for appellees. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 723)

No. 439. **Benjamin F. HAMEY**, petitioner, v. **Ralph B. HARTSOUGH** et al. Oct. 9, 1922. For opinion below, see 283 Fed. 759. Messrs. Frank M. Hoyt, of Milwaukee, Wis., and Charles H. Aldrich, of Chicago, Ill., for petitioner. Messrs. Amasa C. Paul and Frank J. Morley, both of Minneapolis, Minn., and Harry L. Butler, of Madison, Wis., for appellees. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 724)

No. 441. **H. P. CONVERSE** et al., petitioners, v. **PORTSMOUTH COTTON OIL REFINING CORPORATION**. Oct. 9, 1922. For opinion below, see 281 Fed. 981. Messrs. Maco Stewart, of Galveston, Tex., and Baird, White & Lanning, of Norfolk, Va., (Messrs. Clarence W. De Knight and Rufus S. Day, both of Washington, D. C., of counsel), for petitioners.

Messrs. Thomas H. Willcox and J. Westmore Willcox, both of Norfolk, Va., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(260 U. S. 712)

No. 443. C. B. GILES et al., petitioners, v. Henry VETTE et al. Oct. 9, 1922. For opinion below, see 281 Fed. 928. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

(260 U. S. 724)

No. 445. The CHAMPION FIBRE COMPANY, petitioner, v. The PIGEON RIVER RAILWAY COMPANY. Oct. 9, 1922. For opinion below, see 280 Fed. 557. Messrs. Julius C. Martin, Thos. S. Rollins, and Geo. H. Wright, all of Asheville, N. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(260 U. S. 724)

No. 446. J. L. ALBRIGHT, petitioner, v. James C. DAVIS, Director General and Agent, etc. Oct. 9, 1922. For opinion below, see *Payne v. Albright*, 235 S. W. 288. Mr. S. P. Jones, of Marshall, Tex., for petitioner. Mr. Ras Young, of Longview, Tex., for respondents. Petition for a writ of certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas denied.

No. 48. Ira B. MILLS et al., appellants, v. NORTHERN PACIFIC RAILWAY COMPANY et al. Oct. 10, 1922. See, also, 260 U.

S. 697, 43 Sup. Ct. 87, 67 L. Ed. —. Mr. Clifford L. Hilton, Atty. Gen., and Henry C. Flannery, Asst. Atty. Gen., for appellants. Messrs. Charles W. Bunn, Dennis F. Lyons and Benjamin W. Scandrett, all of St. Paul, Minn., for appellees Northern Pac. R. Co. and others. Death of Ira B. Mills suggested, and Ivan Bowen, his successor as a member of the board of railroad and warehouse commissioners, substituted as a party appellant herein, on motion of Mr. P. J. Farrell in behalf of counsel.

(260 U. S. 753)

No. 448. James C. DAVIS, Agent and Director General, etc., petitioner, v. Harold PRESTON. Oct. 10, 1922. On petition for a writ of certiorari to the Circuit Court of Jackson County, State of Missouri. For opinion below, see *Preston v. Union Pac. R. Co.*, 239 S. W. 1080. Mr. A. A. McLaughlin, of Washington, D. C., for petitioner. Messrs. Atwood, Wickersham & Hill, of Kansas City, Mo. (Mr. Oscar S. Hill, of Kansas City, Mo., of counsel), for respondent. Petition dismissed with costs, on motion of Mr. John C. Brooks in behalf of counsel for the petitioner.

(260 U. S. 753)

No. 53. COMMISSIONERS OF THE LAND OFFICE OF the STATE OF OKLAHOMA et al., appellants, v. The UNITED STATES. Oct. 12, 1922. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 270 Fed. 110. Messrs. James M. Beck, Sol. Gen., of Washington, D. C., and William D. Riter, Asst. Atty. Gen., for the United States. Dismissed, with costs, for want of prosecution.

(260 U. S. 151)

(43 Sup. Ct.)

THE SAO VICENTE.

TRANSPORTES MARITIMOS DO ESTADO
v. TIETJEN & LANG DRYDOCK CO.

No. 279.

THE MURMUGAO.

TRANSPORTES MARITIMOS DO ESTADO
v. ROSE (two cases).

Nos. 280, 281.

SAME v. DE SIMONE (two cases).

Nos. 282, 283.

(Argued Oct. 3, 1922. Decided Nov. 13, 1922.)

Ambassadors and consuls ⇨8—Consul general, not party below, not authorized to appear for his government and claim immunity from process.

Where vessels, sued in rem, and their owner, sued in personam, alleged that the owner was a department of the government of Portugal, and denied jurisdiction, and final decrees were entered against the vessels and the owner, and appeals dismissed, the consul general of Portugal in the United States, who was not a party below, was not competent merely by virtue of his office to appear in the Supreme Court for his government and claim immunity from process.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Three suits in rem, by the Tietjen & Lang Drydock Company against the steamship Sao Vicente, and by Maxwell Rose, doing business, etc., and by Thomas de Simone against the steamship Murmugao, both of which steamships were claimed by the Transportes Maritimos do Estado, and two suits in personam, by Maxwell Rose, doing business, etc., and by Thomas de Simone, against the Transportes Maritimos do Estado. Appeals from final decrees in favor of the libellants were dismissed by the Circuit Court of Appeals (281 Fed. 111, 115), and George S. Duarte, Consul General of the Republic of Portugal, brings certiorari in the name of Transportes Maritimos do Estado. Writs dismissed.

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*Mr. F. Dudley Kohler, of New York City, for petitioner.

Messrs. John M. Woolsey, Robert S. Erskine, Meyer Kraushaar, and Emanuel Celler, all of New York City, opposed.

Messrs. Crowell & Rouse, appearing by Mr. E. Curtis Rouse, all of New York City, for respondent Tietjen & Lang Drydock Co.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The above-entitled causes are here on writs of certiorari, issued upon the sole petition of George S. Duarte, who described himself therein as the duly accredited consul general of the republic of Portugal in the United

States of America, without more. The petition sets out the proceedings below; declares "the Portuguese government does not intend to avoid its just obligations to citizens of the United States, but it claims that, if there is any question between it and such citizens, they are matters for adjudication by the diplomatic departments of the two governments, and it does object to the violation of its sovereignty, contrary to all rules of international law and international comity"; and alleges, as one reason for granting the writ, that "an important question of international law and comity is involved." There is nothing to show that the consul general had authority or right to take any action concerning the matters in question, except as may be inferred from his official position. Considering the possible international aspect of the controversy, we granted the petition, and appropriate writs issued. Counsel have been heard, both orally and by briefs.

Nos. 279, 280, and 282 are separate proceedings in rem, commenced in the United States District Court, Southern District of New York, against the Sao Vicente and the Murmugao, to recover for materials, supplies, work, and labor furnished to them. In each case, after arrest of the steamer, the Transportes Maritimos do Estado, intervening for its interest, appeared before the court and made claim, averring that it was in possession when the process issued, and was the

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true and bona fide owner. It asked *to defend accordingly, gave bond for costs and value, and secured the vessel's discharge. Thereafter the steamer answered, denying the allegations of the libel, and as a distinct and complete defense alleged that it was owned and operated by the Transportes Maritimos do Estado, a department of the government of Portugal not subject to suits in courts of the United States. This special defense was declared insufficient and final decrees were duly entered. Appeals to the Circuit Court of Appeals were dismissed (The Carlo Poma, 255 U. S. 219, 41 Sup. Ct. 309, 65 L. Ed. 594), that court being of opinion that the only controverted point was the jurisdiction of the trial court. 281 Fed. 111 and 115.

Nos. 281 and 283 are separate proceedings in personam, commenced in the same District Court against Transportes Maritimos do Estado, alleged to be a foreign corporation organized under the laws of the republic of Portugal, to recover for services, goods, wares, and merchandise furnished to its steamers, the Cunene and the Santo Antao. The Murmugao was attached. The respondents answered, made general denials, and, as a distinct and complete defense, alleged the Cunene and the Santo Antao were owned and operated by a department of the sovereign government of Portugal, and that the court was therefore without jurisdiction. This defense was held insufficient. Appeals

to the Circuit Court of Appeals were dismissed, upon the view that they involved only the question of jurisdiction.

We are of the opinion that the writs of certiorari were providently awarded and must be dismissed. The consul general was not party to any of the proceedings below, and is not competent, merely by virtue of his office, to appear here for his government and claim immunity from process in the manner attempted. In *The Anne*, 3 Wheat. 435, 445 (4 L. Ed. 428), a prize proceeding for condemnation, a claim was interposed in behalf of the Spanish consul for restitution of the ves-

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sel because of asserted violation of the *neutral territory of Spain. Speaking through Mr. Justice Story, this court said:

"And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish counsel, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign. We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion, or proof, of any such delegation of special authority in this case; and therefore we consider this claim as asserted by an incompetent person, and on that ground it ought to be dismissed."

And see *United States v. Wong Kim Ark*, 169 U. S. 649, 678, 18 Sup. Ct. 456, 42 L. Ed. 890; In *Re Baiz*, 135 U. S. 403, 424, 10 Sup. Ct. 854, 34 L. Ed. 222; *Ex Parte Muir*, 254 U. S. 522, 532, 41 Sup. Ct. 185, 65 L. Ed. 383; *The Pesaro*, 255 U. S. 216, 218, 41 Sup. Ct. 308, 65 L. Ed. 592.

Dismissed.

(260 U. S. 127)

McKEE et al. v. GRATZ.

(Argued Oct. 13-16, 1922. Decided Nov. 13, 1923.)

No. 61.

1. Fish ⚡7(1)—Statute declaring state's title held merely in aid of regulation, and not to affect landowner's interest.

Rev. St. Mo. 1909, § 6508, declaring that the ownership of all fish, etc., is in the state,

is only in aid of the state's power of regulation, and leaves the interest of a landowner in mussels in a stream thereon as it was before.

2. Fish ⚡7(3)—Mussels are in landowner's possession, so as to support action for conversion.

Mussels, having a practically fixed habitat and little ability to move, are in the possession of the owner of the land, so as to support an action for conversion against a trespasser; and this is even more true as to the shells, when left piled on the bank awaiting transportation.

3. Trover and conversion ⚡16—Possession will support recovery against trespasser.

Possession is enough to warrant recovery of substantial damages for conversion by a trespasser.

4. Fish ⚡7(3)—Jury could find possession of mussels not affected by navigability of stream.

The jury at least might find that the navigability of a stream containing mussels did not affect the landowner's possession of the mussels, as regards conversion by a trespasser.

5. Trespass ⚡25—Common law mitigated by common understanding respecting uninclosed lands.

The strict rule of the common law as to entry on a close as constituting trespass must be taken to be mitigated by common understanding with regard to the large expanses of uninclosed and uncultivated lands in many parts of the country over which it is customary to wander, shoot, and fish at will until the owners see fit to prohibit it.

6. Trespass ⚡25—License to shoot and fish may be implied from habits of country.

A license to wander, shoot, and fish at will on uninclosed uncultivated land may be implied from the habits of the country, especially in Missouri, where the statutory prohibitions (Rev. St. Mo. 1919, §§ 3654, 5662) are limited to inclosed and cultivated lands and private ponds.

7. Fish ⚡7(3)—Whether persons taking mussels and removing shells were trespassers held for jury.

In view of Rev. St. Mo. 1919, §§ 3654, 5662, prohibiting hunting and fishing only on inclosed and cultivated lands and private ponds, where there was evidence of a practice to wander, shoot, and fish at will on uninclosed and uncultivated land until the owner saw fit to prohibit it, it was a question for the jury whether persons taking mussels from a stream or pools and removing the shells were entitled to rely on such practice, and, if entitled to rely on it at all, whether they could do so to the extent of the considerable and systematic work done by them, and it could not be said as matter of law that they were trespassers.

8. Trespass ⚡60—Mussels held not part of realty as respects treble damages.

Mussels in a stream or pools are not part of the realty, within Rev. St. Mo. 1909, § 5448, giving a right of action for treble damages for injury to real estate.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by Benjamin Gratz against James S. McKee and others. A judgment for defendants on a directed verdict was reversed, and a new trial granted, by the Circuit Court of Appeals (270 Fed. 713), and defendants bring certiorari, and plaintiff brings a cross-petition for certiorari. Judgment of the Circuit Court of Appeals affirmed.

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*Messrs. Lon O. Hocker, Frank H. Sullivan, and George F. Haid, all of St. Louis, Mo., for petitioners.

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*Mr. S. Mayner Wallace, of St. Louis, Mo., for respondent.

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*Mr. Justice HOLMES delivered the opinion of the Court.

[1] This is a suit brought by the respondent, who is also a cross petitioner, to recover the value of mussel shells removed from the lands of the respondent's assignor and manufactured by the petitioners into buttons. It was brought in a Court of the State of Missouri, but was removed to the District Court of the United States. There were two counts; one simply for the conversion of the shells and a second alleging that the shells were part of the realty and that the plaintiff was entitled to treble damages under R. S. Mo. 1909, § 5448 (R. S. Mo. 1919, § 4242). At the trial the District Court directed a verdict for the defendants and the judgment was affirmed by the Circuit Court of Appeals. *Gratz v. McKee*, 258 Fed. 335, 169 C. C. A. 351. The main question was disposed of on the ground that by the Statutes of Missouri, R. S. 1909, §§ 6508, 6551, the title to the mus-

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sels was in the State. *As to the second count it was held that the mussels were not part of the realty. Later, a rehearing was granted, and while the Court adhered to its former opinion on the second count, it rightly, as we think, held that the statutes declaring the title to game and fish to be in the State spoke only in aid of the State's power of regulation and left the plaintiff's interest what it was before. See *Missouri v. Holland*, 252 U. S. 416, 434, 40 Sup. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984. It assumed that the defendants were trespassers and sent the case back for a new trial on that footing, the damages to be confined to the value of the shells at the date of conversion and not to include that subsequently added by manufacturing them into buttons. *Gratz v. McKee* (C. C. A.) 270 Fed. 713.

[2-4] The mussels were taken alive from the bottom of what seems to have been at times a flowing stream, at times a succession of pools, were boiled on the banks and the shells subsequently removed. As to the plaintiff's title, it is not necessary to say that the mussels were part of the realty within

the meaning of the Missouri Statutes or in such sense as to make the plaintiff an absolute owner. It is enough that there is a plain distinction between such creatures and game birds or freely moving fish, that may shift to another jurisdiction without regard to the will of land owner or State. Such birds and fishes are not even in the possession of man. 252 U. S. 434, 40 Sup. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984; 2 Kent, Comm. 349; *Young v. Hichens*, 6 Q. B. 606. On the other hand it seems not unreasonable to say that mussels having a practically fixed habitat and little ability to move are as truly in the possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered under ground or unknown property at the bottom of a canal. *Elwes v. Brigg Gas Co.*, 33 Ch. D. 562; *Reg. v. Rowe*, Bell, C. C. 93; *Barker v. Bates*, 13 Pick. (Mass.) 255, 23 Am. Dec. 678. This is even more obvious as to the shells, when left piled

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upon the bank, as they were, to *await transportation. *Northern Pacific R. R. Co. v. Lewis*, 162 U. S. 366, 378, 382, 16 Sup. Ct. 831, 40 L. Ed. 1002. Possession is enough to warrant recovery of substantial damages for conversion by a trespasser. We say nothing about the character of the stream as to navigability. The jury at least might find that there was nothing in that to prevent the application of what we have said. We are slow to believe that there were public rights extending to the removal of mussels against the land owner's will.

[5-7] But it cannot be said as matter of law that those who took the mussels were trespassers; or even wrongdoers in appropriating the shells. The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country. *Marsh v. Colby*, 39 Mich. 626, 33 Am. Rep. 439. In Missouri the implication is fortified by the limit of statutory prohibitions to enclosed and cultivated land and private ponds. R. S. 1919, §§ 5662, 3654. There was evidence that the practice had prevailed in this region. Whether those who took these mussels were entitled to rely upon it, and whether, if entitled to rely upon it for occasional uses, they could do so to the extent of the considerable and systematic work that was done were questions for the jury. They could not be disposed of by the Court. The implication of a license of the kind that we have mentioned from general understanding and practice does not encounter the difficulties that have been suggested in implying a license from conduct alone in cases where the same conduct after twenty years might generate an easement, it being a plain contradiction to imply ad interim a

license which would prevent the acquisition
 of a prescriptive *137
 right. *Chenery v. Fitchburg R. Co.*, 160 Mass. 211, 212, 35 N. E. 554, 22 L. R. A. 575.

[8] As to the rule of damages in case the plaintiff recovers, in the absence of a decision by the Supreme Court of the State we should not regard the mussels as part of the realty within the meaning of the statute relied upon in the second count, and so far as appears at present we see no reason for charging the defendants, if at all, with more than the value of the mussels at the time of conversion as ruled below. *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653; *Wooden-Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Union Naval Stores Co. v. United States*, 240 U. S. 284, 36 Sup. Ct. 308, 60 L. Ed. 644. The result is that this judgment of the Circuit Court of Appeals is affirmed, but not all the principles laid down by it, and that the case will stand for trial by jury in the District Court.

Judgment affirmed.

(260 U. S. 201)

GASTON, WILLIAMS & WIGMORE OF CANADA, Limited, v. WARNER.

(Argued Oct. 13, 1922. Decided Nov. 13, 1922.)

No. 59.

1. Brokers ⇐20—Validity and operation of contract to procure purchaser for British steamship held governed by law of New York where made.

Where a contract, employing plaintiff to find a purchaser for a British steamship, was made in New York, and nothing was said as to where the ship then was, what flag she carried, or what law was to govern the transaction, it was governed as to its validity and operation by the law of New York.

2. Brokers ⇐63(1)—Entitled to commissions when purchasers procured, though defendant unable to consummate sale because of laws of another country.

Where, in pursuance of a contract of employment, plaintiff procured purchasers for a British steamship, with whom the owner in New York entered into a contract of charter and sale providing for payment and delivery in New York, plaintiff could not be deprived of the stipulated commission because the owner could not consummate the sale by reason of its inability to perform a condition made necessary by the regulations of the British government.

3. Brokers ⇐58—Broker not deprived of commission for contract made with purchaser for sale of British steamship void under British laws.

Though a contract for the charter and sale of a British steamship to purchasers procured by plaintiff was void under the British law, when made without permission from the shipping comptroller required by government

regulations, plaintiff's connection with such contract was not such as to deprive him of his commission, as his right of action was on his own contract of employment.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Action by Phillip A. Warner against Gaston, Williams & Wigmore of Canada, Limited. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (272 Fed. 56), and defendant brings certiorari. Affirmed.

Mr. Cletus Keating, of New York City, for petitioner.

Mr. Joseph P. Nolan, of New York City, for respondent.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

The parties to this action on December 11, 1916, in New York City, entered into a contract, the essential terms of which appear in the following letter from petitioner to respondent:

"Referring to our conversation this afternoon, I beg to advise that you are authorized to offer the steamer *Eskasoni* for sale for four hundred and seventy-five thousand dollars, \$475,000.

"Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers."

Respondent was a citizen of the state of New York and a resident of New York City. Petitioner was a foreign corporation, organized and existing under the laws of the Dominion of Canada. The steamship referred to was a British steamship of St. Johns, Newfoundland, owned by the petitioner. It was agreed that the respondent should receive 2½ per cent. commission for securing a purchaser for the ship. Respondent undertook the employment and subsequently introduced to petitioner two prospective purchasers, with whom petitioner entered into a written contract for the charter and sale of the ship for the sum mentioned. Five thousand dollars was paid down on account, out of which respondent received 2½ per cent., or \$125.

Subsequently it appeared that the petitioner was bound by a contract with the British government to comply with the instructions and rules of that government in the operation of its vessels, and whereby it agreed not to charter any vessel to any one to whom that government should object. Among the governmental regulations then in force was one which provided that:

"A person shall not without permission in writing from the shipping comptroller directly
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 or indirectly and *whether on his own behalf or on behalf of or in conjunction with any other

person, purchase or enter into or offer to enter into any agreement or any negotiations with a view to an agreement for the purchase of any ship or vessel."

Any act in contravention of this regulation was declared to be an offense.

Permission to make the sale in question was never obtained and the petitioner was notified by its consul that such permission would be withheld by the British government. The petitioner thereupon refused to consummate the sale and returned to the purchasers the \$5,000 which they had paid.

The respondent brought an action against petitioner in the District Court of the United States, Southern District of New York, to recover the balance of his commission, which resulted in a judgment in his favor. On error to the Circuit Court of Appeals for the Second Circuit that court affirmed the judgment of the lower court, and the petitioner brings the case here on writ of certiorari.

The District Court declined to charge, as requested by petitioner, that if the jury believed the evidence to the effect that the contract under British law was illegal and void, that this would constitute a good defense to the action. On the contrary, that court instructed the jury in effect that the invalidity of the contract under British law would constitute no defense to the action and directed a verdict for the respondent, which was returned in the sum of \$11,750, and judgment was entered accordingly.

[1] The contract, as stated, was made in New York, and it does not appear that the contracting parties in making it had in view any other law than that of the place where it was made. It is therefore to be governed as to its validity and operation by the law of the state of New York. *Bulkley v. Honold*, 19 How. 390, 392, 15 L. Ed. 663; *Scudder v.*

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Union National Bank, 91 U. S. 406, 412, 23 L. Ed. 245. Tested by that law the contract is valid. By the terms of the contract respondent was "authorized to offer the steamer *Eskasoni* for sale for \$475,000." Nothing was said as to where the ship then was, what flag she carried nor what law was to govern the transaction. The contract of charter and sale provided for the payment of the consideration in several installments in New York City and for the delivery of the ship to the purchasers at that port.

[2] When, in pursuance of this contract, respondent procured purchasers for the ship at the stated sum, with whom petitioner entered into contract, the transaction, so far as the respondent was concerned, was completed and he became entitled to the payment of the stipulated commission. The fact that the contract of charter and sale was subsequently canceled because petitioner was unable to secure the consent of the British government to the sale could have no effect upon

the respondent's rights. The contract with respondent, as well as the contract of charter and sale, was made and was to be performed within the state of New York, and being valid under the law of that state, the respondent is not to be deprived of his compensation simply because petitioner found itself unable to consummate the latter contract by reason of its inability to perform a condition made necessary by the provisions of the law of another country. See *Aber v. Pennsylvania Co.*, etc., 269 Pa. 384, 112 Atl. 444.

[3] Even if the contract of sale was void by British law, all other questions aside, respondent's connection with it was not such as to deprive him of his commission. His action was not to enforce that contract, but his own. *Irwin v. Williar*, 110 U. S. 499, 509, 510, 4 Sup. Ct. 160, 28 L. Ed. 225.

We find no error in the judgment of the Circuit Court of Appeals and it is Affirmed.

(260 U. S. 115)

DUESENBERG MOTORS CORPORATION v. UNITED STATES.

(Argued Oct. 19, 1922. Decided Nov. 13, 1922.)

No. 80.

1. United States $\S$ 70(1)—Government contractor held not entitled to reimbursement for outlays made in expectation of profits not realized because of ending of war.

Where a contract made with the government during the war for the manufacture of aeronautical equipment contemplated a revision of the schedule of deliveries, and provided for cancellation if the public interest so required, and was several times modified to meet changing purposes, without any complaint by the contractor that the government had been delinquent in furnishing specifications, or otherwise, and there was no claim that the failure to furnish specifications was willful or fraudulent, and the contractor would have had time to perform the contract, but for the Armistice, the contractor held not entitled to reimbursement for outlays made in expectation of profits which were not realized because of the ending of hostilities.

2. United States $\S$ 70(1)—Effect of contract and modifications held not determinable from any one provision.

The legal effect of a contract for the manufacture of aeronautical equipment for the government, and of various modifications thereof, held not determinable from any one provision, but from the totality of them, and their relations and purposes.

Appeal from the Court of Claims.

Suit by the Duesenberg Motors Corporation against the United States. Judgment for the United States (56 Ct. Cl. 96), and claimant appeals. Affirmed.

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 *Mr. Geo. A. King, of Washington, D. C.,
 for appellant.

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 *Mr. Alfred A. Wheat, of New York City,
 for the United States.

Mr. Justice McKENNA delivered the opinion of the Court.

[1] Action in the Court of Claims against the United States for expenses in endeavoring to perform certain contracts with the United States made during the war with Germany, or for anticipated profits.

The contracts were for aeronautical equipment for war purposes. There were a first and primary contract and seven other contracts called supplemental agreements. The latter contained modifications of the first or primary contract and each agreement contained modifications of those which preceded.

The first or primary contract, dated November 20, 1917, provided for 500 United States standard 12-cylinder engines, sometimes referred to as Liberty engines. By an agreement dated December 11, 1917, the number was increased to 1,000. By another agreement, dated January 4, 1918, the type of motor was changed, and a motor called the Bugatti motor was substituted, and there were other agreements.

From this general statement it will be seen that the contract and agreements are determining elements in the claims sued upon. A full recital of them, however, would extend this opinion to an embarrassing length. We shall confine ourselves, therefore, to those which we regard of determining pertinence.

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 *Upon demurrer of the United States the Court of Claims decided the contractor entitled to no relief and dismissed its petition. This action is contested, and it is earnestly insisted that the contracts made time their essence and required speed and dispatch from the contractor, and demanded in their performance precedence upon all other work, involving necessarily sacrifice and expense upon the part of the contractor. And time, it is contended, being of the essence of the contracts, this necessarily implied that the United States must have done everything to permit the contractor to comply with its obligations. The government, however, was delinquent, and it is alleged that—

"the drawings and specifications referred to in the contract (Exhibit A) as being attached thereto (but which were not in fact so attached) were furnished piecemeal from time to time, but not so as to enable the claimant to enter into quantity production; and the only work which was practicable under said contract was in making extensive alterations in the plant of claimant company to adapt it to the uses of the government for the purpose of carrying out the contract (Exhibit A), to assemble a competent engineering staff, and to make other preparations for the performance of said contract, all of which the claimant did at great expense."

And further delinquency is charged in not performing the agreement which substituted the Bugatti motors and article 1 of the agreement is quoted as follows:

"That, subject to all the provisions of article 1 in said contract No. 2318 contained, the contractor shall make for the government, instead of the articles described in article 1 of said contract, 2,000 Bugatti motors, and such spare parts for said motors as the government may order from time to time during the period of the construction of said motors, in accordance with specifications to follow."

The specifications were not furnished, it is said, until September 25, 1918, and that the

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 delay was a breach of "the contract and the contractor is entitled to recover for the losses caused thereby.

To this the Court of Claims answered that the contract contemplated a revision of the schedule [times of delivery] in regard to the engines. The provision to which that purpose was attributed is that—

"In view of the present uncertain factors inherent in the articles and in the establishment of the industry of producing them, it is understood that this schedule may require revision.
 * * *

The schedule designated June, 1918, as the month of complete production.

Changes were provided for in another article, and by still another it was provided that if in the opinion of the Chief Signal Officer of the United States the public interests so required, the government might, upon 30 days' notice terminate the contract. And there was provision for settlement of disputes.

Dates are important to be considered. The supplemental contract in which article 1 appears, and which adopts article 1 of the first contract, is dated January 4, 1918. Another agreement which was supplementary to that agreement was dated January 15, 1918, and still another dated February 11, 1918.

In none of these agreements, continuing as they did the obligations of the parties to them and the means of their performance, is there a word of complaint that the government had been or was delinquent on account of not furnishing specifications or in any way. In the agreement of February 11, 1918, in article II it is provided that:

"In the interest of both parties hereto and in order to expedite the delivery of the said supplies, the government will advance to the contractor under the principal agreement the sum of four hundred thousand dollars (\$400,000) on the terms and security hereinafter mentioned, and will make payments directly to the contractor by check dated February 25, 1918."

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 *There was another agreement dated February 14, 1918, which continued in effect, except as modified, all that preceded. There

was no protest or complaint of any kind, no accusation of default or delay on the part of the government.

There was a seventh agreement made September 26, 1918, and another made October 23, 1918, for advance payments to the contractor.

[2] The agreements are of significant strength. Their legal effect and that of the contract cannot be determined by any one provision, but the totality of them must be regarded and their relations and purposes.

A war of magnitude was waging. The government was eager for efficient instrumentalities and the contractor was enticed by the profit of their manufacture. The matters were urgent but they were beset with contingencies. The government could terminate the contract in the interest of the public welfare, and the war might cease. The latter did happen. However, before it happened and, before, it may be, there were signs of its happening, there were dealings and adjustments of preparation between the government and the contractor. They took care of, and were intended to take care of, changing purposes, and no dissatisfaction was expressed. One of the changes was, as we have said, from the construction of 500 Liberty motors to 1,000, the completion and delivery of which was to be in June, 1918, and, as we have said, another change was the substitution of 2,000 Bugatti motors for the Liberty engines and for such spare parts as the government might order from time to time; the motors to be delivered by September, 1918. By the supplemental agreements which provided for those changes it was also provided that their cost was to be paid by the government, and the profit of the contractor was changed from \$625 for each article to \$750, and the government agreed to advance the contractor \$1,250,000 to be repaid with interest at 5 per cent.

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*Upon this change to the Bugatti motors comes the first claim of the contractor, based upon article 1 of the agreement of January 4, 1918, by which it was provided as follows:

"That subject to all the provisions of article 1 in said contract No. 2318 contained, the contractor shall make for the government, instead of the articles described in article 1 of said contract, two thousand (2,000) Bugatti motors, and such spare parts for said motors as the government may order from time to time during the period of the construction of said motors, *in accordance with specifications to follow.*" (Italics ours.)

No time is specified. It is, however, contended that necessarily a reasonable time must have been intended and was not observed. The specifications, it is alleged, did not follow until September 25, 1918, when the entire time for the production of the motors was within a few days of expiring, whereby it became impossible to produce any

of the articles within the time limit of the contract.

It is not alleged, however, that the failure to furnish the specifications was wilful on the part of the government or fraudulent. On the contrary, it is alleged that there was a belief upon the part of the government officers by whom and under whom the supplemental agreement was made that there were in existence complete specifications of the articles which needed only to be obtained from France; that the motors had passed the experimental stage and were ready for production. It is, however, alleged that the statements in the contract operated as a representation to the contractor that such was the fact, and that production in quantity could begin at or shortly after the entry into the agreement. It is further alleged that when the first motor was received shortly after the date of the agreement it developed that extensive changes would be necessary and the contractor was directed to proceed,

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meanwhile actively, with production *on the separate parts to the extent possible in view of the undeveloped character of the specifications of the engine. This was done in conjunction with the officers of the government.

It will be observed that it is not alleged that the belief of the government officers was not consistently entertained nor that the contractor did not share it. Nor is it said that the work on the separate parts and the preparations for the performance of the contract did not engage the contractor's time. Indeed, the fact is that by January 4, there were changes to the advantage of the contractor, and again by the agreement of February 11, 1918, and another as late as October 23, 1918, by which the government agreed to advance to the contractor \$1,250,000. And still no complaint. On the contrary there was acceptance of assistance.

It is manifest there were uncertainties on both sides and that as they developed preparations were necessary to meet them, and in meeting them, the contractor did not regard the government in any way delinquent. It was the abrupt and unexpected suspension of hostilities and the declaration of an armistice that was the cause of loss to the contractor, and the disappointment of profits from its contract which it was preparing to realize and would have realized. But it took that chance and has not now a legal claim against the government for reimbursement of its outlays. We need not distinguish between the outlays nor dwell upon them. They were outlays of the speculation, and subject to sacrifice and loss with its disappointment.

We have seen that counsel make much of the effect of the government's urgency, and, it is contended, time in consequence became an essential of the contract. This, the contention is, influenced the contractor and nec-

essarily determines the obligation of the government. The government was undoubt-

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edly urgent, made so by its seri*ous situation and tremendous responsibilities, but such was not the situation of the contractor. Time to perform its contract was all that was necessary to it and but for the Armistice it would have had time. If the Armistice could have been foreseen the relative situations might have been different. Expedition would not then have been exigent to the government's purposes, but would then have been necessary to the contractor, if profits were to be realized from the production of the motors. There was no prophecy of the Armistice—its sudden happening terminated the further execution of the contractor's undertaking, preventing, as we have said, the realization of profits. And, we repeat, this chance the contractor took and must abide the result.

Judgment affirmed.

(260 U. S. 146)

STATE OF OHIO ex rel. SENEY, Pros. Atty.
of Lucas County, Ohio, v. SWIFT
& CO. et al.

(Argued Oct. 16, 1922. Decided Nov. 13,
1922.)

No. 67.

1. Courts ⇨385(4)—Case may be taken direct to Supreme Court on jurisdictional question, when other defenses waived.

After final judgment in the District Court, other defenses being waived, a cause might have been taken by direct appeal to the Supreme Court on a jurisdictional question only.

2. Removal of causes ⇨111—Jurisdiction of District Court dependent on substantial grounds alleged.

The District Court's jurisdiction of a suit removed from a state court depends on the substantial grounds for removal alleged in the petition for removal.

3. Appeal and error ⇨173(2)—Suiter may not maintain position in Supreme Court conflicting with that taken below.

Where relator, without traversing the facts alleged in defendant's petition for removal, had always maintained that none of the grounds for removal alleged were good, the only point open in the Supreme Court after affirmance by the Circuit Court of Appeals was the point that the ground for removal sustained by the Circuit Court of Appeals lacked substantiality, as suitors may not maintain a position in the Supreme Court conflicting with that taken below.

4. Courts ⇨382(1) — When plaintiff takes case to Circuit Court of Appeals, where he raises only jurisdictional question, judgment is final.

Under Judicial Code, §§ 128, 238 (Comp. St. §§ 1120, 1215), where matters other than a

jurisdictional question were involved, and relator chose to go to the Circuit Court of Appeals, where he presented only the question of jurisdiction, the judgment of that court was final, and an appeal could not be entertained by the Supreme Court.

5. Courts ⇨383(1)—Certiorari only granted under special circumstances.

Writs of certiorari to review judgments of the Circuit Courts of Appeals are only granted under special circumstances.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Proceeding by the State of Ohio, on the relation of Allen J. Seney, Prosecuting Attorney of Lucas County, Ohio, against Swift & Co., and another. A judgment dismissing the complaint was affirmed by the Circuit Court of Appeals (270 Fed. 141), and relator appeals. Appeal dismissed.

Messrs. Allen J. Seney and Charles S. Northup, both of Toledo, Ohio, for appellant.

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*Mr. Harold W. Fraser, of Toledo, Ohio, for appellees.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Styling himself the plaintiff, and declaring that he proceeded officially on behalf of the state, Allen J. Seney, prosecuting attorney, instituted the original proceeding against Swift & Co. and the Northern Refrigerating Company, in the court of common pleas for Lucas county, Ohio. He charged that those companies were parties to certain agreements and transactions in respect of stored pork products denounced by the Valentine Anti-Trust Law (Gen. Code Ohio, §§ 6390-6402) and the Smith Cold Storage Law (107 Ohio Laws, p. 594), and prayed for an order restraining delivery of the products to Swift & Co., for a receiver, and for an injunction forbidding further unlawful acts.

In due time, alleging that the controversy was solely between it and Allen J. Seney, prosecuting attorney, and complete determination could be had without the presence of the Northern Refrigerating Company, Swift & Co. asked removal of the cause to the United

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States *District Court. Shortly stated, the petition set up the following grounds:

1. The controversy is controlled by, and necessarily involves, the Constitution or laws of the United States.

2. Defendant cannot enforce, in the judicial tribunals of Ohio, its equal civil rights as a citizen of the United States.

3. The parties are citizens of different states.

Swift & Co. filed the record in the District Court, and later presented an answer and cross-petition. Upon the claim that the

cause was not removable and the District Court lacked jurisdiction, the relator moved to remand to the state court on the record as it then stood, and neither party offered affidavits or other evidence in support of or in opposition thereto. This motion being overruled, he refused to litigate the merits. Thereafter evidence was introduced to show that the pork was in interstate transportation, resting under a storage in transit privilege, and had never been intended for sale in Ohio. A final judgment dismissed the complaint. The court based its conclusion in part upon findings of an adequate affirmative defense.

The relator appealed to the Circuit Court of Appeals, where he relied wholly upon the jurisdictional question. That court said, "The only question * * * now in controversy in this court is whether the court below acquired jurisdiction by the petition for removal," but ruled that the final decree appealed from involved something more than jurisdiction, and sustained the appeal. It considered the three specified grounds for removal, held the first and second unsubstantial, the third sufficient, and affirmed the trial court. 270 Fed. 141. Thereupon this appeal was taken, and the relator again seeks to present the single question upon which he relied below.

[1] After final judgment in the District Court, other defenses being waived, the cause might have come here by direct appeal upon

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the jurisdictional question only *(Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 96, 42 Sup. Ct. 35, 66 L. Ed. 144); but other matters were involved which could have been reviewed. He chose to go to the Circuit Court of Appeals, and there assailed the removal and nothing more.

[2, 3] The District Court's jurisdiction depended upon the substantial grounds alleged in the petition for removal. Southern Pacific Co. v. Stewart, 245 U. S. 359, 363, 364, 38 Sup. Ct. 130, 62 L. Ed. 345. Without traversing the facts alleged therein, the relator has always maintained that none of such grounds was good. The Circuit Court of Appeals adopted his views as to Nos. 1 and 2, supra, but declared the third—diversity of citizenship—a substantial one. Generally, at least, suitors may not maintain a position here which conflicts with that taken below; and the only point now open, in any view, is that the claim of diverse citizenship lacks substantiality. Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 97, 98, 42 Sup. Ct. 35, 66 L. Ed. 144. The court below, upon full consideration, rejected this contention.

[4] Section 128, Judicial Code (Comp. St. § 1120), provides that Circuit Courts of Appeals shall exercise appellate jurisdiction over final decisions of District Courts in all classes of cases except those wherein appeals

and writs of error may be taken directly to the Supreme Court.¹

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*Section 238, Judicial Code (Comp. St. § 1215), provides that appeals and writs of error may be taken from final judgments of the District Courts directly to the Supreme Court when jurisdiction of the court is in issue, in prize causes, cases involving the construction or application of the Constitution of the United States, etc.²

The Act of March, 3, 1891, from which these sections take their origin, has been uniformly construed as intended to distribute jurisdiction among the appellate courts, prevent successive appeals, and relieve the docket of this court. If appellant, in the way now attempted, can secure two reviews of a cause wherein he has presented to the court below no controverted question except the jurisdictional one, a fundamental purpose of the statute will be frustrated. Robinson v. Caldwell, 165 U. S. 359, 362, 17 Sup. Ct. 343, 41 L. Ed. 745; Loeb v. Trustees of Columbia Township, 179 U. S. 472, 478, 21 Sup. Ct. 174, 45 L. Ed. 280; Union & Planters' Bank v. Memphis, 189 U. S. 71, 73, 74, 23 Sup. Ct. 604, 47 L. Ed. 712; Carolina Glass Co. v. State of South Carolina, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658; El Banco Popular, etc., v. Wilcox, 255 U. S. 72, 75, 41 Sup. Ct. 312, 65 L. Ed. 510; The Carlo Poma, 255 U. S. 219, 221, 41 Sup. Ct. 309, 65 L. Ed. 594; Alaska Pacific Fisheries v. Territory of Alaska, 249 U. S. 53, 60, 61, 39 Sup. Ct. 208, 63 L. Ed. 478.

¹ Sec. 128. The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

² Sec. 238. Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

And we accordingly hold that, whenever the suitor might have come here directly from the District Court upon the sole ques-

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tion which he chose to controvert in the *Circuit Court of Appeals, the judgment of the latter becomes final, and we cannot entertain an appeal therefrom.

[5] The suggestion of counsel that this court must have denied the writ of certiorari heretofore applied for because of the pending appeal, is not well founded. Such writs are only granted under special circumstances, adequately specified in former opinions. *Hamilton-Brown Shoe Co. v. Wolf Bros., etc.*, 240 U. S. 251, 257, 258, 36 Sup. Ct. 269, 60 L. Ed. 629.

Dismissed.

(260 U. S. 174)

ZUCHT v. KING et al.

(Argued Oct. 20, 1922. Decided Nov. 13, 1922.)

No. 84.

1. Courts ⇨394(5)—Ordinance is "law," within statute as to review by Supreme Court when validity of law sustained.

A city ordinance is a "law" of the state, within Judicial Code, § 237, as amended (Comp. St. § 1214), which provides for review by the Supreme Court on writ of error when the validity of a law is sustained by the highest court of the state in which a decision could be had.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

2. Courts ⇨391(3)—Supreme Court will decline jurisdiction, when constitutional question not substantial.

Though the validity of a law was formally drawn in question in a suit in the state courts, it is the duty of the Supreme Court to decline jurisdiction whenever it appears that the constitutional question presented is not, and at the time of granting the writ was not, substantial in character.

3. Health ⇨25—Compulsory vaccination within state's police power.

It is within the police power of a state to provide for compulsory vaccination.

4. Constitutional law ⇨63(2)—State may delegate determination of when health regulations shall become operative.

A state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative.

5. Municipal corporations ⇨591—Municipality may vest broad discretion in officers respecting application and enforcement of health law.

A municipality may, consistently with the federal Constitution, vest in its officials broad discretion in matters affecting the application and enforcement of a health law.

6. Constitutional law ⇨212—Classification may be applied under police power, without violating equal protection clause.

In the exercise of the police power, reasonable classification may be freely applied, and such regulation is not violative of the equal protection clause, merely because it is not all-embracing.

7. Courts ⇨394(5)—Question of validity of vaccination ordinance will not support writ of error to state court.

The question as to the validity, under the constitutional provisions as to due process and equal protection of the laws, of an ordinance excluding children or others from the public schools or other places of education unless a certificate of vaccination is presented, is not sufficiently substantial to support a writ of error to review a judgment of a state court, in view of prior decisions.

8. Schools and school districts ⇨158(1)—Vaccination ordinance held not to confer arbitrary power.

An ordinance excluding from the public schools, or other places of education, children or other persons not having a certificate of vaccination, does not confer arbitrary power, but only the broad discretion required for the protection of public health.

9. Courts ⇨394(5)—Claim that officials, in administering ordinance, had denied equal protection of the laws, reviewable only on certiorari.

The claim that, in administering an ordinance excluding children from schools unless vaccinated, officials have discriminated against plaintiff in such a way as to deny to her the equal protection of the laws, presents a substantial constitutional question; but as it does not go to the validity of the ordinance, but only to the validity of the authority of the officials, it can be reviewed only by certiorari, unless the case is otherwise properly before the Supreme Court upon writ of error.

In Error to the Court of Civil Appeals, Fourth Supreme Judicial District, of the State of Texas.

Suit by Rosalyn Zucht, by A. D. Zucht, her next friend, against W. A. King and others. A judgment dismissing the bill of complaint was affirmed by the Court of Civil Appeals (225 S. W. 267), and plaintiff brings error. Writ dismissed.

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*Mr. Don A. Bliss, of San Antonio, Tex., for plaintiff in error.

Messrs. R. L. Ball and A. W. Seeligson, both of San Antonio, Tex., for defendants in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Ordinances of the city of San Antonio, Texas, provide that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination. Purporting to act

under these ordinances, public officials excluded Rosalyn Zucht from a public school because she did not have the required certificate and refused to submit to vaccination. They also caused her to be excluded from a private school. Thereupon Rosalyn brought this suit against the officials in a court of the state. The bill charges that there was then no occasion for requiring vaccination; that the ordinances deprive plaintiff of her liberty without due process of law, by, in effect, making vaccination compulsory; and also that they are void, because they leave to the board of health discretion to determine when and under what circumstances the requirement shall be enforced, without providing any rule by which that board is to be guided in its action, and without providing any safeguards against partiality and oppression. The prayers were for an injunction against enforcing the ordinances, for a writ of mandamus to compel her admission to the public school, and for damages. A general demurrer to the bill of complaint was sustained by the trial court; and, plaintiff having declined to amend, the bill was dismissed. This judgment was affirmed by the Court of Civil Appeals for the Fourth Supreme Judicial District. 225 S. W. 267. A motion for rehearing was

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overruled, and an application *for a writ of error to the Supreme Court of Texas was denied by that court. A petition for a writ of certiorari filed in this court was dismissed for failure to comply with rule 37 (37 Sup. Ct. v) 257 U. S. 650, 42 Sup. Ct. 53. The case is now here on writ of error granted by the Chief Justice of the Court of Civil Appeals. It is assigned as error that the ordinances violate the due process and equal protection clauses of the Fourteenth Amendment, and that as administered they denied to plaintiff equal protection of the laws.

[1-8] The validity of the ordinances under the federal Constitution was drawn in question by objections properly taken below. A city ordinance is a law of the state, within the meaning of section 237 of the Judicial Code, as amended (Comp. St. § 1214), which provides a review by writ of error where the validity of a law is sustained by the highest court of the state in which a decision in the suit could be had. *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 555, 34 Sup. Ct. 364, 58 L. Ed. 721. But, although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character. *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

Long before this suit was instituted, *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, had settled that it is within the police power of a state to provide for compulsory vaccination. That case and others had also settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515. And still others had settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law. *Lieberman v. Van de Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305. A long line of decisions by

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this court had also settled that in the exercise of the police power reasonable classification may be freely applied, and that regulation is not violative of the equal protection clause merely because it is not all-embracing. *Adams v. Milwaukee*, 228 U. S. 572, 33 Sup. Ct. 610, 57 L. Ed. 971; *Miller v. Wilson*, 236 U. S. 373, 384, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829. In view of these decisions we find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error. Unlike *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.

[9] The bill contains also averments to the effect that in administering the ordinance the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567. But the question is not of that character which entitles a litigant to a review by this court on writ of error. The question does not go to the validity of the ordinance; nor does it go to the validity of the authority of the officials. Compare *United States v. Taft*, 203 U. S. 461, 27 Sup. Ct. 148, 51 L. Ed. 269; *Champion Lumber Co. v. Fisher*, 227 U. S. 445, 33 Sup. Ct. 329, 57 L. Ed. 591; *Yazoo & Mississippi Valley R. R. Co. v. Clarksdale*, 257 U. S. 10, 16, 42 Sup. Ct. 27, 66 L. Ed. 104. This charge is of an unconstitutional exercise of authority under an ordinance which is valid. Compare *Stadelman v. Miner*, 246 U. S. 544, 38 Sup. Ct. 359, 62 L. Ed. 875. Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed by this court only on petition for a writ of certiorari.

Writ of error dismissed.

(260 U. S. 205)

SOUTHERN PAC. CO. et al. v. OLYMPIAN DREDGING CO.

(Argued Oct. 19, 1922. Decided Nov. 13, 1922.)

No. 78.

1. Navigable waters ⇨20(2)—**Condition imposed by Secretary on construction of bridge held authorized.**

Under Act Sept. 19, 1890, § 7, as amended by Act July 13, 1892, § 3, prohibiting the erection of bridges over navigable waters without the approval of the Secretary of War, the Secretary was authorized to impose as a condition of his approval the requirement that the piers of an old bridge be removed to a certain depth.

2. Navigable waters ⇨20(2)—**Condition imposed by Secretary of War as to removal of old bridge held authoritative determination, on which bridge owner had right to rely.**

In view of the general assumption by Congress by Act Sept. 19, 1890, of control over the subject of navigable waters and obstructions thereof, and of the large powers delegated to the Secretary of War, where the Secretary approved the plans and location of a bridge, on condition that an existing bridge and its piers to a certain depth below the level of lowest low water be removed, such condition was an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation, and where the bridge owner complied therewith it was not liable for damages due to a collision with one of the old piers after the government had radically changed the surface of the water by dredging.

3. Navigable waters ⇨20(6)—**Owner of bridge not required to take notice of radical changes in surface of water due to governmental dredging.**

While a railroad company, abandoning an old bridge across a navigable stream and removing the old piers to the depth required by the Secretary of War, may have been required to take notice of changes in the course of the channel or stream from natural causes and provide against any injury resulting therefrom, it was not required to take notice of radical changes due to dredging by the government lowering the bed of the river and also the surface of the water.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Libel by the Olympian Dredging Company against the Southern Pacific Company and another. Decree dismissing the libel was reversed by the Circuit Court of Appeals (270 Fed. 384), and defendants bring certiorari. Reversed, and decree of District Court affirmed.

Messrs. Wm. R. Harr, of Washington, D. C., and E. J. Foulds and Elmer Westlake, both of San Francisco, Cal., for petitioners.

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*Mr. Thomas E. Haven, of San Francisco, Cal., for respondent.

Mr. Justice SUTHERLAND, delivered the opinion of the Court.

In 1895 the California Pacific Railroad Company, one of the petitioners, was authorized by the Legislature of the state of California to construct, and did construct, a railroad bridge across the Sacramento river. For some years prior to that time this company had owned and both petitioners had used another bridge situated in the near vicinity. Upon the construction of the new bridge in 1895 the old bridge was abandoned and demolished. The plans and location of the new bridge, so authorized by the Legislature, received the formal approval of the Secretary of War, in conformity with section 7 of the Act of September 19, 1890 (26 Stat. 454), as amended by section 3 of the Act of Congress of July 13, 1892 (27 Stat. 110), subject to the following condition:

"That said railway company, within 90 days after the completion of the new bridge, shall remove every portion of the present existing bridge, the old piers to be removed from the bed of the river to a depth of seven (7) feet below the level of the lowest low water, being a reading of 7.5 feet on the K street gauge, Sacramento, California."

The new bridge was finished in 1895 and the destruction of the old bridge was completed early in the following year. The condition imposed by the Secretary of War was fully complied with. Indeed it appears that the piles constituting the piers of the old bridge were cut down 3 or 4 feet lower than was required, to a level with or below the then existing bed of the river.

Subsequent to the removal of the piles the government of the United States constructed

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a wing dam above and *carried on dredging operations immediately below the bridge, so that the bed of the river was gradually lowered until, in 1918, when the injury in question occurred, the surface of the water was about 7 feet lower than at the time the piles were destroyed, although the depth of the water remained approximately the same with the result that the old stumps protruded several feet above the then existing bed of the river.

There is nothing to indicate that either of the petitioners had actual knowledge of the changed conditions which brought about the protrusion of the old piles above the bed of the river, or any knowledge that these piles were a menace to navigation.

On July 13, 1918, the dredger Thor, owned by respondent, on her way down the river, drifting with the current, struck on one or more protruding stumps, the upper portion of which had been destroyed, with the result that her hull was pierced and she sank.

The respondent filed a libel in the United States District Court for the Southern District of California against petitioners, ask-

ing damages for collision, and, after hearing that court dismissed the libel. The Circuit Court of Appeals, reversing the District Court, held that petitioners were liable for this injury, notwithstanding their full compliance with the condition imposed by the Secretary of War, upon the ground that it was reasonably probable in 1895 that the channel of the river would shift and the conditions ensue which brought about the lowering of the river bed, and that, consequently, it was their duty to anticipate and to guard against the effect of these conditions upon the piles and their failure to do so was actionable negligence.

We are unable to agree with this conclusion. By the Act of September, 1890 (26 Stat. 453, 454), Congress inaugurated a new policy of general, direct control over the navigable waters of the United States. The

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act provided for the alteration of existing bridges which interfered with free navigation (sections 4 and 5); prohibited the dumping of waste material in such waters so as to obstruct navigation (section 6); made it unlawful to build wharves, piers, and other structures named, without the permission of the Secretary of War, in such manner as to obstruct or impair navigation; or to commence the construction of any bridge over any such waters under any act of a state Legislature until the location and plans therefore had been submitted to and approved by the Secretary of War; or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War (section 7). The amendment of 1892 did not alter section 7 in any respect material to this inquiry.

[1] By this legislation Congress assumed jurisdiction of the subject of obstructions to navigation and committed to the Secretary of War administrative power in so far as administration was necessary. Under section 7, it was not enough for the California Pacific Railroad Company to secure the authority of the California Legislature to build the new bridge; it was necessary in addition to have the location and plans approved by the Secretary of War before the bridge could be lawfully constructed. That the Secretary of War was authorized to impose the condition heretofore quoted does not admit of doubt. The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval. In the light of this general assumption by Congress of control over the subject and of the large powers delegated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done to insure free and safe

navigation so far as the obstruction in question was concerned.

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[2] *To hold, as did the Circuit Court of Appeals, that this determination afforded no protection to petitioners, but that they relied upon it only at their peril, we think is a conclusion without warrant. Having complied with the direction of the Secretary, and having no further interest in anything at that point on the river, it seems altogether unreasonable to hold them to an indefinite and speculative responsibility for future changed conditions. The piles had been removed early in 1896, with an overgenerous observance of the directions of the Secretary. As matters then stood, the removal of the piles, so far as they constituted any obstruction or menace to navigation was complete; that they afterwards became an obstruction was due to changes of a most radical character in the channel of the river, brought about, in the main, by the dredging operations of the government itself. Was the petitioner guilty of negligence in not anticipating the effect of these changes, which did not culminate in the conditions complained of until 22 years later? The question must be answered in the negative.

The order of the Secretary of War, directing the removal of the old piles from the bed of the river to the depth there specified was a valid order, since it was the condition upon which his approval of the location and plans of the new bridge was made. The new bridge was in the near vicinity of the old bridge, for which it was, in fact, a substitute. The effect which the continued maintenance of the latter after the completion of the former might have had upon the navigability of the river at that point is not disclosed. The Secretary of War evidently concluded that the situation was such as to require the removal of the old bridge and piles, but not such as to require the removal of the latter beyond the depth fixed by his order. Whether the limitation in this respect was grounded alone upon what the Secretary considered would be sufficient to secure the safety of

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navigation, or upon the *fact that to leave the stumps in the bed of the river would be of some positive service in stabilizing the shifting bed of the stream, or useful in some other way, does not appear. It was not for the petitioners, however, to question either his reasons or his conclusions. They were justified in proceeding upon the assumption that what the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation was in fact no obstruction. The language which this Court employed in *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195, 30 Sup. Ct. 356, 361 (54 L. Ed. 435) is pertinent:

"* * * Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the sub-

ject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that executive officers conform their action to the mode prescribed by Congress."

See, also, *Union Bridge Co. v. United States*, 204 U. S. 364, 385, 27 Sup. Ct. 367, 51 L. Ed. 523; *The Douglas*, 7 Probate Division (1882) 157; *Frost v. Railroad Co.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68; *Maine Water Co. v. Knickerbocker Steam Towage Co.*, 99 Me. 473, 59 Atl. 953; *The Plymouth*, 225 Fed. 483, 140 C. C. A. 1.

Even if we leave out a consideration altogether the order of the Secretary of War, it is still difficult to see upon what just ground petitioners could be held liable.

The changes which occurred in the bed of the river were not due to natural causes, whose effect could reasonably have been

*211 anticipated, but were due to the artificial operations of the Government the effect of which appeared only after the lapse of a long period of years.

[3] We agree with what was said by the District Court, in deciding the instant case, upon that subject:

"While the railroad company was perhaps required to take notice of the changes in the course of the channel or stream from natural causes and provide against any injury that might result from such changes, it could not, in my opinion, be required to take notice of such radical changes as occurred here by the acts of the government over which it had no control and which it had no reason to anticipate or provide against."

The opinion of the Circuit Court of Appeals is that the question of liability was not affected by the fact that the conditions imposed by the Secretary of War were complied with, holding that these conditions or restrictions did not define the measure of liability to third persons rightfully navigating the river, and *Maxon v. Chicago & North Western Railway Co.* (D. C.) 122 Fed. 555, is relied upon in support of this view. That was a case, however, where a railroad company had constructed a bridge in conformity with the license granted by the War Department. The obstruction which caused the injury complained of consisted of stone and other material thrown into the river by the railroad company at the foot of and about one of the bridge abutments, and extending out into the channel; but it was no part of the bridge structure and was entirely un-

authorized. The court held that the tug which collided with the obstruction had a right to the use of the channel to its full width and having no knowledge or warning of the presence of the obstruction was entitled to recover for the resulting injury. The stone and other material were unlawfully thrown into the stream and constituted from the beginning an unlawful obstruction. In the instant case the piles forming part of the old bridge were lawfully placed and law-

*212 fully maintained until they were *ordered removed by the Secretary of War. His order for their removal was complied with, and the channel was left by petitioners wholly unobstructed, in law and in fact. The obstruction did not develop until years afterward and was due to causes which they were not bound to anticipate and provide against and for which they were in no degree responsible.

The decree of the Circuit Court of Appeals is therefore reversed and that of the District Court affirmed.

Reversed.

(260 U. S. 166)

BALTIMORE & O. S. W. R. CO. v. SETTLE et al.

(Argued and Submitted Oct. 20, 1922, and Decided Nov. 13, 1922.)

No. 83.

1. Carriers ⇐30—Rights of shipper determined by law and published rate.

The rights of a shipper against a carrier are determined by law through the provisions of the tariff which are embodied in the applicable published rate.

2. Commerce ⇐34—Applicability of Interstate or intrastate tariff dependent on character of movement, and not necessarily on contract.

Whether an interstate or intrastate tariff is applicable depends on the essential character of the movement, and is not necessarily determined by the contract between shipper and carrier.

3. Carriers ⇐196—That possession taken at ostensible destination and cars not rebilled for several days would have supported finding against through shipment.

In an action to recover the difference between the interstate through rate and the sum of the interstate and intrastate rates on lumber shipped to defendants at O., and reshipped to M., that possession of railroad cars was taken by the shipper at O., and that they were not rebilled to M., a point in the same state, for several days, would have justified the jury in finding, if shipper's intention had been in issue, that it was originally intended to end the movement at O., and that there was no through interstate shipment from the original shipping point to M.

4. Commerce ⇐33—Intention held to determine as matter of law that shipment was interstate.

Where an interstate shipper's intention at all times was that cars should be sent to M., and they were billed to O., possession taken there, and the cars rebilled to M., without any intention other than a mere possibility that the interstate journey should end there, the intention as carried out determined as matter of law the essential nature of the movement, and made the entire movement from the original point to M. an interstate shipment.

5. Commerce ⇐33—Neither through billing, uninterrupted movement, continuous possession by carrier, nor unbroken bulk essential to through shipment.

Through billing, uninterrupted movement, continuous possession by carrier, or unbroken bulk are common incidents of a through shipment, and, when the intention is in issue, the presence or absence of one or all may be important; but, when it is admitted that the shipment made to the ultimate destination had at all times been intended, they are without legal significance, and none of them is essential to a through interstate shipment.

6. Carriers ⇐30—Published rate cannot be avoided by stopping at intermediate point and making ostensible intrastate shipment to destination.

The published interstate rate from a shipping point to M. was the only lawful rate for transportation to M., and could not be defeated by shipping to an intermediate point, taking possession there, and rebilling to M. as an ostensible intrastate shipment, for the purpose of acquiring a lower rate.

Mr. Justice McReynolds dissenting.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Action by the Baltimore & Ohio Southwestern Railroad Company against W. H. Settle and another, partners under the firm name of W. H. Settle & Co. A judgment for defendants was affirmed by the Circuit Court of Appeals (272 Fed. 675), and plaintiff brings error. Reversed.

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*Mr. Geo. Hoadley, of Cincinnati, Ohio, for plaintiff in error.

Mr. Harry C. Barnes, of Chicago, Ill., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Baltimore & Ohio Southwestern Railroad has freight stations at Oakley and at Madisonville, both within the city limits of Cincinnati. It duly published, in connection with other carriers, interstate carload rates on lumber from Southern points to Oakley and to Madisonville. It also duly published intrastate carload rates from Oakley to Madisonville. The interstate rates to Madisonville were higher than the interstate rates to

Oakley plus the local rate from Oakley to Madisonville. W. H. Settle & Co., who are lumber dealers, with a place of business at Madisonville, had lumber shipped from the South to Oakley, paid the freight to that point, received at that station delivery of the loaded cars on the team tracks or in the bulk yard, and, without unloading any of the cars, reshipped them within a few days to Madisonville on local bills of lading, paying the local freight rate. Thus the shippers secured transportation of the lumber to Madisonville by paying less in freight charges than would have been payable according to the interstate tariff, if the cars had been billed through to Madisonville. At the time these cars were shipped from points of origin, and continuously thereafter, it had been the intention of the shippers that the cars should go to Madisonville. They were billed to Oakley, and

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physical possession was *taken by the shipper there, in order to get the benefit of the lower freight charges resulting from the combination of rates. The railroad insisted that, in view of this fact, the through rate to Madisonville applied, and it brought an action against the shippers, in the federal District Court for Southern Ohio, Western Division, to recover the difference between the amounts actually received and the through rate to Madisonville. A demurrer to the petition, which set up the above facts, was overruled by the trial court, judgment entered thereon was reversed by the Circuit Court of Appeals for the Sixth Circuit, and the case was remanded to the District Court. *Settle v. Baltimore & O. S. W. R. Co.*, 249 Fed. 913, 162 C. C. A. 111. The railroad then discontinued that suit and brought this one in the same court. The action was tried before a jury, the facts above stated were shown, the shippers got the verdict, and judgment entered for them was affirmed by the Circuit Court of Appeals, 272 Fed. 675. The case is here on writ of error.

It is admitted that, if the reshipment from Oakley to Madisonville was part of a through interstate movement, the railroad was entitled to recover. The question is presented whether, in view of the undisputed facts, the original and continuing intention so to reship made the reshipment, as matter of law, part of a through interstate movement. The following instruction, given and excepted to, shows sufficiently how the question arose:

"As a matter of law, the existence of an original and continuing intention in the minds of the defendants Settle and Clephane to reship this lumber from Oakley to Madisonville, for the purpose of saving expense, is not, of itself, sufficient to convert the shipments into through shipments, if there was otherwise a good faith delivery at Oakley. * * * If there was a good faith delivery of this lumber at Oakley to Settle and Clephane, the fact they always had an intention in their mind, and persevered in

that intention, of reshipping it to Madisonville

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*for the purpose of saving money on freight, that would not necessarily constitute a through shipment in interstate commerce."

No material fact, evidential or ultimate, had been left in dispute. There was no room for any issue of good faith to be determined by the jury. Physical delivery of the cars to the shippers had been made at Oakley, after payment of the freight and other charges. The shippers had no place of business at Oakley. The delivery there was the completion of one stage in the contemplated movement to Madisonville. After a brief interval the second stage was begun under the local bill of lading. It was conceivable that the shippers might find a customer who would take the lumber at Oakley, and in that event the rail movement would have ended there. But that was not probable or expected, nor was it the reason for shipping to Oakley. The movement had been divided by the shippers into two stages—instead of using through billing—because they believed that by so doing they could secure transportation to Madisonville at less than the through interstate rate. Whether under the Act to Regulate Commerce (Comp. St. § 8563 et seq.) lower intermediate rates can be so used in combination is the precise question for decision.

[1, 2] The contention of the shippers is that the character of a movement, as intrastate or interstate, and hence what the applicable rate is, depends solely upon the contract of transportation entered into between shipper and carrier at the point of origin of the traffic; that when an interstate shipment reaches the destination named in this contract, and after payment of charges delivery is taken there by the consignee, the contract for interstate transportation is ended; that any subsequent movement of the commodity is, of necessity, under a new contract with the carrier, and at the published rate; and that, since this lumber came to rest at Oakley before that new movement, the reshipment

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from there to Madisonville (both *stations being within the state of Ohio) was an intrastate movement. This contention gives to the transportation contract an effect greater than is consistent with the purposes of the Act to Regulate Commerce. The rights of shipper against carrier are determined by law through the provisions of the tariff which are embodied in the applicable published rate. *Atchison, Topeka and Santa Fé Ry. Co. v. Robinson*, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; *Western Union Telegraph Co. v. Steve Bros. & Co.*, 256 U. S. 566, 41 Sup. Ct. 584, 65 L. Ed. 1094. And whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject re-

ceived much consideration. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; *Railroad Commission of Louisiana v. Texas & Pacific Ry. Co.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215. And in *Baer Bros. Mercantile Co. v. Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 490, 34 Sup. Ct. 641, 58 L. Ed. 1055, this court held that a carrier cannot, by separating the rate into its component parts, charging local rates, and issuing local waybills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a through interstate movement.

[3-5] If the intention with which the shipment was made had been actually in issue, the fact that possession of the cars was taken by the shipper at Oakley, and that they were not rebilled for several days, would have justified the jury in finding that it was originally the intention to end the movement at Oakley, and that the rebilling to Madisonville was an afterthought. But the defendant *Clephane* admitted at the trial that it was intended from the beginning that the

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cars should go to Madisonville, *and this fact was assumed in the instructions complained of. In other words, Madisonville was at all times the destination of the cars, Oakley was to be merely an intermediate stopping place, and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement, and hence that the movement through to Madisonville was an interstate shipment; for neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of a through interstate shipment. These are common incidents of a through shipment, and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs apply. See *Atchison, Topeka & Santa Fé Ry. Co. v. Harold*, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050; *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 38 Sup. Ct. 49, 62 L. Ed. 199; *Central Railroad Co. of New*

Jersey v. United States, 257 U. S. 247, 42 Sup. Ct. 80, 66 L. Ed. 217. Compare *Philadelphia & Reading Ry. Co. v. Hancock*, 253 U. S. 284, 40 Sup. Ct. 512, 64 L. Ed. 907.

[6] Through rates are ordinarily made lower than the sum of the intermediate rates. This practice is justified, in part, on the ground that operating costs of a through movement are less than the aggregate costs of the two independent movements covering the same route. But there may be traffic or commercial conditions which compel, or justify, giving exceptionally low rates to move-

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ments which are intermediate. The mere existence of such intermediate rates confers no right upon the shipper to use them in combination to defeat the applicable through rate. Here there had been published interstate rates for the transportation from the Southern points to Madisonville. For such transportation the interstate rates to Madisonville were the only lawful rates. To permit the applicable through interstate rate to be defeated by use of a combination of intermediate rates would open wide the door to unjust discrimination, and it would unjustly deplete the revenues of the carrier. The sole question, therefore, which could arise in this case was whether the movement actually entered upon at point of origin, and persisted in, was transportation of the lumber to Madisonville.

Before the decisions above referred to it was commonly assumed that, while a carrier, or one of its employees, might not act as a reconsigning agent for a shipper, in order to enable him to use a combination of lower intermediate rates, and thus avoid the higher charges incident to the through interstate movement, the shipper might so use the combination, provided he consigned the car to himself at the intermediate point, there paid the charges, took possession, and then reshipped the car on the local rate to its real destination.¹ The distinction made was without basis in reason. To permit carriers' revenues from interstate rates to be depleted by such misuse of a combination of intermediate rates would be no less inconsistent with the provisions and purposes of the Act to Regulate Commerce than to permit them to be used as a means of discrimination.

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And, since the decisions cited *above were rendered, the principle there declared has been steadfastly applied by the Interstate

Commerce Commission for the purpose of protecting revenues of railroads against such attacks.² See, also, *McFadden v. Alabama Great Southern R. R. Co.*, 241 Fed. 562, 154 C. C. A. 338. The decision in *Gulf, Colorado & Santa Fé Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, relied upon by defendants in error, is entirely consistent with these later decisions of this court, although some expressions in the opinion are not.

The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began. Shipments to and from distributing points often present this situation, if the applicable tariffs do not confer reconsignment or transit privileges.³ The distinction is clear between cases of that character and the one at bar, where the essential nature

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of *the traffic as a through movement to the point of ultimate destination is shown by the original and persisting intention of the shippers which was carried out.

Reversed.

Mr. Justice McREYNOLDS dissents.

² *Kanotex Refining Co. v. Atchison, Topeka & Santa Fé Ry. Co.*, 34 Interst. Com. Com'n R. 271; *Id.*, 46 Interst. Com. Com'n R. 495; *Rates on Railroad Fuel and Other Coal*, 36 Interst. Com. Com'n R. 1, 8; *Lumber Rates from New Castle, Cal.*, 37 Interst. Com. Com'n R. 596, 597; *Lumber from Easton, Wash.*, 39 Interst. Com. Com'n R. 188, 189; *Miller Brothers v. St. Louis & San Francisco R. Co.*, 42 Interst. Com. Com'n R. 261, 262; *Memphis Merchants' Exchange v. Illinois Central R. Co.*, 43 Interst. Com. Com'n R. 378, 391; *E. J. Woolworth v. Union Pacific R. R. Co.*, 46 Interst. Com. Com'n R. 437, 438; *Sugar Land Mfg. Co. v. Beaumont, Sour Lake & Western Ry. Co.*, 56 Interst. Com. Com'n R. 212.

³ *Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 983, was a case of this character. See, also, *Southern Pacific Co. v. Arizona*, 249 U. S. 472, 39 Sup. Ct. 313, 63 L. Ed. 713; *Bracht v. San Antonio & Aransas Pass Ry. Co.*, 254 U. S. 489, 41 Sup. Ct. 150, 65 L. Ed. 366; *Illinois Grain to Chicago*, 40 Interst. Com. Com'n R. 124; *Kettle River Co. v. Missouri Pacific Ry. Co.*, 52 Interst. Com. Com'n R. 73, 77. On the other hand, there are many instances where the grant by tariffs of extensive transit or reconsignment privileges have rendered what otherwise would be independent local movements, a part of the through interstate shipment. See *In Matter of Substitution of Tonnage at Transit Points*, 18 Interst. Com. Com'n R. 280; *The Transit Case*, 24 Interst. Com. Com'n R. 340.

¹ See *D. Morgan v. Missouri, Kansas & Texas Ry. Co.*, 12 Interst. Com. Com'n R. 525, 528; *D. E. Wood Butter Co. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 16 Interst. Com. Com'n R. 374; *Big Cañon Ranch Co. v. Galveston, Harrisburg & San Antonio Ry. Co.*, 20 Interst. Com. Com'n R. 523, 526. Compare *Kurz v. Pennsylvania Co.*, 16 Interst. Com. Com'n R. 410, 413.

(260 U. S. 71)

NATIONAL UNION FIRE INS. CO. v. WANBERG.

(Submitted Oct. 6, 1922. Decided Nov. 13, 1922.)

No. 32.

1. Insurance — State may regulate, as business affected with public interest.

A state may regulate the conduct by corporations, domestic or foreign, of insurance as a business affected with a public interest.

2. Constitutional law — Insurance — Statute providing when hail insurance shall take effect held valid; freedom of contract, equal protection and due process not denied by statute as to acceptance of hail insurance applications.

Comp. Laws N. D. 1913, § 4902, providing that hail insurance shall take effect 24 hours after the application is taken by the authorized local agent, and that, if the company declines to write the insurance, it shall notify the applicant and the agent by telegram, does not substitute mandatory obligation for freedom of contract, or deny the equal protection of the laws, and is not so arbitrary or unreasonable as to deprive those whom it affects of their property or liberty without due process of law, as in effect it forbids companies to engage in such business, unless they so extend the scope of authority of their local agents, or so speed communication between them and their authorized representatives, as to enable an applicant to know promptly whether he is protected, especially as the statute has been in force for some years, and has apparently not driven companies out of the business.

3. Insurance — That statute providing when hail insurance shall take effect bears more heavily on foreign companies does not affect validity.

That Comp. Laws N. D. 1913, § 4902, providing that hail insurance shall take effect 24 hours after the application is taken by the local agent, and that, if the company declines to write the insurance, it shall give notice by telegram, bears more heavily on foreign companies whose principal offices may be far removed than those whose headquarters are within the state, gives such foreign companies no right to complain.

4. Insurance — State may impose different conditions on foreign companies than on domestic.

The business of insurance companies is purely intrastate, and the state has power, though not unlimited, to require foreign companies to accept conditions different from those imposed on domestic corporations.

5. Insurance — Statute held not to require acceptance of applications or deny right to require payment in advance or right of cancellation.

Comp. Laws N. D. 1913, § 4902, providing that hail insurance shall take effect 24 hours after the application is taken, etc., does not

require a company to receive applications, or prevent it from insisting on payment of the premium in advance, or from reserving the usual right to cancel the contract on service of due notice with a return of a proper proportion of the premium.

6. Constitutional law — Wisdom of legislation not for the courts.

Whether legislation is wise is not a question for the courts to consider.

7. Insurance — Provision that policy shall not take effect until accepted by branch office void, when contrary to statute.

As Comp. Laws N. D. 1913, § 4902, providing that hail insurance shall take effect 24 hours after the application is taken, etc., is valid, a consent by insured in the application that the policy shall not take effect until the company's branch office has an opportunity to examine it, and shall accept it, is void as defeating the object of the statute.

In Error to the Supreme Court of North Dakota.

Action by Robert Wanberg against the National Union Fire Insurance Company. A judgment for plaintiff was affirmed by the Supreme Court of North Dakota (46 N. D. 369, 179 N. W. 666), and defendant brings error. Affirmed.

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*Messrs. Nathan H. Chase, of Minneapolis, Minn., and Wm. H. Barnett, of Fargo, N. D., for plaintiff in error.

Messrs. W. B. Overson and Wm. G. Owens, both of Williston, N. D., for defendant in error.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a writ of error to the Supreme Court of North Dakota, brought to reverse its judgment affirming one of the district court of Williams county of that state for \$1,254.25, with interest and costs, upon a contract of hail insurance against the National Union Fire Insurance Company, a corporation of Pennsylvania. The judgment rests for its validity on section 4902 of the Compiled Laws of North Dakota of 1913, as follows:

"Every insurance company engaged in the business of insuring against loss by hail in this state, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and the hour the application for such insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application, by telegram, and in that event, the insurance shall not become effective: Provided, that nothing in this article shall prevent the company from issuing a policy on such application and putting the insurance in force

prior to the expiration of said twenty-four hours."

The facts as stipulated were:

At 10 o'clock in the forenoon of July 12, 1917, Wanberg, on his farm at Tioga, in North Dakota, signed and delivered to Everson, the agent of the defendant company, an application on the blank furnished by the company for insurance on his crops in the sum of \$1,400 against loss or damage by hail

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or any other cause, except *fire, floods, winter-kill, or failure of insured to use good husbandry. He also paid to Everson the premium of \$140. Everson had authority as agent only to solicit and receive such applications and the premium therefor and to transmit them to the company's Western office at Waseca, Minn., where applications were acted upon and policies issued. The company was duly licensed under the laws of North Dakota to transact its business in the state. On the afternoon of July 13, 1917, Everson mailed the application with the premium, less commission, to the office at Waseca, where it arrived on Sunday, July 15th, and was delivered on Monday the 16th. In the meantime, at 6 o'clock in the evening of July 14th, a hail storm injured Wanberg's growing crops to the extent of the amount of the judgment. On Tuesday, July 17th, and without knowledge of the loss, the Waseca agency returned the application and premium to Everson, saying that at that late date it would not be accepted. The application contained a provision that it should take effect from the day it was received and accepted, as evidenced by the issuance of a policy thereon at the Waseca, Minn., agency for the company.

The only error we can consider which was duly reserved is that section 4902 as applied to this case violates the Fourteenth Amendment, in that it operates to deprive the company of liberty of contract, and therefore of its property without due process of law, and of the equal protection of the laws.

[1-4] The decision of this court in *German Alliance v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, settled the right of a state Legislature to regulate the conduct by corporations, domestic and foreign, of insurance as a business affected with a public interest. This includes provision for "unearned premium fund or reserve, the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, re-

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quiring *deposits in money or bonds, confining the business to corporations, limitation of risks, and other regulations equally restrictive." 233 U. S. 412, 34 Sup. Ct. 619, 58 L. Ed. 1011, L. R. A. 1915C, 1189. It includes moreover the restrictions of defense to recovery on policies and the forbidding of stipulations to evade such restrictions. *Orient Insurance Co. v. Daggs*, 172 U. S.

557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895. But it is said the line of possible and valid regulation has here been passed by affirmatively imposing a contract on an insurance company before it has had a chance to consider the circumstances and decide that it wishes to make it; indeed, that it declares that to be an agreement with heavy obligation which is in fact no agreement at all. Thus it is argued that by this statute mandatory obligation is substituted for freedom of contract which is just that against which the Fourteenth Amendment was intended to secure persons. We agree that this legislation approaches closely the limit of legislative power, but not that it transcends it. The statute treats the business of hail insurance as affected with a public interest. In that country, where a farmer's whole crop, the work and product of a year, may be wiped out in a few minutes and where the recurrence of such manifestations of nature is not infrequent, and no care can provide against their destructive character, it is of much public moment that agencies like insurance companies to distribute the loss over the entire community should be regulated so as to be effective for the purpose. The danger and loss to be mitigated are possible for a short period. The storms are usually fitful, and may cover a comparatively small territory at a time, so that of two neighbors, one may have a total loss, and the other may escape altogether. The risk justifies a high rate of insurance. It differs so much in these and other respects from other insurance that it may properly call for special legislative treatment. The statute applies

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to all companies engaged *in such insurance. There is no discrimination, and no denial of the equal protection of the laws. The fact that the time requirements of the statute may bear more heavily on foreign companies whose principal offices may be far removed than upon those whose headquarters are within the state is a circumstance necessarily incident to their conduct of business in another state of which they cannot complain. They cannot expect the laws of the state to be bent to accommodate them as a matter of strict legal right, however wise it may be for a Legislature to give weight to such a consideration in securing the use of foreign capital for its people. Moreover, as the business of such insurance companies is purely intrastate (*New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332), the state has power to require them to accept conditions different from those imposed on domestic corporations (*Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, and cases cited), though this is not, of course, un-

limited (*Terral v. Burke Construction Co.*, 257 U. S. 529, 532, 533, 42 Sup. Ct. 188, 66 L. Ed. 352).

The Legislature was evidently convinced that it would help the public interest if farmers could be induced generally to take out hail insurance and "temper the wind" so injurious to the agriculture of the state, and that they would be more likely to avail themselves of this protection if they could effect the insurance promptly and on the eve of the danger. The Legislature said, therefore, to companies intending to engage in hail insurance:

"To accomplish our purpose we forbid you to engage in this kind of business unless you agree to close your contracts within 24 hours after application is made. You must so extend the scope of the authority of your local agents, or must so speed communication between them and your representatives who have authority, as to enable an applicant to know within the limits of a day whether he is protected, so

that, if not, he may at once go to *another company to secure what he seeks. If, therefore, you engage in this exigent business, and allow an application to pend more than 24 hours, you will be held to have made the contract of insurance for which the farmer has applied."

This does not force a contract on the company. It need not accept an application at all, or it can make its arrangements to reject one within 24 hours. It is urged that no company, to be safe and to make the business reasonably profitable, can afford to place more than a certain number of risks within a particular section or township, and that what is called "mapping" must be done to prevent too many risks in one locality, and to distribute them so that the company may not suffer too heavily from the same storm. Applications are often received by agents in different towns for the crops in the same section or township, so that, if local agents were given authority finally to accept applications, this "mapping" essential to the security of the company in doing the business at all, would be impossible. It seems to us that this is a difficulty easily overcome by appointing agents with larger territorial authority and subagents near them, or by the greater use of the telegraph or telephone in consulting the home office or more trusted local agencies. While the time allowed is short, we cannot say that it is unreasonable in view of the legitimate purpose of the legislation and the possibilities of modern business methods.

[5, 6] There is nothing in the statute under discussion which requires a company to receive applications or prevents it from insisting on the payment of a premium in advance before receiving them, or from reserving the usual right on the part of the insurer at any time to cancel the contract of

insurance on service of due notice with a return of a proper proportion of the premium. Not infrequently companies in their own interest in some kinds of insurance intrust to local insurance agents authority to bind

*their principals temporarily until the application can be examined and approved by the head office. The statute here in question has been in force since 1913, and it does not seem to have driven companies out of the hail insurance business, an indication that they are able profitably and safely to adjust themselves and their methods to its requirements. Whether it is wise legislation is not for us to consider. All we have to decide and that we do decide is that it is not so arbitrary or unreasonable as to deprive those whom it affects of their property or liberty without due process of law.

[7] It is pointed out on behalf of the company that the very application which the defendant in error signed contained an express consent that the policy should not take effect until the company's agency at Waseca, Minn., should have an opportunity to examine it and should accept it. It is clear that, if the statute is valid, such a consent is void, because it defeats the very object of the statute. This is settled by *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895, and *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, already cited.

The judgment of the Supreme Court of North Dakota is Affirmed.

(260 U. S. 90)

RYAN v. UNITED STATES.

(Argued Oct. 16, 1922. Decided Nov. 13, 1922.)

No. 64.

1. Customs duties $\S$ 60—Nothing in statute to prevent appointment of inspectors at rate of \$4 a day.

Under Rev. St. $\S\S$ 2733, 2737, and Act March 3, 1881, there was nothing to prevent the Secretary of the Treasury from appointing customs inspectors at the port of New York at a salary of \$4 a day.

2. Customs duties $\S$ 60—Statute authorizing increase of compensation of inspectors permissive, and not rendered mandatory by appropriation acts.

Act Dec. 16, 1902, authorizing the Secretary of the Treasury to increase the compensation of inspectors of customs at the port of New York in a sum not exceeding \$1 a day, as compensation for work performed at unusual hours and as reimbursement for expenses, was wholly permissive, and was not rendered mandatory by Act June 30, 1906, and Act March 4, 1907, making appropriations to pay inspectors at the port of New York the difference between

the salary of \$4 a day paid them for certain months and "their proper salary for the same period (\$5 per diem)"; there being inspectors whose pay had been fixed at \$5 a day, to which such language could be applied.

Appeal from the Court of Claims.

Suit by Thomas F. E. Ryan against the United States. From a judgment for the United States (56 Ct. Cl. 103), the claimant appeals. Affirmed.

Messrs. Wm. E. Russell, of New York City, and L. T. Michener, of Washington, D. C., for appellant.

Mr. Assistant Attorney General Lovett, for the United States.

Mr. Chief Justice TAFT delivered the opinion of the Court.

Ryan, the claimant and appellant, by his amended petition in the Court of Claims, sought to recover from the United States \$3,465, being \$1 per diem from April 16, 1910, to and including October 10, 1919. He was during that period a customs inspector at New York, and received \$4 per day. He says that by law he was entitled to \$5 per day, and he brings suit to recover the difference. The Court of Claims gave judgment for the government. The question for our

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decision is what was *Ryan's lawful compensation during this period of 9½ years.

Ryan entered the customs service as a probationary junior clerk, class C, in 1899, after passing a civil service examination. He was promoted from one place to another in the service until as the result of a promotion examination he became inspector class 2 at \$4 a day, and executed an oath as such on April 16, 1910. This appointment was made in pursuance of authority granted by the Secretary of the Treasury to the collector at New York to appoint three inspectors of customs at \$4 a day, class 2. By the same authority 22 more inspectors of the same class were appointed before July 1, 1910. On that day, the collector at New York, with the approval of the Secretary, effected a reorganization by which 72 inspectors were appointed to class 2 at \$4 a day, 396 to class 4 at \$5 per day, and 52 to class 5 at \$6 per day. The appointment of the claimant and others in April, 1910, as inspectors of class 2, \$4 per day, marked their entrance into the service, and they were not reappointed under the reorganization, but remained as inspectors of class 2 under their original appointments.

[1] Was this appointment of Ryan at \$4 a day authorized by law? Section 2733, R. S., provides that each inspector of customs shall receive for every day he shall be actually employed in aid of customs \$3. Section 2737 provides that the Secretary of the Treasury may increase the compensation of inspectors of customs in such ports as he may think it advisable so to do, and may designate, by adding to the present compensation

of such officers, a sum not exceeding \$1 a day. By Act of March 3, 1881 (21 Stat. 429), the Secretary was given authority to appoint inspectors of customs at a compensation less than \$3 per day when in his judgment the public service would permit. There is certainly nothing in the foregoing provisions,

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still in force, which prevented *the Secretary from appointing inspectors in New York at \$4 a day. By virtue of this authority, before 1902, he had increased the pay of all inspectors at New York to \$4.

[2] By Act of December 16, 1902 (32 Stat. 753), the Secretary was authorized to increase the compensation of inspectors of customs at the port of New York as he might think advisable and proper by adding to their then compensation a sum not exceeding \$1 per day, such additional compensation to be for work performed at unusual hours for which no compensation was then allowed, and as reimbursement of expenses for meals and transportation while in the performance of official duties. Under the foregoing, in 1903, the Secretary increased the pay of inspectors then in office in New York to \$5 per day, class 4. The act of 1902 is wholly permissive in its language. It does not require an increase of \$1 a day, or any part of it, to inspectors in New York. It only authorizes it.

It is contended, however, that the act of 1902 has been construed by Congress in two deficiency appropriation acts to be mandatory, and to require that all inspectors appointed in New York shall receive \$5 a day. The acts relied on are that of June 30, 1906 (34 Stat. 634, 636), and that of March 4, 1907 (34 Stat. 1371, 1373). In substantially the same language they appropriated money to pay inspectors of the port of New York "the difference between the per diem salary of \$4.00 per diem paid them during the months of October, November and December, 1905, and their proper salary for the same period (\$5.00 per diem) in accordance with the act of Congress, approved December 16, 1902." These deficiency appropriations related to 331 inspectors at New York whose pay had been fixed at \$5 a day under the act of 1902, prior

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to October 1, 1905, and which on that *date was reduced by the Secretary of the Treasury to \$4. On January 1, 1906, their pay was increased again to \$5.

It would be straining provisions of a deficiency act applying to special instances to hold that it was intended to change a plainly permissive statute into a mandatory one. The much more natural interpretation of the language used is that Congress thought that the pay of these inspectors which had been increased to \$5 a day under the act of 1902 by the Secretary, had thus become fixed by law, and so that the Secretary had no power to reduce them. This fully satisfies the words

relied on, without amending the statute or making it mean what it plainly does not mean.

Counsel for appellant presses upon the court also, its decision in *Cochnowar v. United States*, 248 U. S. 405, 39 Sup. Ct. 137, 63 L. Ed. 328, as a basis for recovery here. In that case, the claimant, a customs inspector in New York, had been, with all his fellows, advanced to \$5 a day (class 4), under the act of 1902. The Secretary had, thereafter, reduced him and his fellows to \$4 a day (class 2), and counsel for the government asserted authority to do this under the act of 1909 (35 Stat. 1065), by which the Secretary was empowered to "increase and fix the compensation of inspectors of customs as he might think advisable, not to exceed in any case \$6.00 per diem." The court held that authority to increase did not give authority to decrease, and that as the pay of the inspectors in that case had been fixed at \$5, it was the legal pay and they could recover the balance due. The court took the same view which before the act of 1909 Congress seemed to have taken in the deficiency acts we have just discussed. Neither the language of Congress in the deficiency acts nor the *Cochnowar* Case has any application to the one before us, because here the claimant entered the service as a new appointee at

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\$4 a day *(class 2), which, as we have seen, the Secretary had full authority to fix, and his pay was not increased during the period for which he seeks recovery.

This conclusion makes it unnecessary for us to consider any other question in the record.

Affirmed.

(260 U. S. 137)

BROWNE v. THORN et al.

(Argued Oct. 20, 1922. Decided Nov. 13, 1922.)

No. 88.

1. Appeal and error *§*1094(2)—Where jury found on the evidence against defendant's contention, it cannot be sustained in Supreme Court.

Where verdict found against contention that transaction was a gambling one, and Circuit Court of Appeals affirmed the judgment on the verdict, it will not be set aside by the Supreme Court; there being evidence pro and con.

2. Gaming *§*12—Customer's undisclosed intention held not to render transactions gambling transactions.

If cotton brokers did not know that a customer had no intention to deliver or receive actual cotton bought and sold through them, the customer's undisclosed intention was not enough to render the transactions invalid as gambling transactions.

3. Gaming *§*12—"Hedging" by manufacturers and others is *prima facie* lawful.

"Hedging," which is a means by which manufacturers and others, who have to make contracts of purchase or sale in advance, secure themselves against fluctuations of the market by counter contracts, is *prima facie* lawful.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Hedging Contract.]

4. Frauds, statute of *§*116(1, 2)—Cotton Futures Act held satisfied by bought, and sold notes executed on Cotton Exchange, not signed by both brokers mentioned.

Cotton Futures Act Aug. 11, 1916, pt. A, § 4 (Comp. St. § 6309d), requiring contracts of sale for future delivery to be in writing, or evidenced by written memorandum signed by the party to be charged, or his agent, must be read in the light of decisions on similar language of the statute of frauds, and thereunder bought and sold notes executed on a cotton exchange, and mentioning only the names of the brokers, and not signed by both of the brokers, were sufficient.

5. Brokers *§*15—Sale of cotton at the best possible price held not unauthorized.

Where stop orders given by cotton brokers' customers were understood to direct, not only a sale at the price mentioned, but, if that could not be obtained, at the next best possible price, a sale by brokers for the best possible price that could be obtained, though less than the price specified in a customer's stop orders, was not unauthorized.

In Error and on Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by Charles R. Thorn and others, partners doing business as Thorn & Maginnis, against Fred Browne. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (272 Fed. 950), and defendant brings error and certiorari. Affirmed.

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*Mr. James B. McDonough, of Ft. Smith, Ark., for plaintiff in error.

Messrs. Ira D. Oglesby, of Ft. Smith, Ark., and L. C. Going, of Memphis, Tenn., for defendants in error.

Mr. Justice HOLMES delivered the opinion of the Court.

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*This is a suit brought by the respondents, cotton brokers, to recover the balance of an account for the purchase and sale of two thousand bales of cotton on the New Orleans Cotton Exchange. At a first trial a verdict was directed for the defendant on the ground that broker's seller's slips coupled with oral evidence that corresponding buyer's slips were executed, or vice versa, were not competent evidence of the transactions, under the United States Cotton Futures Act. Act of August 11, 1916, c. 313, part A, § 4, 39 Stat. 446, 476 (Comp. St. § 6309d). The judgment

was reversed by the Circuit Court of Appeals after a very satisfactory discussion. *Thorn v. Browne*, 257 Fed. 519, 168 C. C. A. 469. There followed a second trial in which the verdict was for the plaintiff and a judgment, sustained by the Circuit Court of Appeals, *Browne v. Thorn*, 272 Fed. 950, that is brought here by writ of error, supplemented by a petition for a writ of certiorari. There is no ground for the writ of error on the record, although the plaintiff in error now, in view of *Hill v. Wallace*, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. Ed. 822, May 15, 1922, argues that the Cotton Futures Act is void except in the taxing provision enacted as an alternative to compliance with its regulations. A petition for certiorari was granted at the October Term, 1920. 256 U. S. 689, 41 Sup. Ct. 625, 65 L. Ed. 1172.

[1-3] The first ground relied upon for the petition is that the transactions were gambling transactions. That was the petitioner's contention at the trial, but to put it at the lowest, there was evidence to the contrary, the question was left to the jury with instructions that if the plaintiff knew that the defendant had no intention to deliver or receive the actual cotton they could not recover, and the jury found for the plaintiffs. The defendant contended that his undisclosed intention was enough to defeat the plaintiff's claims; but that is not the law. It is objected that the judge instructed the jury that hedging was lawful, hedging being explained as a means by which manufacturers and others who have to make contracts of purchase or sale in advance secure them-

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selves against the fluctuations *of the market by counter contracts. Prima facie such transactions are lawful. *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 249, 25 Sup. Ct. 637, 49 L. Ed. 1031.

[4] The bought and sold notes executed on the Exchange mentioned only the names of the brokers and neither was signed by both the brokers. It is said that the Act of Congress, § 4, was not satisfied. We agree with the Circuit Court of Appeals that the language of section 4 of the Cotton Futures Act must be read in the light of the decisions upon the similar language of the Statute of Frauds and that the notes were sufficient; assuming without discussion that in this case it was necessary to prove that section 4 was followed. See *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

[5] Perhaps the most serious of the petitioner's defences was that the 2,000 bales of cotton were sold without authority. As stated by his counsel, on Germany's announcing unrestricted submarine warfare cotton fell and the petitioner telegraphed to the defendants to sell 2,000 bales. The telegram read as follows: "Stop ten seventeen twenty and

ten seventeen fifteen"—which is understood to carry a direction to sell one thousand bales at 17.20 cents per pound and one thousand at 17.15. But there was clear and sufficient evidence that such stop orders as they were called were understood to direct not only sale at the price mentioned but, if that could not be got, a sale at the next best possible price. The respondents sold at fourteen cents which was the best that could be done. We think it unnecessary to go into further detail to show that the judgment should be affirmed.

Judgment affirmed.

(260 U. S. 125)

KEOKUK & HAMILTON BRIDGE CO. v. UNITED STATES.

(Argued and Submitted Oct. 13, 1922. Decided Nov. 13, 1922.)

No. 58.

1. Courts $\S$ 389—Findings of Court of Claims cannot be reopened in Supreme Court.

Where the Court of Claims found that a pier in connection with a bridge was merely damaged, and not destroyed, by work done by the government in the bed of the river, the claimant cannot reopen the findings of fact, and maintain that the pier was destroyed, in the Supreme Court.

2. United States $\S$ 125—No remedy for incidental damage caused bridge by government work.

Where a pier maintained in connection with a bridge sustained only incidental damage from work done by the government in the bed of the stream, which, if inflicted by a private individual, would have been only a tort, there is no remedy against the United States.

Appeal from the Court of Claims.

Suit by the Keokuk & Hamilton Bridge Company against the United States. Judgment for the United States (55 Ct. Cl. 480), and the claimant appeals. Affirmed.

Mr. Felix T. Hughes, of Keokuk, Iowa, for appellant.

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*Mr. Solicitor General Beck, of Washington, D. C., for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

The appellant had an authorized bridge across the Mississippi River with a pivot pier and draw to permit the passage of vessels. As a necessary incident it maintained what is called a protection pier extending down stream. In consequence of later authorized constructions it became necessary to deepen the channel on the easterly side of the pier and the part of this work with which we are concerned was done by the United States. The bed of the stream by the side of the pier

was solid rock and into this the United States drilled and blasted it with dynamite. The work was done in the usual way and with more than ordinary care, but by the action of the water driven upon the pier by the blast; and possibly by the concussion of the blasts themselves, portions of the pier fell into the river, and some damage was inflicted. It could have been repaired for \$1,000. The company however rebuilt the bridge to fit it for heavier traffic, and brought this suit alleging that the pier was destroyed and in that way taken by the United States.

[1, 2] An appreciable part of the claimant's argument consists in an attempt to reopen the findings of fact and to maintain that the pier was destroyed, as giving more force to the contention that it was taken. This, of course, is vain. *Union Pacific Ry. Co. v. United States*, 116 U. S. 154, 6 Sup. Ct. 325, 29 L. Ed. 584; *Talbert v. United States*, 155 U. S. 45, 15 Sup. Ct. 4, 39 L. Ed. 64. We must assume, as we have stated from the findings of the Court of Claims, that the pier was not destroyed but simply was damaged in a way that could have been repaired for a moderate sum. However small the damage it may be true that deliberate action in some cases might generate the same claim as other forms of deliberate withdrawal of property from the admitted owner. *United States v.*

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**Cress*, 243 U. S. 316, 329, 37 Sup. Ct. 380, 61 L. Ed. 746. But without considering how the line would be drawn when such action took place in the improvement of navigation, it is enough to say that this is an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else. In such cases there is no remedy against the United States. See *Bedford v. United States*, 192 U. S. 217, 224, 24 Sup. Ct. 238, 48 L. Ed. 414.

Judgment affirmed.

(260 U. S. 141)

NEW YORK, N. H. & H. R. CO. v. FRUCHTER (two cases).

(Argued Oct. 6-9, 1922. Decided Nov. 13, 1922.)

Nos. 35, 36.

Electricity — 15(1)—No recovery for injury to boy climbing bridge and touching electric wire, in absence of direct or implied invitation.

Where the top girders of a bridge carrying a street over a railroad were 23 feet above the street, and fastened thereto were upright towers, posts, or struts, to which cross-arms supporting electric wires were attached 6 feet above their bases, there could be no recovery for injury to a boy climbing on such struts and coming in contact with the electric wires,

in the absence of any evidence that the railroad company directly or by implication invited or licensed him to climb to a point from which he could touch the wire.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Two actions, by David Fruchter, an infant, by Jennie Fruchter, his guardian ad litem, and by Sam Fruchter, against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiffs was affirmed by the Circuit Court of Appeals (271 Fed. 419), and defendant brings certiorari. Reversed and remanded.

Mr. James W. Carpenter, of New Haven, Conn., for petitioner.

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*Messrs. Harold R. Medina and Leon Sanders, both of New York City, for respondents.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Since 1908, 149th street, New York City, has been carried over and across the tracks of the New York, New Haven & Hartford Railroad by a public municipal steel truss bridge of standard construction. The bridge is 54 feet wide, 270 feet long and is formed of posts, beams, girders, etc., connected and strengthened by trellis or lattice work. The top girders, or beams, are 23 feet above the street. The local law imposes upon the railroad the duty of maintaining the framework; the municipality is required to keep the roadway in repair.

Fastened to the top girder at the end of the bridge are two upright steel lattice towers, posts, or struts. Cross-arms, attached to these 6 feet above their bases, support bare wires carrying electric current used for operating trains. The nearest wire is 19 inches from the strut.

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*With considerable difficulty and some danger active boys can climb to the highest parts of the bridge. They did often climb upon it; some reached the struts. They were frequently chased away by a policeman and the railroad guard, and seem generally to have understood that to play there was forbidden; when an officer came in sight, they kept off. At each corner of the bridge there was a notice board displaying the words: "Live Wires. Danger. Keep Off."

In June, 1916, the plaintiff David Fruchter, 8 years old, by using the trellis work, climbed from the street to the top of the bridge in quest of a bird's nest. He then saw a bird on the wire above, and to catch it climbed up the strut and reached out; the bird flew away; his hand touched the wire, and severe injuries resulted. He sued for damages, and the father also seeks to recover for loss of services and expenses incurred. The causes

were tried together. The Circuit Court of Appeals affirmed judgments for the plaintiffs February, 1921. 271 Fed. 419.

At the time of the accident the boy was attending school. Whether he could then read the warning words upon the notice boards is left in doubt; upon the witness stand he both affirmed and denied that he could. He further stated that before climbing upon the bridge he looked to see whether a policeman was present, and admitted that if one had been there he would not have gone up.

The court below accepted the theory that the jury could have found the structure was well known to be both dangerous and attractive to children, and that failure to supply proper guards, human or mechanical, constituted negligence within the doctrine of *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and *Union Pacific Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434.

In *United Zinc & Chemical Co. v. Britt*, 258 U. S. 268, 42 Sup. Ct. 299, 66 L. Ed. 615 (March 27, 1922), we pointed out the theory

upon which liability may *¹⁴⁵exist for injuries suffered by an infant, although the circumstances would give no cause of action to an adult:

"Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand, the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. * * * There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

Considering the peculiar circumstances of the present cause, it is clear that if the plaintiff had been an adult he could not recover; and we are unable to find any sufficient evidence from which the jury could have properly concluded that the railroad company either directly or by implication invited or licensed him to climb upon the strut to a point from which he could touch the bare wire 30 feet above the street. The motion for an instructed verdict should have been granted.

The judgment of the court below is reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

UNITED STATES v. BOWMAN.

(260 U. S. 94)

(Argued Oct. 17, 1922. Decided Nov. 13, 1922.)

No. 69.

1. Criminal law $\S$ 97(1/2)—Locus depends on purpose of Congress as evinced by description, and on power and jurisdiction of government.

The construction of a criminal statute as to the locus of the crime, when not specially defined, depends on the purpose of Congress, as evinced by the description and nature of the crime, and on the territorial limitations on the power and jurisdiction of a government to punish crime under the law of nations.

2. Criminal law $\S$ 97(1/2)—Failure of Congress to provide punishment for offenses outside territorial jurisdiction negatives such purpose.

Crimes against private individuals or their property must be committed within the territorial jurisdiction of the government, where it may properly exercise it, and failure of Congress to provide that punishment is to extend to such offenses committed outside the strict territorial jurisdiction of the government negatives the purpose of Congress in this regard.

3. United States $\S$ 121—Statute punishing false claims applies to high seas or foreign port.

Criminal Code, $\S$ 35, as amended by Act Oct. 23, 1918 (Comp. St. Ann. Supp. 1919, $\S$ 10199), making it an offense to present a false claim to the government, or any corporation in which the United States is a stockholder, etc., when construed with other sections of that chapter is not limited to the land jurisdiction of the United States but extends to such frauds when committed on vessels of the United States on the high seas, or in foreign ports, at least when committed by American citizens.

4. Statutes $\S$ 241(1) — Penal statutes, like others, to be fairly construed.

Notwithstanding the rule that criminal statutes are to be strictly construed, they must, like all other statutes, be fairly construed according to the legislative intent, as expressed in the enactment.

5. Criminal law $\S$ 97(3)—Punishment of citizens for offense in foreign port does not violate dignity or right of sovereignty of foreign country.

It is no offense to the dignity or right of sovereignty of a foreign country to hold American citizens for a crime against the United States government, to which they owe allegiance, committed on vessels of the United States in a port of such foreign country.

In Error to the District Court of the United States for the Southern District of New York.

Raymond H. Bowman and others were indicted for conspiracy. A demurrer by the

defendant named was sustained, and the United States brings error. Reversed, with directions.

Mr. Solicitor General James M. Beck, of Washington, D. C., for the United States.

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*Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a writ of error under the Criminal Appeals Act (34 Stat. c. 2564, p. 1246 [Comp. St. § 1704]) to review the ruling of the District Court sustaining a demurrer of one of the defendants to an indictment for a conspiracy to defraud a corporation in which the United States was and is a stockholder, under section 35 of the Criminal Code, as amended October 23, 1918 (40 Stat. 1015 [Comp. St. Ann. Supp. 1919, § 10199]).

During the period covered by the indictment, i. e., between October, 1919, and January, 1920, the steamship *Dio* belonged to the United States. The United States owned all the stock in the United States Shipping Board Emergency Fleet Corporation. The National Shipping Corporation agreed to operate and manage the *Dio* for the Fleet Corporation, which under the contract was to pay for fuel, oil, labor, and material used in the operation. The *Dio* was on a voyage to Rio Janeiro under this management. Wry was her master, Bowman was her engineer, Hawkinson was the agent of the Standard Oil Company at Rio Janeiro, and Millar was a merchant and ship repairer and engineer in Rio. Of these four, who were the defendants in the indictment, the first three were American citizens, and Millar was a British subject. Johnston & Co. were the agents of the National Shipping Corporation at Rio. The indictment charged that the plot was hatched by Wry and Bowman on board the *Dio* before she reached Rio. Their plan was to order, through Johnston & Co., and receipt for, 1,000 tons of fuel oil from the Standard Oil Company, but to take only 600 tons aboard, and to collect cash for a delivery of 1,000 tons through Johnston & Co., from the Fleet Corporation, and then divide the money paid for the undelivered 400 tons

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among the four defendants. This *plan was to be, and was, made possible through the guilty connivance of the Standard Oil agent, Hawkinson, and Millar, the Rio merchant, who was to, and did, collect the money. Overt acts charged included a wireless telegram to the agents, Johnston & Co., from the *Dio* while on the high seas ordering the 1,000 tons of oil. The Southern District of New York was the district into which the American defendants were first brought and were found, but Millar, the British defendant, has not been found.

The first count charged a conspiracy by the defendants to defraud the Fleet Corporation, in which the United States was a stockholder, by obtaining and aiding to obtain the

payment and allowance of a false and fraudulent claim against the Fleet Corporation. It laid the offense on the high seas, out of the jurisdiction of any particular state, and out of the jurisdiction of any district of the United States, but within the admiralty and maritime jurisdiction of the United States. The second count laid the conspiracy on the *Dio* on the high seas and at the port of Rio Janeiro, as well as in the city. The third count laid it in the city of Rio Janeiro. The fourth count was for making and causing to be made in the name of the Standard Oil Company, for payment and approval, a false and fraudulent claim against the Fleet Corporation in the form of an invoice for 1,000 tons of fuel oil, of which 400 tons were not delivered. This count laid the same crime on board the *Dio* in the harbor of Rio Janeiro. The fifth count laid it in the city, and the sixth at the port and in the city.

No objection was made to the indictment or any count of it for lack of precision or fullness in describing all the elements of the crimes denounced in section 35 of the Criminal Code as amended. The sole objection was that the crime was committed without the jurisdiction of the United States or of any state

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thereof and on the high seas or *within the jurisdiction of Brazil. The District Court considered only the first count, which charged the conspiracy to have been committed on the *Dio* on the high seas, and, having held that bad for lack of jurisdiction, a fortiori it sustained the demurrer as the others.

The court in its opinion conceded that under many authorities the United States as a sovereign may regulate the ships under its flag and the conduct of its citizens while on those ships, and cited to this point *Crapo v. Kelly*, 16 Wall. 610, 623-632, 21 L. Ed. 430; *United States v. Rodgers*, 150 U. S. 249, 260, 261, 264, 265, 14 Sup. Ct. 109, 37 L. Ed. 1071; *The Hamilton*, 207 U. S. 398, 403, 405, 28 Sup. Ct. 133, 52 L. Ed. 264; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047; *Wilson v. McNamee*, 102 U. S. 572, 574, 26 L. Ed. 234; *United States v. Smiley*, 6 Sawyer, 640, 645, Fed. Cas. No. 16,317. The court said, however, that while private and public ships of the United States on the high seas were constructively a part of the territory of the United States—indeed, peculiarly so, as distinguished from that of the States—Congress had always expressly indicated it when it intended that its laws should be operative on the high seas. The court concluded that, because jurisdiction of criminal offenses must be conferred upon United States courts and could not be inferred, and because section 35, like all the other sections of chapter 4 (Comp. St. §§ 10191-10252), contains no reference to the high seas as a part of the locus of the offenses defined by it, as the sections in chapters 11 and 12 of the Criminal Code (Comp. St. §§ 10445-10483a)

do, section 35 must be construed not to extend to acts committed on the high seas. It confirmed its conclusion by the statement that section 35 had never been invoked to punish offenses denounced, if committed on the high seas or in a foreign country.

[1,2] We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power

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and jurisdiction of a *government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. We have an example of this in the attempted application of the prohibitions of the anti-trust law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy.

[3] But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. Many of these occur in chap-

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ter 4, which bears the title "Offenses *against the Operation of the Government." Section 70 of that chapter (Comp. St. § 10238) punishes whoever as consul knowingly certifies a false invoice. Clearly the locus of this crime as intended by Congress is in a foreign

country, and certainly the foreign country in which he discharges his official duty could not object to the trial in a United States court of a United States consul for crime of this sort committed within its borders. Forging or altering ship's papers is made a crime by section 72 of chapter 4 (Comp. St. § 10240). It would be going too far to say that because Congress does not fix any locus it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission. Section 42 of chapter 4 (Comp. St. § 10206) punishes enticing desertions from the naval service. Is it possible that Congress did not intend by this to include such enticing done aboard ship on the high seas or in a foreign port, where it would be most likely to be done? Section 39 (Comp. St. § 10203) punishes bribing a United States officer of the civil, military, or naval service to violate his duty or to aid in committing a fraud on the United States. It is hardly reasonable to construe this not to include such offenses when the bribe is offered to a consul, ambassador, and army or a naval officer in a foreign country or on the high seas, whose duties are being performed there, and when his connivance at such fraud must occur there. So, too, section 38 of chapter 4 (Comp. St. § 10202) punishes the willfully doing or aiding to do any act relating to the bringing in, custody, sale or other disposition of property captured as prize, with intent to defraud, delay or injure the United States or any captor or claimant of such property. This would naturally often occur at sea, and Congress could not have meant to confine it to the land of the United States. Again, in section 36 of chapter 4 (Comp. St. § 10200), it is made a crime to steal, embezzle, or knowingly apply to his own use ordnance, arms, ammunition, clothing, subsistence stores, money or other property of the

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United *States furnished or to be used for military or naval service. It would hardly be reasonable to hold that if any one, certainly if a citizen of the United States, were to steal or embezzle such property which may properly and lawfully be in the custody of army or naval officers either in foreign countries, in foreign ports or on the high seas, it would not be in such places an offense which Congress intended to punish by this section.

What is true of these sections in this regard is true of section 35, under which this indictment was drawn. We give it in full in the margin.¹

¹ Section 35 of the Criminal Code, as amended October 23, 1918 (40 Stat. 1015), is as follows:

Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockhold-

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*It is directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military or naval service or to any department thereof, or any corporation in which the United States is a stockholder, or whoever connives at the same by the use of any cheating device, or whoever enters a conspiracy to do these things. The section was amended in 1918 to include a corporation in which the United States owns stock. This was evidently intended to protect the Emer-

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gency Fleet Corporation in which the *United States was the sole stockholder, from fraud of this character. That corporation was expected to engage in, and did engage in, a most extensive ocean transportation business, and its ships were seen in every great port of the world open during the war. The same section of the statute protects the arms, ammunition, stores, and property of the army and navy from fraudulent devices of a similar character. We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in the section.

[4] Nor can the much-quoted rule that criminal statutes are to be strictly construed avail. As said in *United States v. Lacher*, 134 U. S. 624, 629, 10 Sup. Ct. 625, 627 (33

L. Ed. 1080), quoting with approval from *Sedgwick*, *Statutory and Const. Law* (2d. Ed.) 288:

"Penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment."

They are not to be strained either way. It needs no forced construction to interpret section 35 as we have done.

[5] Section 41 of the *Judicial Code* (Comp. St. § 1023) provides that:

"The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought."

The three defendants who were found in New York were citizens of the United States, and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance. The other defendant is a subject of Great Britain. He has never been apprehended, and it will be time enough to consider what, if any, juris-

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diction the Dis^{tr}ict Court below has to punish him when he is brought to trial.

The judgment of the District Court is reversed, with directions to overrule the demurrer and for further proceedings.

er, any claim upon or against the government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination, or conspiracy to defraud the government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with in-

tent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both. And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than \$500 or imprisoned not more than two years, or both.

(260 U. S. 110)

BRATTON et al. v. CHANDLER et al.

(Argued Oct. 10, 1922. Decided Nov. 13, 1922.)

(No. 239.)

Brokers ~~§~~—Constitutional law ~~§~~318—
Statute regulating and licensing does not authorize procuring of evidence without opportunity to meet it.

Under the rule that a statute must be construed to avoid grave doubts of its constitutionality, Acts Tenn. 1921, c. 98, § 8, regulating and licensing real estate brokers, which authorizes the commission thereby created to require "and procure" all satisfactory proof deemed desirable of the honesty, truthfulness, reputation, and competency of applicants for licenses, will be construed as only conferring the power of affirmative direction upon the commission, necessarily to be exercised in supplement to the action of the applicant, and with the same publicity and opportunity to meet adverse evidence, and not as authorizing the commission in violation of Const. U. S. Amend. 14, to procure proof without notice or opportunity to the applicant to meet it.

Appeal from the District Court of the United States for the Western District of Tennessee.

Suit by William C. Chandler and another, individually and as copartners, as Chandler & Walden, and others, against R. W. Bratton and others. From a decree granting a temporary injunction, defendants appeal. Reversed and remanded.

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*Messrs. M. M. Neil, Thomas H. Jackson, and James L. McRee, all of Memphis, Tenn. (Frank M. Thompson, Atty. Gen., and Nathan William MacChesney, of Chicago, Ill., of counsel), for appellants.

Messrs. Elias Gates, Julian C. Wilson, and Walter P. Armstrong, all of Memphis, Tenn., for appellees.

Mr. Justice McKENNA delivered the opinion of the Court.

The appellees, as complainants in the District Court, in their capacity as copartners or as individuals, assailed the constitutionality, under the Fourteenth Amendment of the Constitution of the United States, of a statute of Tennessee passed in 1921, entitled:

"An act to define, regulate and license real estate brokers and real estate salesmen, to create a state real estate commission, and to provide a penalty for a violation of the provisions thereof." Laws 1921, c. 98.

Appellants Bratton, Adams, and Brownlow were appointed commissioners under the act, and they and the appellant Bates, as Attorney General of Shelby County, or as district attorney (he is described as the latter in the answer) of the county, were, it is

alleged, charged with the duty of enforcing the act.

The pleadings are very elaborate and need not be reproduced. The court restrained the execution of the statute until its further order, basing its action upon the provisions of the statute, which the court decided did not afford to applicants for licenses due process of law. To review the order and the grounds of it, this appeal is directed.

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*The act constitutes a commission to be appointed by the Governor of the state and in 21 sections defines the powers and duties of the commission, the qualifications of applicants for licenses, and the procedure they must observe.

The District Court (three judges sitting) gave a very studious and comprehensive consideration to the provisions of the act, but rested its decision adverse to the constitutionality of the act upon section 8. The determining pertinency of the section the court expressed by saying that "the first step in the proposed regulation" of the real estate business "is the granting and issuing of licenses as provided in section 8" of the act. That "section gives color and purpose to every other section in the act and without which the other sections would be meaningless."

We may then accept the controlling and comprehensive effect of the section and concentrate attention and decision upon it, premitting all others or comment upon them.

The condemning comment of the court was that section 8 authorized the commission, not only to require an applicant to furnish evidence of his qualifications, but to *procure* independently of the applicant any proof it may deem desirable, and this without any provision for notice or opportunity to meet the evidence so procured, nor even to be advised of the nature or source of the evidence. Because of this delinquency the court was of opinion that the act did not afford due process of law, and was therefore unconstitutional and void.

Is the comment and conclusion justified? The section requires an application for a license to be made in writing and provides, with circumstantial detail, what it shall contain and concludes as follows:

"The commission is hereby authorized to require and *procure* [italics ours] any and all

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satisfactory proof as shall be deemed *desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's or salesman's license, or of any of the officers or members of any such applicant, prior to the issuance of any such license. The Commission is expressly vested with the power and authority to make, prescribe and enforce any and all such rules and regulations connected with the application for any license, as shall be deemed necessary to

administer and enforce the provisions of this act."

The District Court, in further comment upon the provision, expressed a doubt that any rulings or regulations that might be promulgated by the commission would cure the defect of the statute and added:

"However, that question is not here presented, for it does not appear from the pleadings in this case that any such rulings have been promulgated though the commission is functioning in manner and form as authorized by the statute."

So determined was the court in the view it had of section 8 that it rejected the immunity which section 19 gave from the unconstitutionality which might taint any section or provision of the act from extending to other sections or provisions. "Be it further enacted," is the declaration of section 19, "that should the courts declare any section or provision of this act unconstitutional, such decision shall affect only the section or provision so declared to be unconstitutional, and shall not affect any other section or part of this act."

The court justified its rejection of section 19 because in its (the court's) view the section had "no application in determining the validity of the sections in which the unconstitutional provision is found." To this conclusion the court considered itself constrained because to eliminate the offensive part of section 8 "would emasculate the entire section" and the commission would be a mere automaton without authority to determine

^{*114} the fundamental questions of the *right of the applicant for a license" because it would be confined to and be compelled to accept as conclusive the evidence presented by the applicant, which the court considered "was not the legislative intent." And hence the court's conclusion was that section 8 "was so closely related to the valid sections that without it they could serve no purpose within the contemplation of the Legislature," citing *Weaver v. Davidson Co.*, 104 Tenn. 315, 59 S. W. 1105; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 565, 22 Sup. Ct. 431, 46 L. Ed. 679.

The views of the court are stated with great force, but we are unable to yield to them—their reasoning or conclusions. By section 8, as we have said, the Commission is "authorized to *require* and *procure* [italics ours] any and all satisfactory proof as shall be deemed desirable in reference" to the conditions and qualifications of applicants for licenses. The words are "require and procure." They seem to have independent and cumulative meaning, one demanding publicity, the other permitting secrecy. But to this possibility we are not disposed; we prefer the admonition of the cases and their deci-

sion as expressed in *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, 36 Sup. Ct. 658, 659 (60 L. Ed. 1061, Ann. Cas. 1917D, 854) as follows:

"A statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408."

In the cited case the admonition is said to express an elementary rule, and we think the statute of Tennessee attracts instead of repels the admonition. The statute is drawn with care to details and their importance, importance to the business regulated and the persons who will desire to engage in it, action under it was intended, therefore, to be open and direct, not to be remitted in any part to secrecy, prejudice, or intrigue.

In conclusion, we may say that, if the word "procure" is more than a tautological repetition of the word "require," it was only

^{*115} to confer the power of affirmative *direction upon the commission, necessary to be exercised in supplement to the action of the applicant and with the same publicity and opportunity of the applicant to meet adverse evidence. And the act construed as we construe it will take no power from the commission necessary to the performance of its duties, and will leave no power with it that it can exercise to the detriment of any right assured to an applicant for a license by the Constitution of the United States.

The decree of the court ordering the issuance of a temporary injunction is

Reversed, and the case remanded for further proceedings in accordance with this opinion.

(260 U. S. 103)

ORTEGA CO. v. TRIAY.

(Argued Oct. 18, 19, 1922. Decided Nov. 13, 1922.)

No. 75.

1. Carriers  12(1)—Railroad Commission held authorized under Constitution and statute to increase rates.

Under Const. Fla. art. 16, § 30, giving the Legislature power to pass laws for the correction of abuses and to prevent unjust discrimination and "excessive charges" by carriers, and the statute authorizing the Railroad Commission to make reasonable and just rates of freight and passenger tariffs, the commission has power to increase as well as decrease rates; there being nothing in the quoted words to require the regulation to be downward and not upward, if the charges authorized are not excessive.

2. Carriers  12(1)—Powers of Railroad Commission are quasi legislative.

Under the Florida statute authorizing Railroad Commission to make reasonable and just

rates of freight and passenger tariffs, its powers are quasi legislative; the public welfare being their test and measure.

Appeal from the District Court of the United States for the Southern District of Florida.

Suit by the Ortega Company against E. J. Triay, as receiver of the Jacksonville Traction Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Messrs. Herman Ulmer and W. T. Stockton, both of Jacksonville, Fla., for appellant.

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*Messrs. Peter O. Knight, of Tampa, Fla., and J. L. Doggett, of Jacksonville, Fla., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

The case is in narrow compass. Its purpose is to enjoin the appellee, as receiver of the Jacksonville Traction Company, grantee of the Jacksonville Electric Company as hereinafter stated and a corporation of Massachusetts, from collecting more than a particular fare, 5 cents, and compelling the specific performance of an alleged contract providing for such fare.

The grounds of the suit are set forth with great detail but may be epitomized narratively as follows: The Ortega Company was in 1910 and prior thereto the owner, and operated a line of electric railroad from the city of Jacksonville to a point in a place designated as Ortega in Duval county, Fla. The Ortega Company sold the railroad to R. J. Richardson, February 12, 1910, in pursuance of a contract, and March 6, 1911, Richardson and his wife conveyed the railroad to the Jacksonville Traction Company. Richardson was at all the times agent of the Jacksonville Electric Company.

The conveyance from the Ortega Company contained, among other provisions, the following covenant:

"The Jacksonville Electric Company further covenants and agrees that said street railroad shall be operated in such manner that passengers for a single fare of 5 cents may travel from any point reached by street cars in the city of Jacksonville to the terminus in Ortega and vice versa, over the lines of the Jacksonville Electric Company, and the line conveyed by the Ortega Company."

And it was covenanted that—

"Said single fare of 5 cents shall be sufficient compensation for a continuous journey either way, with such transfers as may be necessary."

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*The Jacksonville Electric Company went into the possession of the railroad and operated it as agreed upon the basis of a 5-cent fare.

At the time of the conveyance, the railroad and its appurtenances were reasonably of the value of \$33,157.37, and the conveyance was made in consideration of the covenant

and a cash consideration of \$10,000, less certain deductions. The cash consideration was of minor import; the principal consideration was the covenant.

At the time of making the contract with the Electric Company, the Ortega Company was engaged in the development of a large tract of land lying in Duval county at the terminus of the Ortega line, and the company sold the railroad for approximately \$26,000 less than its reasonable value upon the express covenant of the Electric Company to operate the line upon a 5-cent basis. The continued violation of the covenant will deprive the Ortega Company of property worth many thousand dollars, and will result in irreparable injury to the company, "the nature and character of which injury redress at law would be uncertain and inadequate and the damages resulting therefrom impossible of ascertainment."

April 18, 1911, the Jacksonville Electric Company conveyed the railroad to the Jacksonville Traction Company and that company went into possession of the road and operated it in accordance with the covenant.

On October 30, 1919, appellee Triay was appointed receiver of the Traction Company and ever since has been, and still is, acting as receiver, managing and operating the railways and properties of the Traction Company, including the Ortega line.

From the time of the conveyance to the Jacksonville Electric Company until December 15, 1920, that company and the Traction Company and appellee, as receiver, successively operated the road on a 5-cent basis.

On the — day of January, 1920, appellee filed with the Railroad Commission of Florida

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da a petition asking that *the Commission assume jurisdiction of the rates and fares of the Traction Company and authorize an increase in them. The request was granted December 2, 1920, and a fare of 7 cents was authorized and has since been charged.

The Railroad Commission was created by the Legislature of the state in 1897 (Laws 1897, c. 4549) and was required (by the same law passed) in the same year, to "make reasonable and just rates of freight and passenger tariffs to be observed by all railroad companies and all others engaged as common carriers doing business in this state." Acts 1897, c. 4549. The requirement was repeated by an act passed in 1913 (Acts 1913, c. 6527), and by the latter act it was made the duty of the Commission to make reasonable and just rules and regulations to enforce the observance by the carriers of their tariffs.

The only provision of the Constitution of the state dealing with the powers of the Legislature is section 30 of article 16 which provides as follows:

"The Legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons

and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures."

By reason of the constitutional provision and limitation, so much, the petition proceeds, of the legislative provisions above stated, as attempts to confer upon the Commission the power to increase the rates and charges of appellee, is unconstitutional and void and the order of the Commission is void and of no effect, and impairs the obligation of the contract between the Ortega Company and the Electric Company and constitutes a taking of the property of the Ortega Company without due process of law contrary to the Constitution of the United States.

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*An injunction was prayed pending the suit and that appellee be compelled to operate the Ortega line at a 5-cent fare as covenanted and that the Ortega Company be granted such further relief as proper and agreeable to equity.

A motion to dismiss the bill for want of equity was made upon the ground that under the laws and Constitution of Florida the Railroad Commission had the power it exercised in authorizing the Traction Company to increase the fares and charges from 5 cents to 7 cents, and that such power since the adoption of the Constitution in 1885 could not be limited by private contract rights: such rights necessarily yielding to the public welfare as expressed in the laws and Constitution of the state.

The court took that view and, quoting section 30 of article 16 of the Constitution relied on by the Ortega Company, rejected that company's construction of it and decided that the Commission could raise as well as lower rates and that the Supreme Court of the state had so adjudged. The court, therefore, denied the motion of the Ortega Company for a temporary injunction and dismissed the bill.

There are certain admissions of appellant that are pertinent to our consideration: (1) In the absence of constitutional restrictions, a state has the power to raise or lower rates of public utility corporations, and may exercise it through railroad commissions. (2) The power is not lessened or limited by the existence of private contracts. The power is considered as part of the contract. (3) The power exercised to either raise or lower a rate is not in itself and without more an impairment of the obligation of a contract or the taking of property without due process of law.

This power, and its exercise, it is contended, is not applicable to the facts presented in

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the instant case *because under the Florida Constitution the Legislature is prohibited from increasing rates; it can only lower them. To support this view of the Constitu-

tion, appellant presents a somewhat elaborate and involved argument terminating in the assertion that section 30 of article 16 of the Constitution grants the Legislature "power to prevent excessive charges by common carriers." And this, the further contention is, necessarily means the power to reduce, not to increase. In one direction only, is the contention, may the Legislature modify rates and "that direction is down." And it is added with emphasis, "the power to prevent excessive charges, power to lower excessive charges, power to reduce excessive charges, all mean the same thing."

The power exercised by the Commission not being possessed, a valid contract, it is asserted, existed between the Ortega Company and the other companies and that "the order of the Railroad Commission increasing the rate of fares impairs its obligation." And a federal question is presented "for this court to determine, unhampered by state decisions."

It is to be observed that section 30 of article 16 of the Constitution was adopted in 1885, that is, prior to the covenant relied on by the Ortega Company, and that also, prior to the covenant, the Railroad Commission was created and power given it to "make reasonable and just rates of freight and passenger tariffs, to be observed by all railroads." The contention is that, if the latter act be construed to give a greater power than section 30 gives, the act is void, and section 30 is only to be considered as constituting the obligation of the covenant and this court has the power to construe it "unhampered by state decisions."

[1] The contention is direct, and we may accept the power ascribed to us, and, exercising it, we say unhesitatingly that we concur with the District Court that under section 30 and the legislation of the state

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the Commission is competent to increase as well as to decrease rates. And such we think, as the District Court decided, is the effect given section 30 and the legislation of the state by the Supreme Court of the state, although we cannot say that in any case there is a precise contrast between the power to increase as distinguished from the power to decrease rates, which is now the point in controversy. We think, however, the power to increase as well as to decrease rates is an inevitable deduction from the reasoning of the cases.

In *State ex rel. Railroad Commissioners v. A. C. L. R. Co.*, 60 Fla. 465, 54 South. 394, it was said that—

"The Railroad Commissioners have such powers only as are expressly or impliedly conferred upon them by statute."

But, it was further said:

"Authority that is indispensable or useful to the valid purposes of a remedial law may be

inferred or implied from authority expressly given."

Applying this, it was further said that a "wide discretion is accorded to them [the Railroad Commissioners] in the exercise of such authority."

In *State of Florida ex rel. Railroad Commissioners v. A. C. L. R. Co.*, 61 Fla. 799, 54 South. 900, it was decided that the difficulty of enumerating all of the powers conferred upon the Commissioners in the interest of the general welfare made it necessary to confer some in general terms, "and general powers given are intended to confer other powers than those specifically enumerated."

In *State of Florida ex rel. Commissioners v. Florida East Coast Railway Co.*, 57 Fla. 522, 49 South. 43, section 30 of article 16 is quoted, and it was said of it that it was "not a grant of power to the Legislature, nor is it a limitation upon the power of the Legislature, but it is an express recognition of a power existing in the legislative department of the state government."

[2] It will be observed, therefore, that the Board of Railroad Commissioners is constituted by the Legislature, and that the powers are conferred upon the board in general

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*terms to be exercised in the public welfare, and a wide discretion is accorded it which is not constrained by peremptory directions. The powers are quasi legislative, the public welfare being their test and measure. *State v. Railroad Commissioners*, 79 Fla. 526, 84 South. 444, 446. There is nothing in the words "excessive charges" in section 30 of article 16, nor in their context, that requires the regulation of the charges to be downward and not upward, if the charges authorized be not excessive.

Necessarily, therefore, we affirm the action of the District Court; but, while this denies the relief the Ortega Company prays against appellee, we do not wish to be understood as adjudging that the company may not be entitled to some remedy for the nonobservance of the contract by the Traction Company. See *Louisville & Nashville R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848.

(260 U. S. 156)

KEOGH v. CHICAGO & N. W. RY. CO. et al.

(Argued Oct. 12, 1922. Decided Nov. 13, 1922.)

No. 51.

1. Carriers ⇨26—Prior to Act Feb. 28, 1920, carriers entitled to maintain unreasonably low rates, if not discriminatory.

Prior to Transportation Act Feb. 28, 1920, carriers were at liberty to establish or maintain

even unreasonably low rates, provided they were not discriminatory.

2. Commerce ⇨88—Approval of rates by Interstate Commerce Commission held to settle questions of reasonableness and discrimination.

Proceedings before the Interstate Commerce Commission on complaint respecting rates filed by carriers, in which the Commission, after investigation and hearings, approved the rates, settled the questions of their reasonableness and nondiscriminatory character.

3. Monopolies ⇨16(3), 24(1) — Combination of carriers to fix reasonable and nondiscriminatory rates may be illegal.

Under the Anti-Trust Act, a combination of carriers to fix rates may be illegal, though the rates fixed are reasonable and nondiscriminatory, and, if illegal, the government may have redress by criminal proceedings under section 3 (Comp. St. § 8822), by injunction under section 4 (Comp. St. § 8823), and by forfeiture under section 6 (Comp. St. § 8828).

4. Monopolies ⇨28 — Private shipper cannot recover damages from conspiracy to fix railroad rates which are reasonable and nondiscriminatory.

Where railroad rates, though fixed pursuant to conspiracy between carriers, have been approved as reasonable and nondiscriminatory by the Interstate Commerce Commission, a private shipper may not, under Anti-Trust Act, § 7 (Comp. St. § 8829), recover damages because of his loss of benefit of a rate still lower, which but for the conspiracy he would have enjoyed, in view of Interstate Commerce Act, §§ 8, 9, 16 (Comp. St. §§ 8572, 8573, 8584), relative to the rights of persons injured, the fact that the recovery of damages might operate to give him a preference, the necessity of determining whether the hypothetical lower rate would have been nondiscriminatory, and the impossibility of obtaining such a determination from the Commission, and the speculative character of his damages.

5. Monopolies ⇨23—Railroad rate not necessarily illegal, because result of illegal conspiracy.

A railroad rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade, in violation of the Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830), as the legality of rates is determined by the Interstate Commerce Act.

6. Monopolies ⇨28—"Injury" implies violation of legal rights, which in case of shipper are measured by published tariff.

Within Anti-Trust Act, § 7 (Comp. St. § 8829), giving a right of action to one injured in his business or property by violations thereof, "injury" implies violation of a legal right, and the legal rights of a shipper as against the carrier in respect to a rate are measured by the published tariff.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injury.]

7. Carriers ⚡30—Rights defined by published tariff cannot be varied or enlarged.

Unless and until suspended or set aside, the rate contained in a carrier's published tariff is for all purposes, as between carrier and shipper, the legal rate, and the rights of the parties as defined by the tariff cannot be varied or enlarged by contract or tort of the carrier, or affected by the tort of a third party.

8. Commerce ⚡85—For Interstate Commerce Commission to determine in first instance whether rate discriminatory.

The Interstate Commerce Commission must determine, at least in the first instance, whether a rate is discriminatory.

9. Commerce ⚡85 — Interstate Commerce Commission cannot determine whether hypothetical rate would have been discriminatory.

Though the Interstate Commerce Commission has broad powers, and may investigate and decide whether a rate has been, is, or would be discriminatory, it cannot pass on the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, in order to enable a shipper to sue for damages from conspiracy to fix a higher rate.

10. Monopolies ⚡28—Damages must be proved, and by facts from which logically and legally inferable.

Under Anti-Trust Act, § 7 (Comp. St. § 8829), giving a right of action to one injured in his business or property by violations thereof, recovery cannot be had, unless it is shown that as a result of defendant's acts damages in some amount susceptible of expression in figures resulted, and the damages must be proved by facts from which their existence is logically and legally inferable, and cannot be supplied by conjecture.

11. Monopolies ⚡28—Shipper's damages from conspiracy to fix rate higher than would otherwise have prevailed too conjectural for recovery.

A shipper's damages from a conspiracy between carriers to fix a higher rate on a certain class of goods than would otherwise have prevailed, but found by the Interstate Commerce Commission to be reasonable and nondiscriminatory, are too conjectural for recovery, as his competitors would have been entitled to the same rate, and an adjustment of the rate on articles competing with such class of goods would have been required.

In *Error to the United States Circuit Court of Appeals for the Seventh Circuit.*

Action by John W. Keogh against the Chicago & Northwestern Railway Company and others. A judgment for defendants on demurrer was affirmed by the Circuit Court of Appeals (271 Fed. 444), and plaintiff brings error. Affirmed.

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*Mr. H. P. Young, of Chicago, Ill., for plaintiff in error.

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*Mr. R. Bruce Scott, of Chicago, Ill., for defendants in error.

Mr. Justice BRANDEIS delivered the opinion of the court.

This action, under section 7 of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. § 8829), was brought by Keogh in the federal District Court for Northern Illinois, Eastern Division, in November, 1914. Eight railroad companies and twelve individuals were made defendants. The case was heard upon demurrer to a special plea; the demurrer was overruled; judgment was entered for defendants, plaintiff electing to stand upon his demurrer; and this judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit. 271 Fed. 444. The case is here on writ of error.

The cause of action set forth was this: Keogh is a manufacturer of excelsior and flax tow at St. Paul, Minn. The defendant corporations are interstate carriers engaged in transporting freight from St. Paul to points in other states. Prior to September 1, 1912, these carriers formed an association known

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as the Western *Trunk Line Committee. The individual defendants are officers and agents of the carriers and represent them in that committee. It is a function of the committee to secure agreement in respect to freight rates among the constituent railroad companies, which would otherwise be competing carriers. By means of such agreement, competition as to interstate rates from St. Paul on excelsior and tow was eliminated, uniform rates were established, and interstate commerce was restrained. The uniform rates so established were arbitrary and unreasonable; they were higher than those theretofore charged; and they were higher than the rates would have been, if competition had not been thus eliminated. Through this agreement for uniform rates Keogh was damaged. The declaration contains a schedule of the amounts paid by him in excess of those which would have been paid under rates prevailing before September 1, 1912, and which, but for the conspiracy, would have remained in effect. He claims damages to the extent of this difference in rates. He also alleges as an item of damages that the increase in freight rates lessened the value of his St. Paul factory through loss of profits.

Defendants set up the fact that every rate complained of had been duly filed by the several carriers with the Interstate Commerce Commission; that upon such filing the rates had been suspended for investigation, upon complaint of Keogh, pursuant to the Act to Regulate Commerce of February 4, 1887, c. 104, § 15, 24 Stat. 379, 384, as amended (Comp. St. § 8583); that after extensive hearings, in which Keogh participated, the rates were approved by the Commission; and that they were not made effective until after they had been so approved. The character of the proceedings before the Commission was more fully shown by reference to *Keogh v. Chicago,*

Burlington & Quincy R. Co., 24 Interst. Com.

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Com'n R. 606; also Rates *on Excelsior and Flax Tow from St. Paul, Minn., 26 Interst. Com. Com'n R. 689; Rates on Excelsior and Flax Tow from St. Paul, Minn., 29 Interst. Com. Com'n R. 640; Morris, Johnson, Brown, Manufacturing Co. v. Illinois Central R. Co., 30 Interst. Com. Com'n R. 443; The Excelsior and Flax Tow Cases, 36 Interst. Com. Com'n R. 349.

[1] The case is presented on these pleadings. Whether there is a cause of action under section 7 of the Anti-Trust Act is the sole question for decision. Keogh contends that his rights are not limited to the protection against unreasonably high or discriminatory rates afforded him by the Act to Regulate Commerce; that under the Anti-Trust Act he was entitled to the benefit of competitive rates; that the elimination of competition caused the increase in his rates; and that, as he has been damaged thereby, he is entitled to recover. The instrument by which Keogh is alleged to have been damaged are rates approved by the Commission. It is, however, conceivable that, but for the action of the Western Trunk Line Committee, one or more of these railroads would have maintained lower rates. Rates somewhat lower might also have been reasonable. Moreover, railroads had often, in the fierce struggle for business, established unremunerative rates. Since the case arose prior to Transportation Act of February 28, 1920, c. 91, § 418, 41 Stat. 474, 485, the carriers were at liberty to establish or maintain even unreasonably low rates, provided they were not discriminatory. Compare Interstate Commerce Commission v. Baltimore & Ohio R. Co., 145 U. S. 263, 277, 12 Sup. Ct. 844, 36 L. Ed. 699; Skinner & Eddy Corporation v. United States, 249 U. S. 557, 565, 39 Sup. Ct. 375, 63 L. Ed. 772.

[2-4] All the rates fixed were reasonable and nondiscriminatory. That was settled by the proceedings before the Commission. Los Angeles Switching Case, 234 U. S. 294, 34 Sup. Ct. 814, 58 L. Ed. 1319. But under the Anti-Trust Act a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal; and, if so, the government may have redress by criminal proceedings under section 3 (Comp. St. § 8822), by in-

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junction *under section 4 (Comp. St. § 8823), and by forfeiture under section 6 (Comp. St. § 8828). That was settled by United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the government. It does not, however, follow that Keogh, a private shipper, may recover damages under section 7 because he lost the benefit of rates still low-

er, which, but for the conspiracy, he would have enjoyed. There are several reasons why he cannot.

[5] A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce. Under section 8 of the latter act (Comp. St. § 8572) the exaction of any illegal rate makes the carrier liable to the "persons injured thereby for the full amount of damages sustained in consequence of any such violation," together with a reasonable attorney's fee. Sections 9 and 16 (Comp. St. §§ 8573, 8584) provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. Louisville & Nashville R. Co. v. Ohio Valley Tie Co., 242 U. S. 238, 37 Sup. Ct. 120, 61 L. Ed. 305. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See Meeker v. Lehigh Valley R. Co. (C. C.) 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?

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[6, 7] *Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. Texas & Pacific R. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; Louisville & Nashville R. Co. v. Maxwell, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; Atchison, Topeka & Santa Fe Ry. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; Dayton Iron Co. v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 239 U. S. 446, 36 Sup. Ct. 137, 60 L. Ed. 375; Erie R. Co. v. Stone, 244 U. S. 332, 37 Sup. Ct. 633, 61 L. Ed. 1173. And they are not affected by the tort of a third party. Compare Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink, 250 U. S. 577, 40 Sup. Ct. 27, 63 L. Ed. 1151. This stringent rule prevails, because otherwise the paramount purpose of Congress—

prevention of unjust discrimination—might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under section 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief. Compare *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075.

[8, 9] The character of the issues involved raises another obstacle to the maintenance of the action. The burden resting upon the plaintiff would not be satisfied by proving that some carrier would, but for the illegal conspiracy, have maintained a rate lower than that published. It would be necessary

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for the plaintiff to prove, also, that *the hypothetical lower rate would have conformed to the requirements of the Act to Regulate Commerce. For unless the lower rate was one which the carrier could have maintained legally, the changing of it could not conceivably give a cause of action. To be legal a rate must be nondiscriminatory. And the proceedings before the Commission in this controversy illustrate how readily claims of unjust discrimination arise. See *Morris-Johnson-Brown Manufacturing Co. v. Illinois Central Railroad Co.*, 30 Interst. Com. Com'n R. 443. For this reason, it is possible that no lower rate from St. Paul on tow and excelsior could have been legally maintained without reconstituting the whole rate structure for many articles moving in an important section of the country. But it is the Commission which must determine whether a rate is discriminatory; at least, in the first instance. See *Abilene Case*, supra; *Great Northern Ry. Co. v. Merchants' Electric Elevator Co.*, 259 U. S. 285, 42 Sup. Ct. 477, 66 L. Ed. 943. It has been suggested that this requirement does not necessarily bar an action involving that issue; for a court might suspend its proceeding until the question of discrimination had been determined by the Commission. But here the difficulty presented could not be overcome by such a practice. The powers conferred upon the Commission are broad. It may investigate and decide whether a rate has been, whether it is, or whether it would

be, discriminatory. But by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination. And that hypothetical question is one with which plaintiff would necessarily be confronted at a trial.

[10, 11] Finally, not only does the injury complained of rest on hypothesis (compare *International Harvester Co. v. Kentucky*, 234 U. S. 216, 222-224, 34 Sup. Ct. 853, 58 L. Ed. 1284); but the damages alleged are purely speculative. Under section 7 of the Anti-Trust Act, as under section 8 of the Act to

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Regulate Commerce (*Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315), recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture.¹ To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. *Southern Pacific Co. v. Darnell-Taenzar Co.*, 245 U. S. 531, 38 Sup. Ct. 186, 62 L. Ed. 451. Here the instrument by which the damage is alleged to have been inflicted is the legal rate, which, while in effect, had to be collected from all shippers. Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. Every competitor was entitled to be put—and we must presume would have been put—on a parity with him. And for every article competing with excelsior and tow, like adjustment of the rate must have been made. Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer.

Affirmed.

¹ Compare *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244; *Motion Picture Patents Co. v. Eclair Film Co.* (D. C.) 208 Fed. 416; *Locker v. American Tobacco Co.*, 218 Fed. 447, 134 C. C. A. 247; *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77, 79, 143 C. C. A. 353; *Noyes v. Parsons*, 245 Fed. 689, 158 C. C. A. 91.

(260 U. S. 48)

WICHITA R. & LIGHT CO. v. PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS (KANSAS GAS & ELECTRIC CO., Intervener).

(Argued April 24, 1922. Decided Nov. 13, 1922.)

No. 27.

1. Courts ¶313—Intervention by another corporation held not to take away jurisdiction of suit against Public Utilities Commission.

In a suit by a railway and light company to enjoin a state Public Utilities Commission from putting in force as against it new rates on behalf of a gas and electric company from which it obtained electricity, where the District Court had jurisdiction on the ground of diverse citizenship when the suit was begun, its jurisdiction was not divested by the intervention of the gas and electric company, though a citizen of same state as plaintiff, especially in view of equity rule 37 (33 Sup. Ct. xxviii) relative to interventions.

2. Courts ¶319—Jurisdiction acquired on ground of diversity of citizenship not divested by change of citizenship.

Jurisdiction, once acquired by the District Court on the ground of diverse citizenship, is not divested by a subsequent change in the citizenship of the parties.

3. Electricity ¶11—Gas and electric company not indispensable party to suit against Public Utilities Commission to enjoin new rates.

In a suit by a railway and light company to enjoin the Public Utilities Commission from putting in force as against it new rates on behalf of a gas and electric company from which it obtained electricity, the gas and electric company, though a proper party, was not an indispensable party.

4. Courts ¶263—District Court's jurisdiction held not limited to federal questions.

Where the District Court had jurisdiction on the ground of diverse citizenship, its jurisdiction was not limited to federal questions presented by the bill, but extended to the entire suit and to every question, whether federal or state, involved in its determination.

5. Equity ¶262—Where party moving for judgment reserved right to hearing, if motion denied, it was error to deny it such right.

Where a railway and light company alleged that rates fixed by a state Public Utilities Commission on behalf of a gas and electric company from which it obtained electricity were unjust and discriminatory, and deprived it of property without due process, and denied it the equal protection of the laws, and, in moving for judgment on the pleadings, on the grounds that the order of the Commission was void on its face, and that the facts averred in the petition of the gas and electric company were insufficient, reserved its right to present evidence and have a hearing on the merits, if the motion were denied, it was error, on overruling such motion, for the Circuit Court of Appeals to refuse it a hearing on the truth of the averments of the answer as to the validity of the order, and on the issue made by the bill and answer.

6. Electricity ¶11—Charge that rates were discriminatory and lacking in due process, as against complainant, held to involve mixed question of law and fact.

In suit by railway and light company to enjoin Public Utilities Commission from putting in force, on behalf of a gas and electric company from which it obtained electricity under contract, rates which it charged were unjust and discriminatory as against it, and took its property without due process, and denied it the equal protection of the laws, the charge that due process and the equal protection of the laws was denied was a mixed question of law and fact, on which complainant had a right to be heard.

7. Public service commissions ¶17—Essentials of proceeding inter partes held not governed by statute as to change of rates.

Under Kansas Public Utility Law, § 20, providing that public utility, desiring to change rates, shall file a schedule with the Public Utilities Commission, and that no change shall be made without the Commission's consent, such consent involves no hearing or finding and decision, and the essentials of a proceeding inter partes for leave to increase rates are not therefore measured by that section.

8. Public service commissions ¶23—No presumption that rates reasonable, unless Commission so found.

Under Kansas Public Utility Law, § 18, providing that all orders, rates, etc., fixed by the Public Utilities Commission shall be prima facie reasonable until changed, such presumption does not obtain until there has been a finding by the Commission on the question of reasonableness or unreasonableness.

9. Electricity ¶11—Order increasing rates fixed by contract must contain express finding of unreasonableness of existing rate.

Under Kansas Public Utility Law, §§ 13-16, 20, a valid order of the Public Utilities Commission permitting a gas and electric company to charge higher rates for electricity than the rate fixed by a contract with a consumer must contain an express finding of unreasonableness of the existing rates.

10. Constitutional law ¶62—To prevent improper delegation of legislative power, Legislature must prescribe rules, and administrative board must follow them.

In creating an administrative board to apply to the details of rate schedules the regulatory police power of the state, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin on it a certain course of procedure and certain rules of decision, and such agency must pursue the procedure and rules enjoined and substantially comply therewith; and when it is required as a condition precedent to an order to make a finding of facts, the validity of the order must rest on the needed finding.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Wichita Railroad & Light Company against the Public Utilities Commission of the State of Kansas, in which the Kansas Gas & Electric Company intervened.

A judgment for plaintiff on the pleadings was reversed by the Circuit Court of Appeals (268 Fed. 37), with directions to dismiss the bill, and plaintiff appeals. Reversed, and decree of the District Court affirmed.

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*Henry I. Green, of Urbana, Ill., and Thomas F. Doran, of Topeka, Kan., for appellant.
H. L. McCune, of Kansas City, Mo., for appellees.

The Wichita Railroad & Light Company, a corporation of West Virginia, is an electric street railroad and light furnishing company doing business in Wichita, Kan., and will be known as the Wichita Company. The Kansas Gas & Electric Company, also a West Virginia corporation, and to be known as the Kansas Company, is engaged in the business of furnishing electrical light and power to consumers in Kansas. In 1910, the two companies made a contract by which the Kansas Company agreed to furnish, and the Wichita Company agreed to accept and pay for, electrical energy at certain rates until 1930, and the contract was fulfilled by both until 1918. Then the Kansas Company filed a petition with the Public Utilities Commission of Kansas, to be known as the Commission, in which it alleged that on account of the increase in the cost of production and distribution—

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*“the net income of your petitioner for the year ending December 31, 1917, was approximately \$190,000 less than it would and should have been if your petitioner had been able to operate under the normal conditions that existed in 1914, at which time its said rates were first installed as aforesaid; that if said rates are continued in effect hereafter, the result hereof will be disastrous to your petitioner, depriving it of a reasonable return upon the value of its said property, and making it impossible to find a market for the securities it must issue and sell in order to provide funds with which to make improvements, additions and betterments which are necessary if it is to furnish proper and adequate service to the communities in which it operates.”

The petition further recited that in December, 1916, being of opinion that it could reduce its rates for residential and commercial lighting, it proposed a gradual reduction and filed a schedule for the purpose, which the Commission had not acted on; that in January, 1917, it did reduce its rates, but that if a further reduction under the schedule for 1918 were made, the loss of net earnings to the petitioner would be \$220,000.

The petition continued:

“Your petitioner is of the opinion that in order to meet this situation, and in order to increase the net earnings of your petitioner in an amount sufficient to offset the loss resulting to it from the conditions above stated, an order should be entered by the Commission, authorizing petitioner to add to its existing rates the surcharge hereinafter set out. There are approximately 19,900 consumers now served by your petitioner; the proposed surcharge does not affect consumers using 100 kilowatt hours

or less per month, and therefore 17,000 of said total of 19,000 consumers are not affected. In apportioning the surcharge equitably among the remainder of said consumers, your petitioner has

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taken into consideration the fact that, in *the generation of electrical energy for large power consumers, fuel is approximately 75 per cent. of the cost of generation, and that therefore a surcharge which has for its purpose the reimbursement of the utility company for increase in the cost of fuel should be so adjusted that the surcharge should increase in proportion to the amount of energy consumed. The percentage of increase fixed by such surcharge over existing rates is therefore increased in proportion to the amount of consumption. The last step in said surcharge schedule affects 6 consumers, and the last two steps 33 consumers.

“Wherefore your petitioner asks that an order be made by your honorable Commission, authorizing your petitioner to add to its existing rates for electricity in the state of Kansas, and until the further order of the Commission, the following surcharges:

“For the first 100 KWH per month, no surcharge.

“For the next 1,000 KWH per month, 12 mills net per KWH.

“For the next 10,000 KWH per month, 9.5 mills net per KWH.

“For the next 1,000 KWH per month, 8 mills net per KWH.

“For all excess KWH per month 3.5 mills net per KWH.”

The order of the Commission upon this petition recited that it—

“came duly on for order by the Commission upon the pleadings of the respective parties and the evidence introduced thereunder; and the Commission upon consideration of said pleadings and evidence and being duly advised in the premises, finds that the Kansas Gas & Electric Company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the state of Kansas until the further order of the Commission, the following net surcharge:

“For the first 100 KWH per month, no surcharge.

“For the next 14,900 KWH per month, 1 mill surcharge per KWH.

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*“For the next 20,000 KWH per month, 2 mills surcharge per KWH.

“For all excess over 35,000 KWH per month, 3 mills surcharge per KWH.”

The rates thus fixed were substantially higher than the contract rates.

The Wichita Company thereupon filed a bill in equity in the United States District Court for Kansas seeking to enjoin the Commission from putting the new rates in force as against it. After averring the diverse citizenship of the parties and a sufficient jurisdictional amount involved, the bill alleged that the order impaired the contract which it had with the Kansas Company, in violation of article 1, section 10, of the federal Constitution, that the rates fixed were unjust and unjustly discriminatory as against the complainant, that it was the largest customer of the Kansas Company, and that the

increase of its rate as compared with that of others violated every equitable rule of rate-making, and deprived the plaintiff of its property without due process, and denied it the equal protection of the laws, in violation of the Fourteenth Amendment. A temporary injunction was issued. The answer of the Commission averred that the proceedings were regular and authorized by the statute of Kansas, that the Wichita Company had participated in them, and denied that the surcharges were discriminatory or unjust. The Kansas Company then applied for leave to intervene, and leave was granted. It answered the bill much as the Commission did, but with more elaboration, denying that the order was discriminatory or unjust, and averring that the contract of 1910 was necessarily subject to the legitimate exercise of the police power of the state, and that an order of the Commission regularly made in the exercise of that power could not be regarded as working an impairment of the obligation of the contract in the sense of the contract clause of the federal Constitution.

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*The Wichita Company made a motion for judgment on the pleadings on the ground that the order of the Commission was void on its face—

"but saved and reserved itself all of its rights in the presentation of evidence and proofs and hearing upon the merits of the issues of fact and law, otherwise than as above stated, involved in this cause in the event it should be determined that final judgment and decree should not be entered pursuant to this motion."

The District Court gave judgment for the Wichita Company on the pleadings, and enjoined the Commission and the Kansas Company from putting into force the increased rates. The Circuit Court of Appeals reversed the decree of the District Court and directed a dismissal of the bill; Judge Sanborn dissenting.

The Wichita Company has appealed to this Court.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

[1-3] The appellees urged that the concession of the appellant that contracts in respect to the rates to be charged by a public utility are subject to suspension or abrogation by the police power of the state validly exercised through an administrative agency takes out of this case any federal question, because the issue then is only a state question, to wit, whether under the state statute, the police power was validly exercised. Upon this ground they insist that the bill should have been, and must be now, dismissed for want of jurisdiction and without any inquiry into the other issues of law and fact. The original bill set out two grounds of jurisdiction, first that of diverse citizenship, and, second, that the case arose under the federal Constitution in that the order violated the

contract clause of the federal Constitution, and also the Fourteenth Amendment. The intervention of the Kansas Company, a citi-

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*zen of the same state as the Wichita Company, its opponent, did not take away the ground of diverse citizenship. That ground existed when the suit was begun and the plaintiff set it forth in the bill as a matter entitling it to go into the District Court. Jurisdiction once acquired on that ground is not divested by a subsequent change in the citizenship of the parties. *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154; *Clarke v. Mathewson*, 12 Pet. 164, 171, 9 L. Ed. 1041; *Koenigsberger v. Richmond Mining Co.*, 158 U. S. 41, 49, 15 Sup. Ct. 751. 39 L. Ed. 889; *Louisville, etc., Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 566, 19 Sup. Ct. 817, 43 L. Ed. 1081. Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties. See equity rule 37 (33 Sup. Ct. xxviii); *Adler v. Seaman* (C. C. A.) 266 Fed. 828, 841; *King v. Barr* (C. C. A.) 262 Fed. 56, 59; *Jennings v. Smith* (D. C.) 242 Fed. 561, 564. The Kansas Company, while it had an interest and was a proper party, was not an indispensable party. In *re Engelhard*, 231 U. S. 646, 34 Sup. Ct. 258, 58 L. Ed. 416.

[4] The jurisdiction of the District Court was not limited to federal questions presented by the bill, but extended to the entire suit and every question, whether federal or state, involved in its determination.

[5, 6] The appellant assigns for error that the Circuit Court of Appeals, by directing a dismissal of the bill, refused it a hearing on the truth of the averments of the answer as to the validity of the order, and also on the issue made by the bill and answer as to whether the rates as fixed by the Commission deprived it of its property without due process of law, and denied it the equal protection of the laws. In this ruling we think there was error.

The stress in the hearing on the motion was put on the two contentions—one, that the order of the Commission was void on its face for lack of a necessary finding that the existing contract rates were unreasonably low; and the other, that the facts averred in

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the petition of the *Kansas Company to the Public Utilities Commission were not sufficient to justify such a finding if it had been made. The District Court sustained the contention; the Court of Appeals denied it. The motion for judgment being overruled, the complainant should have been accorded an opportunity, the right to which it had carefully reserved, to traverse the allegations of fact by the Kansas Company as to the basis for the order of the Commission and also to maintain by evidence and argument the issue as to due process of law and the equal protec-

tion of the law. The charge that the order made a classification denying due process and the equal protection of the law was a mixed question of law and fact, upon which the complainant had a right to be heard. Neither court passed on it. For this reason, if there was nothing else, the decree of the Circuit Court of Appeals would have to be reversed. *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, 114, 39 Sup. Ct. 185, 63 L. Ed. 504.

There still remain for our consideration the questions upon which the courts below differed.

The Public Utility Law of Kansas (chapter 238 of the Session Laws of 1911) creates a commission and makes full provision for its procedure and powers. Section 13 provides that—

"It shall be the duty of the Commission, either upon complaint or upon its own initiative, to investigate all rates, * * * fares * * * and if after full hearing and investigation the Commission shall find that such rates * * * are unjust, unreasonable, unjustly discriminatory or unduly preferential, the Commission shall have power to fix and order substituted therefor such rate or rates * * * as shall be just and reasonable."

Section 14 and section 15 require the complaint against rates, etc., to be in writing, and a formal public hearing, of which due notice is to be given to the parties interested.

Section 15 directs how the notice shall be given, and how long before the hearing, and its contents.

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*Section 16 provides that, if upon such hearing the rates, etc., of any public utility are found to be unjust, unreasonable, unfair, unjustly discriminatory, or unduly preferential, the Commission shall have power to fix and substitute therefor rates, etc., "as it shall find, determine or decree to be just, reasonable and necessary." It provides that all orders and decisions of the Commission whereby any rates, etc., are altered, changed, modified, fixed or established, shall be served on the public utility affected thereby and that such public utility unless an action is commenced, in a court of proper jurisdiction to set aside "the findings, orders and decisions" of the Commission, or to review and correct the same, shall carry the provisions of the order into effect.

Section 20 provides that, whenever any public utility shall desire to make a change in any rate or rates, it shall file with the Commission a schedule showing the changes desired to be made and put in force by such public utility, but that no change shall be made in any rate without the consent of the Commission, and within 30 days after such changes have been authorized by the Commission copies of such schedule shall be filed in every station, office, or depot of such public utility for public inspection.

[7] It is said that the order in this case

was authorized by section 20, and therefore that all that was needed was the filing of a schedule of changed rates and the consent of the Commission, and that no finding was required, as in sections 13 and 16. This construction of section 20 is doubtless correct, but it shows that the filing of a schedule of changed rates under that section cannot accomplish the result of abrogating contract rates. It could not do so, any more than would the original filing of a schedule of rates under section 11 requiring every public utility to publish and file with the Commission all schedules of rates do this. The consent of the Commission in section 20 is made necessary only to prevent changing schedules

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without notice to the Commission, and thus to secure a proper supervision of schedules. Such consent does not involve a hearing or a finding and a decision. The section does not, therefore, cover, or measure the essentials of, the proceeding in this case before the Commission which the order shows was upon pleadings and inter partes. We find nothing in *State ex rel. Caster v. Kansas Postal Telegraph-Cable Co.*, 96 Kan. 298, 150 Pac. 544, which gives a different construction to section 20.

[8] The majority opinion in the Circuit Court of Appeals in maintaining the validity of the order in this case relies on section 18 of the act, which provides that all orders, rates, etc., fixed by the Commission shall be in force 30 days thereafter, and shall be prima facie reasonable until changed by the Commission or by a court, and holds from this that it must presume that there was substantial evidence to warrant the findings. But, as we have seen, there is no finding of reasonableness or unreasonableness. Nor can we suppose that the presumption was to obtain until there was such a finding.

[9] The Supreme Court of Kansas, in applying the statute, recognizes that a contract for rates with a public utility cannot be abrogated, except after a finding by the Commission that they are unreasonable. This is made clear by the decision in *Kaul v. American Telephone Co.*, 95 Kan. 1, 147 Pac. 1130. In that case, a number of customers sought to enjoin a telephone company from disconnecting their lines, because they did not pay the schedule rates published and filed with the Commission under the law of 1911 we are considering. The complainants showed an agreement by the telephone company made before the act of 1911, by which the telephone company had engaged to furnish them the service at lower than the published schedule rates on file with the Commission. The injunction was granted. The court said:

"While that Commission is vested with broad regulatory powers, it is not shown nor claimed

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that it has found *the contract rates to be unreasonable. Granting, without deciding, that the Commission has the power under the law

to determine whether or not the rates prescribed by the contract are reasonable and valid, and to revise them if found to be unreasonable, it does not appear that it has exercised the power, nor that they have been presented to it for its consideration. The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event rates previously agreed upon between utilities and patrons will continue in force until the Commission has found them to be unreasonable, and has prescribed other rates."

The proceeding we are considering is governed by section 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that after full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory, or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.

[10] This conclusion accords with the construction put upon similar statutes in other states. *Public Utilities Commission v. Springfield Gas Company*, 291 Ill. 209, 125 N. E. 891; *Public Utilities Co. v. B. & O. S. W. R. R. Co.*, 281 Ill. 405, 118 N. E. 81. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the

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creation of administrative *boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this. It is doubtful whether the facts averred in the petition were sufficient to justify a finding that the contract rates were unreasonably low; but we do not find it necessary to answer this question. We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the state.

We think the motion for judgment on the pleadings should have been granted. The decree of the Circuit Court of Appeals is reversed, and that of the District Court is affirmed.

(260 U. S. 35)

CHICAGO & N. W. RY. CO. v. NYE-SCHNEIDER-FOWLER CO.

(Argued and Submitted April 18, 1922.
Decided Nov. 13, 1922.)

No. 24.

1. Constitutional law §299—When carrier entitled to reimbursement from connecting carrier, it is immaterial whether right rests on common law or on equity.

As the Supreme Court of Nebraska has held that a railway company, held liable for the default of a connecting carrier under Rev. St. Neb. 1913, § 6058, has a right of reimbursement under the general principle of subrogation, it is immaterial, as respects due process of law, whether the right of subrogation was originally founded on the common law or developed in the broader justice of equity jurisprudence.

2. Constitutional law §241, 297—Due process or equal protection not denied by imposing reasonable penalty on carriers for nonpayment of claims.

Common carriers may be grouped in a special class, to secure proper discharge of their functions and to meet their liability for injuries inflicted on the public, and a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them, without denying due process of law or the equal protection of the laws, and this penalty or stimulus may be in the form of attorney's fees.

3. Constitutional law §247, 303—Penalties or attorney's fees imposed on carriers for nonpayment of claims must be reasonable.

Penalties or attorney's fees imposed on carriers for nonpayment of claims for loss or damage must be moderate and reasonably sufficient to accomplish their legitimate object, and the imposition of penalties or conditions that are plainly arbitrary and oppressive, and violate the rudiments of fair play, infringe Const. U. S. Amend. 14.

4. Carriers ⚡2—Constitutional law ⚡247, 303—Statute imposing liability for interest and reasonable attorney's fees for nonpayment of claims against carriers held valid.

Rev. St. Neb. 1913, § 6063, as amended by Laws 1919, c. 134, requiring carriers to settle claims for loss of, and damage to, freight within 60 days, and providing that, if not settled, the amount found due, if more than the amount tendered, shall bear interest at the rate of 7 per cent. from presentation, and that reasonable attorney's fees shall be recoverable, does not violate Const. U. S. Amend. 14, as applied to claims for damages to hogs, which were not difficult of ascertainment, where no tender was made, and only \$200 was allowed as an attorney's fee for preparing 72 different claims for trial, and for a four-day trial.

5. Carriers ⚡2—Constitutional law ⚡247—Statute providing for attorney's fee on appeal, in action for loss or damage to freight, invalid as applied to case in which unjust claim reduced on appeal.

Rev. St. Neb. 1913, § 6063, as amended by Laws 1919, c. 134, construed as requiring the Supreme Court to allow an attorney's fee on an appeal to that court in an action for loss or damage to freight, if plaintiff secures judgment for more than the amount tendered, violates Const. U. S. Amend. 14, as applied to a case in which an unjust and excessive claim was reduced on appeal.

6. Constitutional law ⚡47—Validity of statute providing for attorney's fees not affected by fact greater fees might have been recovered by bringing separate suits for damages to freight.

In passing on the validity of a statute requiring attorney's fees to be awarded on appeal to the Supreme Court in actions for damages to freight, if plaintiff recovered more than the amount tendered, if any, as applied to a case in which damages and attorney's fees recovered below were reduced on appeal, it is immaterial that the claimant might have brought a separate suit on each claim, and thus have recovered a much larger aggregate of attorney's fees.

In Error to the Supreme Court of the State of Nebraska.

Action by the Nye-Schneider-Fowler Company against the Chicago & Northwestern Railway Company. A judgment for plaintiff was modified and affirmed by the Supreme Court of Nebraska (179 N. W. 503), and defendant brings error. Reversed in part, and affirmed in part.

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*Messrs. Wymer Dressler, of Omaha, Neb., Thos. P. Littlepage, of Washington, D. C., and F. W. Sargent, of Chicago, Ill., for plaintiff in error.

Mr. Garrard Glenn, of New York City, for defendant in error.

Mr. Chief Justice TAFT delivered the opinion of the Court.

In this case, the constitutional validity of

two statutes of Nebraska is questioned; the first subjecting the initial railroad of two connecting roads, receiving freight, to liability for safe delivery by the other, and the second making every common carrier liable for a reasonable attorney's fee in the court of first instance and on appeal, for collection from it of every claim for damage or loss to property shipped, not adjusted within 60 days for intrastate shipments.

The Nye-Schneider-Fowler Company, defendant in error, is a corporation of Nebraska.

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raska at Fremont, Nebraska, *engaged in the business of bringing hogs in the state and shipping them to South Omaha for sale in the stockyards there. It brought this suit against the plaintiff in error, a common carrier, to recover damages in the sum of \$2,097.21 and \$900 attorney's fees, for loss or injury to hogs shipped in 105 intrastate shipments, averring due presentation of such claims and the refusal of the company to pay any amount whatever on them. The jury returned a verdict of \$802.27, with interest at 7 per cent., as provided in the statute. On motion, the court fixed the reasonable attorney's fees in the suit at \$600 as part of the costs and judgment for verdict and costs was accordingly entered. By the Supreme Court of the state, to which the defendant company appealed the cause, a remittitur was required and consented to for \$209.01 on the amount recovered for loss and damage, and the fee of \$600 taxed as costs was reduced to \$200; but the Supreme Court taxed the plaintiff in error with an attorney's fee of \$100 for services in the Supreme Court and judgment was entered accordingly. The questions made involved separate statutes and we shall take them up in order.

[1] First. Section 6058 of the Revised Statutes of Nebraska provides as follows:

"Any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers. Whenever two or more railroads are connected together, the company owning either of such roads, receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight, to the consignee of the freight, in the same order in which such freight was shipped."

It is objected that this imposes on one railroad liability for the default of another without providing reimbursement by that other

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and so deprives the one of its property *without due process of law. But the Supreme Court of Nebraska has declared in this case that in such a case, under the statute, the initial carrier has a right of reimbursement under the general principle of subrogation. This conclusion is sound and is supported by *Texas & Pacific Railroad Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105, and the general prin-

ciple involved finds support in *Fisher v. Milwaukee Ry.*, 173 Wis. 57, 180 N. W. 269, *Arnold v. Green*, 116 N. Y. 566, 571, 23 N. E. 1, *Syracuse Lighting Co. v. Maryland Casualty Co.*, 226 N. Y. 25, 122 N. E. 723, and *Holmes v. Balcom*, 84 Me. 226, 24 Atl. 821. Counsel for the plaintiff in error contends that the Legislature has granted no such right of subrogation in this statute; that it is not a right, but purely a matter of equity under the circumstances. We cannot follow this distinction. We have here a construction of this statute by the Supreme Court of the state, in which that tribunal holds that, under all the circumstances to which this statute can apply, subrogation does exist. The initial carrier is, therefore, certainly protected within the jurisdiction within which the statute operates, and, as no doubt can arise as to the enjoyment of the right, it is immaterial whether it was originally founded on the common law or was developed in the broader justice of equity jurisprudence.

Second. Authority for taxing of attorney's fees as part of the costs in such cases is founded in chapter 134, Laws of Nebraska 1919, amending section 6063, Revised Statutes 1913, which reads as follows:

"Every claim for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the state of Nebraska may be liable, shall be adjusted and paid by the common carrier delivering such freight at the place of destination within sixty days, in cases of shipment or shipments wholly within the state, and within ninety days in cases of shipment or shipments between points without

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and points within the state, after *such claim, stating the amount and nature thereof accompanied by the bill of lading or duplicate bill of lading or shipping receipt showing amount paid for or on account of said shipment, which shall be returned to the complainant when the claim is rejected or the time limit has expired, shall have been filed with the agent, or the common carrier at the point of destination of such shipment, or at the point where damages in any other manner may be caused by any common carrier. In the event such claim, which shall have been filed as above provided, within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent. per annum from the date of filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction, and in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court or courts: Provided, in bringing suit for the recovery of any claim for loss or damage as herein provided if consignee or consignor, or real party in interest, shall fail to recover a judgment in excess of the amount that may have been tendered in an offer of settlement of such claim by the common carrier liable hereunder, then such

consignee or consignor, or real party in interest, shall not recover the interest penalty or attorney's fee herein provided."

The Supreme Court of the state has held that provision for attorney's fees in this section is in the nature of reimbursement of costs and not a penalty. *Smith v. Railway Co.*, 99 Neb. 719, 157 N. W. 622; *Marsh v. Railway Co.*, 103 Neb. 654, 173 N. W. 679. But this does not meet the objection pressed

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on us. *These are costs imposed on the defeated defendant in the litigation, but not on the defeated plaintiff. This is an inequality and the question is whether it is a just discrimination and one which the Legislature may make and not take the defeated defendant's property without due process or deny it the equal protection of the law. We have considered in our more recent decisions the constitutional validity of inequalities of this general character as between claimants and common carriers created by state legislation, and it may perhaps be worth while to review the decisions to see what general rule runs through them with a view of applying it to the case before us.

In the first of these cases, *Gulf, etc., Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, a defendant railroad company attacked a statute of Texas under which it had been required to pay an attorney's fee to the plaintiff. The statute provided that any person having a claim for personal services, for overcharges for freight, or for claims for stock killed if it did not exceed \$50, which was duly presented and not settled in 30 days, might, if he recovered the full amount in a suit, recover also an attorney's fee not exceeding \$10 if he had an attorney. This court, three Judges dissenting, held that the statute denied the equal protection of the laws to railroads because it was only a penalty to compel them to pay their debts, and that to single them out as a group of general debtors was not just classification.

In *Atchison, etc., R. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, a statute relating to the liability of railroads for damages for fire caused by their negligent operation, allowed the plaintiff if he recovered a reasonable attorney's fee. This was held a valid classification of defendants because it was a police measure to prevent fire likely to be caused by operation of railroads and the attorney's fee stimulated care to prevent it.

In *Seaboard Air Line v. Seegers*, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108, a state statute imposed a penalty of \$50 on all common

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carriers for failure to adjust damage claims within 40 days if in the subsequent litigation the plaintiff recovered the full amount claimed. The statute was sustained in a case where the claim was \$1.75. It was held not to be a statute imposing a penalty merely for

the nonpayment of debts or against railroad corporations alone as in the *Ellis Case*, but one based solely upon the nature of the business peculiarly within the knowledge of the carrier who could determine the loss more accurately and with less delay than the plaintiff. It was said that the design was to secure a reasonably prompt settlement of proper claims, and especially small claims which most need such penal provisions to protect them.

In *St. Louis, etc., Ry. Co. v. Wynne*, 224 U. S. 354, 32 Sup. Ct. 493, 56 L. Ed. 799, 42 L. R. A. (N. S.) 102, a state statute required railroad companies to pay claims for live stock killed or injured by their trains within 30 days after notice with a penalty for failure to do so, of double damages and attorney's fee if claimant recovered what he sued for. The plaintiff had made a claim for \$500 for the killing of two horses by the defendant's train. On refusal, suit was brought for \$400 and recovery had for that amount. It was held that to apply the statute as the state court did, to a case in which plaintiff had demanded more than he sued for, made an arbitrary exercise of power and deprived defendant of its property without due process of law.

In *Kansas City Ry. v. Anderson*, 233 U. S. 325, 34 Sup. Ct. 599, 58 L. Ed. 983, the same statute which was held invalid in the *Wynne Case* was again before the court for consideration as applied to a case where plaintiff had not demanded more than he sued for and recovered, and the validity of the statute was upheld.

In *Yazoo, etc., R. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 33 Sup. Ct. 40, 57 L. Ed. 193, the statute required every common carrier to settle claims for lost or damaged

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*freight within 60 days and made it liable for \$25 damages in each case in addition to the actual damages, but limited the penalty to claims of less than \$200. The claim was \$4.76 and there was a recovery of the claim and penalty. Such a statute was held a reasonable incentive to the prompt settlement without suit of just demands of a class admitting of special legislative treatment. It was objected to the statute that it intended the assessment of a penalty whether the recovery was less than the claim or not. But the court refused to consider the objection on the ground that it sufficed to hold that as applied to cases like those before it the statute was valid, and that it would not deal with imaginary cases or speculate on what application the state court would make of the statute in another class of cases.

In *Chicago, etc., Ry. Co. v. Polt*, 232 U. S. 165, 34 Sup. Ct. 301, 58 L. Ed. 554, the state statute made a railroad company absolutely responsible for loss of property destroyed by fire communicated from its locomotives

and provided that unless it paid or offered to pay the full amount of the damage within 60 days from notice, the owner should have double damages unless he recovered less than the amount offered by the company before suit. The plaintiff demanded and sued for \$833.30. The company offered \$500. The verdict was for \$780. The court said that the rudiments of fair play required by the Fourteenth Amendment were wanting when a defendant in such a case was compelled to guess rightly what a jury would find or pay double if that tribunal added a cent to the amount tendered, though the tender was futile because of an excessive demand.

In *Missouri, etc., Co. v. Cade*, 233 U. S. 642, 34 Sup. Ct. 678, 58 L. Ed. 1135, a statute regulating the presentation and collection of claims for personal service, material furnished, overcharges for freight, for lost or damaged freight or for stock killed or injured

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against any person or corporation *less than \$200 in amount, required that they be settled in 30 days, and, if not, the person injured could bring suit, and, if he recovered the full amount of his claim, he should be entitled in addition to the amount and costs, to a reasonable attorney's fee, not exceeding \$20. It was held that the attorney's fee here was manifestly only costs of suit, and that, as the statute applied to every one and any person might be plaintiff or defendant, the mere distinction between the costs to be taxed against the plaintiff and those against the defendant did not deny the equal protection of the laws because the plaintiff usually had the burden in the case and as the outlay for an attorney's fee was a necessary consequence of the litigation, it was reasonable to impose it upon the party whose refusal to pay the just claim rendered the litigation necessary.

In *Atchison Ry. v. Vosburg*, 238 U. S. 56, 35 Sup. Ct. 675, 59 L. Ed. 1199, L. R. A. 1915E, 953, a statute requiring prompt furnishing cars by carriers and prompt loading by shippers and which imposed the same penalty per car upon delinquents of either group but which added attorney's fee to the penalty imposed on the carriers in case of recovery by a shipper, was held to deny to the carriers the equal protection of the laws because in such a case there was no ground for putting the carriers in a different class from the shippers and imposing a special burden on them when they were both in identically the same situation.

[2,3] The general rule to be gathered from this extended review of the cases is that common carriers engaged in the public business of transportation may be grouped in a special class to secure the proper discharge of their functions, and to meet their liability for injuries inflicted upon the property of members of the public in their performance;

that the seasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them

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for failure promptly to consider and *pay such claims, in order to discourage delays by them. This penalty or stimulus may be in the form of attorney's fees. But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and "violate the rudiments of fair play" insisted on in the Fourteenth Amendment, will be held to infringe it. In this scrutiny of the particular operation of a statute of this kind, we have sustained it in its application to one set of facts by the state court and held it invalid when applied to another. In some of the cases in which the statutes are sustained there is a fixed penalty or a limited attorney's fee. In others, the attorney's fee is merely required to be reasonable and fixed by the court. In some, there is a limit in the amount of the claims to which the statute applies, and in others not. In some statutes held valid, the penalty or fee is allowed only on condition that the full amount claimed be recovered; in others, that the amount sued for be recovered. In the one case, the statute imposed no condition upon the imposition of a penalty that the full amount claimed or sued for should be recovered, but the court refused to consider the validity of the penalty from that standpoint because the facts did not require it. In another case, the requirement that a tender of the amount recovered could only save double damages was held invalid, because requiring a guess as to the verdict of the jury.

It is obvious that it is not practical to draw a line of distinction between these cases based on a difference of particular limitations in the statute and the different facts in particular cases. The court has not intended to establish one, but only to follow the general rule that when in their actual operation in the cases before it, such statutes work an arbitrary, unequal, and oppressive

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result for *the carrier which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy in respect of state legislation, they will not be sustained.

[4] Coming now to the case before us, we find that the statute affects all common carriers, that it imposes on them the duty of considering and settling claims for loss of and damage to freight within 60 days, and provides that if they do not so settle them and in a subsequent suit more is recovered than the amount tendered, the amount found due shall carry 7 per cent. interest from the presentation of the claim as a penalty and rea-

sonable attorney's fees. If an appeal be taken and the plaintiff succeed, an additional attorney's fee may be included. The statute is confined to freight claims. It does not place a limit on them, but as we have seen, the cases do not require this. The statute does require a tender but in this case the claims were wholly rejected. No tender of any amount was even attempted. The claims numbered 105 when presented and sued on. They were reduced to 72. The trial lasted four days.

It is said here as it was said in the Polt Case, in 232 U. S. 165, 34 Sup. Ct. 301, 58 L. Ed. 554, that the company cannot be subjected to a penalty for not guessing rightly the verdict of a jury. But the cases are very different. There the penalty was double damages for a failure to guess rightly as to the jury's view of damages from a fire to a house when the extent of the damage was not peculiarly within the company's knowledge. Here the damages were for hogs injured during the custody of the carrier and whose value was determined by weight and market price and not difficult of ascertainment after a bona fide effort and there was no effort at a tender at all. Here the penalty is only 7 per cent. interest on the actual recovery and reasonable attorney's fees as costs. The amount of the attorney's fee \$200 for a case involving the preparation for trial of 72 different claims and a four-day trial does not shock one's sense of fairness.

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[5, 6] *It is further separately assigned for error that the Supreme Court imposed upon plaintiff in error an attorney's fee of \$100 when it won the case on appeal by reducing the amount recovered in the trial court. The original section 6063, Revised Statutes of Nebraska, only provided for an attorney's fee to be fixed by the court, but chapter 134, Laws of Nebraska 1919, added the words, "and in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court or courts." This might have been construed to mean that the plaintiff could only have an attorney's fee in the appellate court or courts, if he maintained the judgment he had obtained in the court of first instance. But the Supreme Court of the state, and that controls our view, has evidently interpreted the words "the plaintiff shall succeed" to mean success in securing a judgment for more than the amount tendered, if any, and it is in light of this interpretation that we must consider the reasonableness of the statute and the validity of the fee fixed in this case.

The evident theory of the amendment of section 6063, as thus interpreted, is that the burden of the litigation both in the trial and appellate court could be avoided by reasonable assiduity of the defendant carrier in

availing itself of its peculiar sources of knowledge, ascertaining the actual damage and making a genuine tender of what it believes to be due, and if the ultimate recovery is not more than the tender, that the claimant shall have neither interest nor attorney's fee. Under the circumstances, does the statute thus construed work a fair result? Here is an excessive claim of \$2,000 reduced to \$800 by a trial in one court, with an attorney's fee fixed at \$600, and then an appeal by which the claim is reduced to \$600, and the fee to \$200. It is said that there were 105 claims, reduced by the litigation to 72, and that claimant might have brought a separate suit on each, and so had an attorney's

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*fee in each claim on which it recovered anything, making a larger aggregate of fees than it has secured. But we do not think this consideration can play any part in the case as it is. The complainant doubtless united the claims for its own convenience and to save its own time and that of its counsel.

Then it is said the fee in the Supreme Court is left to the discretion of that court, which can be trusted to do the fair thing, as a chancellor often does, by dividing the costs on an equitable basis. But the difficulty with this view is that the construction which the Supreme Court has given the statute does not reserve to itself this power. It says that in such a statute the fee must be reasonable in that it is to be based on a consideration of the value of the attorney's service to the claimant and the amount of time and labor expended by him, bearing a fair proportion to the amount of the judgment recovered. These are the usual and proper elements in fixing compensation for a lawyer's service. In other words, the Supreme Court, if any amount over the tender is recovered by its judgment, must fix a fee compensating the attorneys for the claimant for their work on the appeal, however excessive the recovery below and however much reduced on the appeal, if more than the original tender. Thus what we have here is a requirement that the carrier shall pay the attorneys of the claimant full compensation for their labors in resisting its successful effort on appeal to reduce an unjust and excessive claim against it. This we do not think is fair play. Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment. *Missouri Pacific Railway Co. v. Tucker*, 230 U. S. 340, 33 Sup. Ct. 961, 57 L. Ed. 1507. While the present case does not involve any such penalties as were there imposed, we think the principle applies to the facts of this case. We hold that so much of the statute as imposed

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an attorney's *fee upon the carrier in this

case in the Supreme Court was invalid. The judgment of the Supreme Court is to this extent reversed and in other respects affirmed. The costs in this court will be taxed one-third to the defendant in error, and two-thirds to the plaintiff in error.

(260 U. S. 77)

BREWER-ELLIOTT OIL & GAS CO. et al. v. UNITED STATES.

(Argued Oct. 12 and 13, 1922. Decided
Nov. 13, 1922.)

No. 52.

1. Indians ⇨12—Title to bed of river held to be determined by act granting to Osage Indians lands subsequently conveyed by Cherokee Indians.

Under Act June 5, 1872, granting to the Osage Indians a tract of land described as bounded by the main channel of the Arkansas river, Acts March 3, 1873, and March 3, 1883, appropriating money to be paid to the Cherokee Indians for such lands and the conveyance thereof by the Cherokee Indians, the title to the river bed is to be determined by the language of the act of 1872; the meaning of the deed being interpreted in the light of the acts in pursuance of which it was made and especially the act of 1872.

2. Indians ⇨12—Act granting land to Osage Indians held sufficient to vest title without subsequent deed from Cherokee Indians.

Act June 5, 1872, granting a described tract of land to the Osage Indians under which they took possession, was sufficient to vest in them good title to the land described without a subsequent deed to the United States made by the Cherokee Indians.

3. Navigable waters ⇨36(1)—Right to make grants of land below high-water mark not affected by treaty.

The declared purpose of the Louisiana Purchase Treaty with France that statehood should be ultimately conferred on the inhabitants of the territory purchased did not affect the power of the government to make grants of land below high-water mark of navigable waters in any territory, when necessary to carry out public purposes appropriate to the objects for which the United States held the territory.

4. Navigable waters ⇨1(3)—"Navigable river" defined.

A "navigable river" is one used or susceptible of being used in its ordinary condition as a highway for commerce over which trade and travel is, or may be, conducted in the customary modes of trade and travel on water, and the mode by which commerce is conducted thereon, or the difficulties attending navigation, is not conclusive.

5. Waters and water courses ⇨89—Grant bounded by main channel of nonnavigable stream held to include bed as far as main channel.

As the Arkansas river along the Osage Indian Reservation was not and never had been

navigable, Act June 5, 1872, granting to the Osage Indians a tract of land described as bounded by the main channel of such river, included the bed of the river as far as the main channel.

6. Courts ⚡365—Decision of state court as to navigability held not controlling in determining title under grant made before statehood.

On the question of title acquired by Indians under a grant made in 1872, and describing the land as bounded by the main channel of the Arkansas river, decisions of the Supreme Court of Oklahoma as to navigability of the river at that point, in suits to which the United States was not a party, are not binding on the federal Supreme Court, as the validity and effect of an act done by the United States is necessarily a federal question.

7. Waters and water courses ⚡89—Admission of state did not divest title of Indians under grant to bed of nonnavigable stream.

When Oklahoma came into the Union, she took sovereignty over public lands in the condition of ownership as they were then, and, if the bed of a nonnavigable stream had then become the property of Indians under a grant from the United States, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states divesting such title.

8. Waters and water courses ⚡89—State cannot adopt retroactive rule destroying title under federal law and grant.

Under the constitutional rule of equality of a state with others upon its admission into the Union, the courts or Legislature of a state cannot, in dealing with the general subject of beds of streams, adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the state at the time of her admission.

9. Public lands ⚡114(1)—Ordinary incidents attaching to title determined by local rules provided grant not impaired.

Where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent under the public land laws may be determined according to local rules, provided such rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against the Brewer-Elliott Oil & Gas Company and others. A decree for the government was affirmed by the Circuit Court of Appeals (270 Fed. 100), and defendants appeal. Affirmed.

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*Messrs. W. A. Ledbetter, S. P. Freeling, H. L. Stuart, and E. E. Blake, all of Oklahoma City, Okl., for appellants.

Mr. Assistant Attorney General Riter, for the United States.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court of Appeals of the Eighth Circuit affirming that of the District Court for Western Oklahoma. The bill in equity was filed by the United States for itself and as Trustee for the Osage Tribe of Indians, against the Brewer-Elliott Oil & Gas Company, and five other such companies, lessees, under oil and gas leases granted by the state of Oklahoma, of portions of the bed of the Arkansas river, opposite the Osage Reservation in that state. It averred that the river bed thus leased belonged to the Osages, and not to Oklahoma, and that the leases were void, that the defendants were prospecting for, and drilling for, oil in the leased lots in the river bed and were erecting oil derricks and other structures therein, and prayed for the cancelling of the leases, the enjoining of defendants from further operations under their leases, and a quieting of the title to the premises in the United States as trustee.

The state of Oklahoma intervened by leave of Court and in its answer denied that the Osage Tribe or the United States as its trustee owned the river bed of which these lots were a part, but averred that it was owned by the state in fee. The other defendants adopted the answer of the state.

After a full hearing and voluminous evidence, the District Court found that at the place in question the Arkansas river was, and

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always had been, a nonnavigable *stream, that by the express grant of the government, made before Oklahoma came into the Union, the Osage Tribe of Indians took title in the river bed to the main channel and still had it. It entered a decree as prayed in the bill. The Circuit Court of Appeals held that whether the river was navigable or nonnavigable, the United States, as the owner of the territory through which the Arkansas flowed before statehood, had the right to dispose of the river bed, and had done so, to the Osages. It also concurred in the finding of the District Court that the Arkansas at this place was, and always had been, nonnavigable, and that the United States had the right to part with the river bed to the Osage Tribe when it did so. It affirmed the decree.

The Osage Tribe derived title to their reservation from the Act of Congress of June 5, 1872, entitled an act to confirm to the Great and Little Osage Indians a reservation in the Indian Territory (17 Stat. 228). The act with its recitals is printed in the margin.¹

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The de*scription of the tract conveyed is:

"Bounded on the east by the ninety-sixth meridian, on the south and west by the north

¹ "Chap. CCCX. An act to confirm to the Great and Little Osage Indians a reservation in the Indian Territory.

"Whereas by the treaty of eighteen hundred and sixty-six between the United States and the Cherokee Nation of Indians, said nation ceded to the United States all its lands west of the ninety-

line of the Creek country, and the main channel of the Arkansas river, and on the north by the south line of the state of Kansas."

The Act of March 3, 1873 (17 Stat. 530, 538), directed the Secretary of the Treasury to transfer \$1,650,600 from Osage funds to pay for lands purchased by the Osages from the Cherokees. The Act of March 3, 1883 (22 Stat. 603, 624), appropriated \$300,000 to be paid to the Cherokees for this and other lands on condition of their executing a proper deed. The conveyance from the Cherokees to the United States in trust for the Osages recites the Cherokee Treaty of 1866 (14 Stat.

799), the *Acts of June 5, 1872, March 3, 1873, and March 3, 1883, and conveys to the United States the tract of country described in the Act of June 5, 1872, except that, instead of its being bounded by the main channel of the Arkansas river, it is described as townships and fractional townships, "the fractional townships being on the left bank of the Arkansas river." The deed purports to be executed under authority of an act of the Cherokee Nation, which directed a deed under the Act of March 3, 1883, requiring conveyance, satisfactory to the Secretary of the Interior, to the United States in trust for the Osages now occupying said tract, "as they occupy the same."

[1,2] We have no doubt that the title to the river bed is to be determined by the lan-

sixth meridian west longitude, for the settlement of friendly Indians thereon; and whereas by act of Congress approved July fifteenth, eighteen hundred and seventy, the President was authorized and directed to remove the Great and Little Osage Indians to a location in the Cherokee country west of the ninety-sixth meridian, to be designated for them by the United States authorities; and whereas it was provided by the same act of Congress that the lands of the Osages in Kansas should be sold by the United States, and so much of the proceeds thereof as were necessary should be appropriated for the payment to the Cherokees for the lands set apart for the said Osages west of the ninety-sixth meridian; and whereas under the provisions of the above mentioned treaty and act of Congress and concurrent action of the authorities of the United States and the Cherokee nation, the said Osages were removed from their former homes in the state of Kansas to a reservation set apart for them in the Indian Territory, at the time of the removal supposed to be west of the said ninety-sixth meridian, and bounded on the east thereby, and upon which said Osages have made substantial and valuable improvements; and whereas by a recent survey and establishment of the ninety-sixth meridian it appears that the most valuable portion of said Osage reservation, and upon which all their improvements are situated, lies east of the said meridian; and whereas it therefore became necessary to select other lands in lieu of those found to be east of the established ninety-sixth meridian for said Osage Indians; and whereas a tract has accordingly been selected, lying between the western boundary of the reservations heretofore set apart for said Indians and the main channel of the Arkansas river, with the south line of the state of Kansas for a northern boundary, and the north line of the Creek country and the main channel of the Arkansas river for a southern and western boundary; and whereas the act of Congress approved July fifteenth, eighteen hundred and seventy, restricts the said reservation for said

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guage of the Act of June 5, 1872, *and that the meaning of the Cherokee deed is to be interpreted not as if its words stood alone but in the light of the acts of Congress in pursuance of which it was made, and especially of the Act of 1872, under which the Osages took possession, and which was enough to vest in them good title to the land described therein without the deed of 1883. *Choate v. Trapp*, 224 U. S. 665, 673, 32 Sup. Ct. 565, 56 L. Ed. 941; *Jones v. Meehan*, 175 U. S. 1, 10, 20 Sup. Ct. 1, 44 L. Ed. 49; *Francis v. Francis*, 203 U. S. 233, 237, 238, 27 Sup. Ct. 129, 51 L. Ed. 165.

Coming then to consider the effect of the words of the Act of 1872 in bounding the Osage reservation "by the main channel of the Arkansas river," we are met by the argument that the United States had no power to grant the bed of the Arkansas river, a navigable stream, to the Indians, because it held title to it only in trust to convey it to the states to be formed out of the Louisiana Purchase which when admitted to the Union must, in order to be equal in power to the other states, be vested with sovereign rights over the beds of navigable waters and streams. The case of *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L. Ed. 565, is cited to sustain this proposition. That was a case where a Spanish claimant of land under navigable waters in Alabama, seeking to establish title against the state, relied on a confirma-

Osage Indians to 'a tract of land in compact form equal in quantity to one hundred and sixty acres for each member of said tribe'; and whereas in a letter of the Cherokee delegation, addressed to the Secretary of the Interior on the eighth day of April, eighteen hundred and seventy-two, on behalf of the Cherokee nation, containing their approval of and assent to the proposition to provide for the settlement of the Osage and Kaw Indians on that portion of the Cherokee country lying west of the ninety-sixth degree west longitude, south of Kansas, east and north of the Arkansas river: Therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in order to provide said Osage tribe of Indians with a reservation, and secure to them a sufficient quantity of land suitable for cultivation, the following-described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely: Bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas river, and on the north by the south line of the state of Kansas: Provided, that the location as aforesaid shall be made under the provisions of article sixteen of the treaty of eighteen hundred and sixty-six, so far as the same may be applicable thereto: And provided further, that said Great and Little Osage tribe of Indians shall permit the settlement within the limits of said tract of land (of) the Kansas tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas tribe of Indians out of the proceeds of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee nation of Indians.

"Approved June 5, 1872."

tion of an invalid Spanish grant by the United States enacted after Alabama became a state. Such a confirmation was held to be ineffective against the sovereign title of the state. The language of Mr. Justice McKinley, who spoke for the court, fully sustains the argument made here that even before statehood, the United States was without power to convey title to land under navigable water and deprive future states of their future ownership. Such a view was not necessary, however, to the case before the court and has since been qualified by the court through Chief Justice Taney in *Goodtitle v. Kibbe*, 9 How. 471, 478, 13 L. Ed. 220. *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244, relied on by counsel for

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appellants, *does not sustain their contention. The gist of the court's holding there was that a right to hunt upon the unoccupied lands of the United States so long as game might be found thereon granted by the United States in an Indian treaty made before the statehood of Wyoming was not to be construed as intended to continue thereafter or to give immunity from the Wyoming game laws.

The whole subject has been clarified after the fullest examination of all the authorities in a most useful opinion by Mr. Justice Gray, speaking for the court in *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. On page 47 of 152 U. S., on page 565 of 14 Sup. Ct. (38 L. Ed. 331), the learned Justice says:

"VIII. Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true."

And he then reviews the cases and thus states the court's conclusion (152 U. S. 48, 14 Sup. Ct. 566, 38 L. Ed. 331):

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.

"IX. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek. * * *

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants,

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in *order to encourage the settlement of the country; but that the navigable waters and the soils under them whether within or above the ebb and flow of the tide, shall be and re-

main public highway; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for future States, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community."

[3] We do not think the declared purpose of the Louisiana Purchase Treaty with France (8 Stat. 200) that statehood should be ultimately conferred on the inhabitants of the territory purchased, relied on by the appellants, varies at all the principles to be applied in this case. They are the same in respect to territory of the United States whether derived from the older states, Spain, France or Mexico. If the Arkansas river were navigable in fact at the locus in quo, the unrestricted power of the United States when exclusive sovereign, to part with the bed of such a stream for any purpose, asserted by the Circuit Court of Appeals would be before us for consideration. If that could not be sustained, a second question would arise whether vesting ownership of the river bed in the Osages was for "a public purpose appropriate to the objects for which the United States hold territory," within the language of Mr. Justice Gray in *Shively v. Bowlby* above

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quoted. *We do not find it necessary to decide either of these questions in view of the finding as a fact that the Arkansas is and was not navigable at the place where the river bed lots, here in controversy, are.

[4, 5] A navigable river in this country is one which is used, or is susceptible of being used in its ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade, and travel on water. It does not depend upon the mode by which commerce is conducted upon it, whether by steamers, sailing vessels or flat boats, nor upon the difficulties attending navigation, but upon the fact whether the river in its natural state is such that it affords a channel for useful commerce. *Oklahoma v. Texas*, 258 U. S. 574, 42 Sup. Ct. 406, 66 L. Ed. 771, decided May 1, 1922; *Economy Light Co. v. United States*, 256 U. S. 113, 41 Sup. Ct. 409, 65 L. Ed. 847; *The Montello*, 20 Wall. 430, 22 L. Ed. 391; *The Daniel Ball*, 10 Wall. 557, 563, 19 L. Ed. 999. Voluminous testimony was introduced in the District Court upon the issue of navigability. That court considered it all with evident care and had no difficulty in reach-

ing the conclusion that the Arkansas River along the Osage Reservation was not, and had never been, navigable within the adjudged meaning of that term, and that the head of navigation is and was the mouth of the Grand river, near which was Fort Gibson, and this is a number of miles below the reservation. The Circuit Court of Appeals reviewed this finding and fully concurred in its correctness. Neither the argument nor the record discloses any ground which can overcome the weight which the findings of two courts must have with us. *Washington Sec. Co. v. United States*, 234 U. S. 76, 78, 34 Sup. Ct. 725, 58 L. Ed. 1220; *Texas Railway Co. v. Louisiana R. R. Commission*, 232 U. S. 338, 34 Sup. Ct. 438, 58 L. Ed. 630; *Chicago, Junction Ry. Co. v. King*, 222 U. S. 222, 224, 32 Sup. Ct. 79, 56 L. Ed. 173; *Dun v. Lumbermen's Credit Association*, 209 U. S. 20, 24, 28 Sup. Ct. 335, 52 L. Ed. 663, 14 Ann. Cas. 501. It is a natural inference that Congress in its grant to the Osage Indians in 1872 made it extend to the main channel of the river, only

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*because it knew it was not navigable. This would be consistent with its general policy. Section 2476, Rev. Stat. (Comp. St. § 4918); *Oklahoma v. Texas*, decided May 1, 1922; *Scott v. Lattig*, 227 U. S. 229, 242, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 289, 19 L. Ed. 74. If the Arkansas river is not navigable, then the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant expressly carries the title to that line.

[6-8] But it is said that the navigability of the Arkansas river is a local question to be settled by the Legislature and the courts of Oklahoma, and that the Supreme Court of the state has held that at the very point here in dispute, the river is navigable. *State v. Nolegs*, 40 Okl. 479, 139 Pac. 943. A similar argument was made for the same purpose in *Oklahoma v. Texas*, supra, based on a decision by the Supreme Court of Oklahoma as to the Red river. *Hale v. Record*, 44 Okl. 803, 146 Pac. 587. The controlling effect of the state court decision was there denied because the United States had not been there, as it was not here, a party to the case in the state court. *Economy Light Co. v. United States*, 256 U. S. 113, 123, 41 Sup. Ct. 409, 65 L. Ed. 847. In such a case as this the navigability of the stream is not a local question for the state tribunals to settle. The question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made, and that was thirty-five years before Oklahoma was taken into the Union and before there were any local tribunals to decide any such questions. As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Fed-

eral government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and if the bed of a nonnavigable stream had then become

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the property *of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of the title. It is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.

[9] It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the public land laws may be determined according to local rules; but this is subject to the qualification that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee. Thus the right of the riparian owner under such grant may be limited by the law of the state either to high or low water mark or extended to the middle of the stream. *Packer v. Bird*, 137 U. S. 661, 669, 11 Sup. Ct. 210, 34 L. Ed. 819.

We said in *Oklahoma v. Texas*, decided May 1, 1922:

"Where the United States owns the bed of a nonnavigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what is intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. Where it is disposing of tribal land of the Indians under its guardianship the same rules apply."

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*In government patents containing no words showing purpose to define riparian rights, the intention to abide the state law is inferred. Mr. Justice Bradley, speaking for the court in *Hardin v. Jordan*, 140 U. S. 371, 384, 11 Sup. Ct. 808, 813 (35 L. Ed. 428), said:

"In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie."

Some states have sought to retain title to the beds of streams by recognizing them as

navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river granted and vesting before statehood, depends for its validity on nonnavigability of the stream in fact. In such a case, navigability vel non is not a local question. In *Wear v. State of Kansas*, 245 U. S. 154, 38 Sup. Ct. 55, 62 L. Ed. 214, Ann. Cas. 1918B, 586, upon which the plaintiffs in error rely, the patent of the United States under which *Wear* derived title was a grant, made before statehood, to land bordering on the Kansas river without restriction, reservation or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on a navigable stream did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a nonnavigable stream, was immaterial. In either view the result there would have been the same. The case of *Donnelly v. United States*, 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710, is to be similarly distinguished, if, indeed it can be said after the qualification of the opinion, 228 U. S. 708, 711, 33 Sup. Ct. 1024, 57 L. Ed. 1035, Ann. Cas. 1913E, 710, to require distinguishing.

The decree of the Circuit Court of Appeals is affirmed.

(260 U. S. 178)

TAKAO OZAWA v. UNITED STATES.

(Argued Oct. 3 and 4, 1922. Decided Nov. 13, 1922.)

No. 1.

1. Aliens ⇨61—Statute held not to repeal by implication statute specifying aliens who may be naturalized.

Act June 29, 1906 (Comp. St. § 4351 et seq.), regulating the naturalization of aliens, and expressly repealing certain sections of the Revised Statutes other than section 2169 (Comp. St. § 4358), which provides that the provisions of that title shall apply to free white persons and aliens of African nativity or descent, does not repeal section 2169 by implication; there being nothing in either repugnant to the other.

2. Aliens ⇨61—Provisions specifying aliens who may be naturalized applies to present naturalization law.

Rev. St. § 2169 (Comp. St. § 4358), providing that the provisions of "this title" shall apply to aliens who are free white persons, etc., uses the quoted words merely to identify the provisions referred to, and applies to Naturali-

zation Act June 29, 1906, as well as the naturalization provisions of the Revised Statutes, and is not now limited to the unrepealed sections of that title.

3. Aliens ⇨61—Statute held not to confer eligibility to citizenship on all aliens.

Act June 29, 1906, § 4 (Comp. St. § 4352), providing that "an alien" may be admitted to citizenship "in the following manner, and not otherwise," does not confer the privilege of naturalization on all aliens, but relates only to the manner or procedure to be followed.

4. Statutes ⇨211—Reference to title or chapter of Revised Statutes is merely method of identifying provisions intended.

The division of the Revised Statutes into titles and chapters is chiefly a matter of convenience, and reference to a given title or chapter is merely a ready method of identifying the particular provisions which are meant.

5. Statutes ⇨181(1)—Duty of court to give effect to intent.

It is the duty of the court in construing a statute to give effect to the intent of Congress.

6. Statutes ⇨184—When language leads to unreasonable result, reason of enactment, design, and purpose considered.

Primarily the intent of Congress in adopting a statute is ascertained by giving the words their natural significance, but, if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, the court may look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.

7. Aliens ⇨61—As brown or yellow races are not "white persons" within statute, they are excluded from naturalization.

Though, when the Naturalization Act of 1790 first restricted naturalization to free white persons, it may have been done solely to exclude Negroes and Indians, and though its framers may have assumed that they were the only persons who would fall outside the designation "white," as the brown or yellow races of Asia are not included, they are necessarily excluded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, White Person.]

8. Aliens ⇨61—"Free" in statute specifying aliens who may be naturalized has no practical significance.

Under Rev. St. § 2169 (Comp. St. § 4358), limiting naturalization to free white persons, etc., the word "free," originally used in recognition of the existence of slavery, no longer has any practical significance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Free.]

9. Aliens ⇨61—"White persons" who may be naturalized are persons of Caucasian race.

Rev. St. § 2169 (Comp. St. § 4358), limiting naturalization to "white persons" and persons of African nativity or descent, uses the quoted words as importing a racial, and not

an individual, test, and as meaning persons of the Caucasian race, regardless of the color of the skin of the individual.

10. Aliens ⇨61—Members of Japanese race not eligible to naturalization.

The Japanese race is not Caucasian, and under Rev. St. § 2169 (Comp. St. § 4358), persons of that race born in Japan are not eligible to naturalization.

11. Aliens ⇨61—Court can only ascertain will of Congress; enlightenment of Japanese immaterial as affecting right to naturalization.

In passing on the eligibility of persons of the Japanese race to naturalization, the court has no function other than to ascertain and declare the will of Congress, and the culture or enlightenment of the Japanese people are not matters which can properly be considered.

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

Application by Takao Ozawa for admission to citizenship. The petition was denied, and the applicant appealed to the Circuit Court of Appeals, which certified questions to the Supreme Court. Questions answered.

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*Messrs. Geo. W. Wickersham, of New York City, and David L. Withington, of Honolulu, T. H., for Takao Ozawa.

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*Mr. Solicitor General Beck, of Washington, D. C., for the United States.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

The appellant is a person of the Japanese race born in Japan. He applied, on October 16, 1914, to the United States District Court for the Territory of Hawaii to be admitted as a citizen of the United States. His petition was opposed by the United States District Attorney for the District of Hawaii. Including the period of his residence in Hawaii appellant had continuously resided in the United States for 20 years. He was a graduate of the Berkeley, Cal., high school, had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home. That he was well qualified by character and education for citizenship was conceded.

The District Court of Hawaii, however, held that, having been born in Japan and

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being of the Japanese race, *he was not eligible to naturalization under section 2169 of the Revised Statutes (Comp. St. § 4358), and denied the petition. Thereupon the appellant brought the cause to the Circuit Court of Appeals for the Ninth Circuit and that court has certified the following questions, upon which it desires to be instructed:

"1. Is the act of June 29, 1906 (34 Stats. at Large, pt. 1, p. 596), providing 'for a uniform rule for the naturalization of aliens' complete in itself, or is it limited by section 2169 of the Revised Statutes of the United States?"

"2. Is one who is of the Japanese race and born in Japan eligible to citizenship under the naturalization laws?"

"3. If said act of June 29, 1906, is limited by section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?"

These questions for purposes of discussion may be briefly restated:

1. Is the Naturalization Act of June 29, 1906 (Comp. St. § 4351 et seq.), limited by the provisions of section 2169 of the Revised Statutes of the United States?

2. If so limited, is the appellant eligible to naturalization under that section?

First. Section 2169 is found in title XXX of the Revised Statutes, under the heading "Naturalization," and reads as follows:

"The provisions of this title shall apply to aliens, being free white persons and to aliens of African nativity and to persons of African descent."

The act of June 29, 1906, entitled "An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform

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rule for the naturalization of aliens *throughout the United States," consists of 31 sections and deals primarily with the subject of procedure. There is nothing in the circumstances leading up to or accompanying the passage of the act which suggests that any modification of section 2169, or of its application, was contemplated.

The report of the House Committee on Naturalization and Immigration, recommending its passage, contains this statement:

"It is the opinion of your committee that the frauds and crimes which have been committed in regard to naturalization have resulted more from a lack of any uniform system of procedure in such matters than from any radical defect in the fundamental principles of existing law governing in such matters. The two changes which the committee has recommended in the principles controlling in naturalization matters and which are embodied in the bill submitted herewith are as follows: First, the requirement that before an alien can be naturalized he must be able to read, either in his own language or in the English language and to speak or understand the English language; and, second, that the alien must intend to reside permanently in the United States before he shall be entitled to naturalization."

This seems to make it quite clear that no change of the fundamental character here involved was in mind.

Section 26 of the Act (Comp. St. § 4381) expressly repeals sections 2165, 2167, 2168,

2173 of title XXX, the subject-matter thereof of being covered by new provisions. The sections of title XXX remaining without repeal are: Section 2166, relating to honorably discharged soldiers; section 2169 (Comp. St. § 4358), now under consideration; section 2170 (section 4360), requiring five years' residence prior to admission; section 2171 (section 4352[11]), forbidding the admission of alien enemies; section 2172 (section 4367), relating to the status of children of naturalized persons; and section 2174 (section 4352[8]), making special provision in respect of the naturalization of seamen.

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[1] *There is nothing in section 2169 which is repugnant to anything in the act of 1906. Both may stand and be given effect. It is clear, therefore, that there is no repeal by implication.

[2, 3] But it is insisted by appellant that section 2169, by its terms is made applicable only to the provisions of title XXX, and that it will not admit of being construed as a restriction upon the act of 1906. Since section 2169, it is in effect argued, declares that "the provisions of this title shall apply to aliens being free white persons, * * *" it should be confined to the classes provided for in the unrepealed sections of that title, leaving the act of 1906 to govern in respect of all other aliens, without any restriction except such as may be imposed by that act itself.

It is contended that, thus construed, the act of 1906 confers the privilege of naturalization without limitation as to race, since the general introductory words of section 4 (Comp. St. § 4352) are:

"That an alien may be admitted to become a citizen of the United States in the following manner, and not otherwise."

But, obviously, this clause does not relate to the subject of eligibility but to the "manner," that is, the procedure, to be followed. Exactly the same words are used to introduce the similar provisions contained in section 2165 of the Revised Statutes. In 1790 the first naturalization act provided that—

"Any alien being a free white person * * * may be admitted to become a citizen. * * *" 1 Stat. 103, c. 3.

This was subsequently enlarged to include aliens of African nativity and persons of African descent. These provisions were restated in the Revised Statutes, so that section 2165 included only the procedural portion, while the substantive parts were carried into a separate section (2169) and the words "An alien" substituted for the words "Any alien."

In all of the naturalization acts from 1790 to 1906 the privilege of naturalization was

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confined to white persons *(with the addition

in 1870 of those of African nativity and descent), although the exact wording of the various statutes was not always the same. If Congress in 1906 desired to alter a rule so well and so long established it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms.

The argument that, because section 2169 is in terms made applicable only to the title in which it is found, it should now be confined to the unrepealed sections of that title, is not convincing. The persons entitled to naturalization under these unrepealed sections include only honorably discharged soldiers and seamen who have served three years on board an American vessel, both of whom were entitled from the beginning to admission on more generous terms than were accorded to other aliens. It is not conceivable that Congress would deliberately have allowed the racial limitation to continue as to soldiers and seamen to whom the statute had accorded an especially favored status, and have removed it as to all other aliens. Such a construction cannot be adopted unless it be unavoidable.

[4] The division of the Revised Statutes into titles and chapters is chiefly a matter of convenience, and reference to a given title or chapter is simply a ready method of identifying the particular provisions which are meant. The provisions of title XXX affected by the limitation of section 2169, originally embraced the whole subject of naturalization of aliens. The generality of the words in section 2165, "An alien may be admitted, * * *" was restricted by section 2169 in common with the other provisions of the title. The words "this title" were used for the purpose of identifying that provision (and others), but it was the provision which was restricted. That provision having been amended and carried into the act of 1906, section 2169 being left intact and un-

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repealed, it will require some*thing more persuasive than a narrowly literal reading of the identifying words "this title" to justify the conclusion that Congress intended the restriction to be no longer applicable to the provision.

[5, 6] It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Heydenfeldt v.*

Daney Gold, etc., Co., 93 U. S. 634, 638, 23 L. Ed. 995. We are asked to conclude that Congress, without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, nevertheless, by failing to alter the identifying words of section 2169, which section we may assume was continued for some serious purpose, has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion. We are, therefore, constrained to hold that the act of 1906 is limited by the provisions of section 2169 of the Revised Statutes.

Second. This brings us to inquire whether, under section 2169, the appellant is eligible to naturalization. The language of the naturalization laws from 1790 to 1870 had been uniformly such as to deny the privilege

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of "naturalization to an alien unless he came within the description "free white person." By section 7 of the act of July 14, 1870 (18 Stat. 254, 256 [Comp. St. § 4358]), the naturalization laws were "extended to aliens of African nativity and to persons of African descent." Section 2169 of the Revised Statutes, as already pointed out, restricts the privilege to the same classes of persons, viz. "to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent." It is true that in the first edition of the Revised Statutes of 1873 the words in brackets, "being free white persons, and to aliens" were omitted, but this was clearly an error of the compilers and was corrected by the subsequent legislation of 1875 (18 Stat. 316, 318). Is appellant, therefore, a "free white person," within the meaning of that phrase as found in the statute?

[7] On behalf of the appellant it is urged that we should give to this phrase the meaning which it had in the minds of its original framers in 1790 and that it was employed by them for the sole purpose of excluding the black or African race and the Indians then inhabiting this country. It may be true that those two races were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be excluded, but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that

the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges. As said by Chief Justice Marshall in *Dartmouth College* *v. Woodward, 4 Wheat. 518, 644 (4 L. Ed. 629), in deciding a question of constitutional construction:

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"It is not enough to say that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception."

If it be assumed that the opinion of the framers was that the only persons who would fall outside the designation "white" were Negroes and Indians, this would go no farther than to demonstrate their lack of sufficient information to enable them to foresee precisely who would be excluded by that term in the subsequent administration of the statute. It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would be Negroes and Indians. It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded,

[8] The question then is: Who are comprehended within the phrase "free white persons"? Undoubtedly the word "free" was originally used in recognition of the fact that slavery then existed and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded.

[9] We have been furnished with elaborate briefs in which the meaning of the words "white person" is discussed *with ability and at length, both from the standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields. It is sufficient to note the fact that these decisions are, in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly the test afforded by the mere color of the skin of each individual is imprac-

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licable, as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. Beginning with the decision of Circuit Judge Sawyer, in *Re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104 (1878), the federal and state courts, in an almost unbroken line, have held that the words "white person" were meant to indicate only a person of what is popularly known as the Caucasian race. Among these decisions, see, for example: *In re Camille* (C. C.) 6 Fed. 256; *In re Saito* (C. C.) 62 Fed. 126; *In re Nian*, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726; *In re Kumagai* (D. C.) 163 Fed. 922; *In re Yamashita*, 30 Wash. 234, 237, 70 Pac. 482, 94 Am. St. Rep. 860; *In re Ellis* (D. C.) 179 Fed. 1002; *In re Mozumdar* (D. C.) 207 Fed. 115, 117; *In re Singh* (D. C.) 257 Fed. 209, 211, 212; and *In re Charr* (D. C.) 273 Fed. 207. With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well established by judicial and executive concurrence and legislative acquiescence that we should not at this late day feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested. *United States v. Midwest Oil Co.*, 236 U. S. 459, 472, 35 Sup. Ct. 309, 59 L. Ed. 673.

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*The determination that the words "white person" are synonymous with the words "a person of the Caucasian race" simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The effect of the conclusion that the words "white person" means a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this court has called, in another connection (*Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616), "the gradual process of judicial inclusion and exclusion."

[10] The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and

state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.

[11] The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. We have no function in the matter other than to ascertain the will of Congress and declare it. Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.

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*The questions submitted are therefore answered as follows:

Question No. 1. The act of June 29, 1906, is not complete in itself, but is limited by section 2169 of the Revised Statutes of the United States.

Question No. 2. No.

Question No. 3. No.

It will be so certified.

(260 U. S. 199)

TAKUJI YAMASHITA et al. v. HINKLE,
Secretary of State of Washington.

(Argued October 3 and 4, 1922. Decided
Nov. 13, 1922.)

No. 177.

1. Aliens ~~61~~—Members of Japanese race not eligible to naturalization.

Persons of the Japanese race born in Japan are not entitled to naturalization, under Rev. St. § 2169 (Comp. St. § 4358).

2. Aliens ~~68~~—Judgment admitting to citizenship persons appearing on face of judgment to be members of Japanese race was void.

Where it appeared upon the face of a judgment admitting persons to citizenship that they were persons of the Japanese race, born in Japan, the court was without jurisdiction, and its judgment was void.

On Writ of Certiorari to the Supreme Court of the State of Washington.

Application by Takuji Yamashita and another for a writ of mandamus, directed to J. Grant Hinkle, as Secretary of State of the State of Washington. The writ was denied by the Supreme Court of Washington, and petitioners bring certiorari. Affirmed.

See, also, 257 U. S. 628, 42 Sup. Ct. 56, 66 L. Ed. 405.

Messrs. Geo. W. Wickersham, of New York City, and Corwin S. Shank, of Seattle, Wash., for petitioners.

Mr. Lindsay L. Thompson, of Olympia, Wash., for respondent.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

This case presents one of the questions involved in the case of Takao Ozawa v. United States, 260 U. S. 178, 43 Sup. Ct. 65, 67 L. Ed. —, this day decided, viz.: Are the petitioners, being persons of the Japanese race born in Japan, entitled to naturalization under section 2169 of the Revised Statutes of the United States?

Certificates of naturalization were issued to both petitioners by a superior court of the state of Washington prior to 1906, when section 2169 (Comp. St. § 4358) is conceded to have been in full force and effect.

The respondent, as Secretary of State of the state of Washington, refused to receive and file articles of incorporation of the Japanese Real Estate Holding Company, executed by petitioners, upon the ground that, being of the Japanese race, they were not at the time of their naturalization and never had been entitled to naturalization under the laws of the United States and were therefore not qualified under the laws of the state of Washington to form the corporation proposed, or to file articles naming them as sole trustees of said corporation. Thereupon petitioners applied to the Supreme Court of the state for a writ of mandamus to compel respondent to receive and file the articles of incorporation, but that court refused and petitioners bring the case here by writ of certiorari.

[1, 2] Upon the authority of Takao Ozawa v. United States, *supra*, we must hold that the petitioners were not eligible to naturalization, and as this ineligibility appeared upon the face of the judgment of the superior court, admitting petitioners to citizenship,

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that court was without *juris dictio* and its judgment was void. In *re* Gee Hop (D. C.) 71 Fed. 274; In *re* Yamashita, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860.

The judgment of the Supreme Court of the state of Washington is therefore
Affirmed.

(260 U. S. 60)

FREUND et al. v. UNITED STATES.

UNITED STATES v. FREUND et al.

(Argued Oct. 5, 6, 1922. Decided Nov. 13, 1922.)

Nos. 29, 37.

1. Post office $\S$ 21(1)—Provision of mail-carrying contract held not to authorize substitution of heavy work of transporting mail between post office and railway station for that specified in contract.

A provision in a mail-carrying contract that the Postmaster General might change the schedule, vary, increase, or decrease the trips,

or extend the trips to new locations, or establish service to and from life offices, stations, etc., provided the substituted service was such that the method of fixing pay under the original contract could be applied to it, held not to authorize the department, because of the refusal of another contractor to furnish certain service, to substitute, for light service on circuits from the post office and back again to take up collections from letter carriers, the heavy work of transporting all the arriving and departing mail of the city between the post office and railway stations; it being impossible to adapt the rate per mile of one route to the other.

2. Post office $\S$ 21(4)—Mail contractors' acceptance of different and more burdensome route held not to bar recovery of reasonable price.

Where bidders on a contract for carrying mails from a new post office, not ready for occupancy until long after the contract date, were led into making the bid and giving a bond by the assurance of the postmaster, to whom they were officially referred, as to the possible date of beginning the contract, and thus became bound to sign the contract before they were advised of the actual date, and though, when the contract was executed, the department intended to force on them a different and more burdensome route, it did not advise them thereof, or give them the exact schedule until shortly before they were to begin performance, their acceptance of the new route by performing the required work thereon held not to bar a recovery for what the services were reasonably worth.

3. Post office $\S$ 21(4)—Mail contractors, compelled to accept different and more burdensome route, held entitled to reasonable value of their services and fair profit.

Mail contractors, who, after bidding on a contract and executing the contract, were compelled to accept a different and more burdensome route, which under the contract the department was not authorized to substitute, were entitled to recover the reasonable value of their services, including a fair profit.

Appeal and Cross-Appeal from the Court of Claims.

Suit by Eugene A. Freund and another against the United States. From a judgment (56 Ct. Cl. 15) allowing the claim in part, claimants appeal, and the United States brings a cross-appeal. Cross-appeal dismissed, judgment reversed, and case remanded, with directions.

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*Mr. Wm. R. Harr, of Washington, D. C., for claimants.

Mr. Alfred A. Wheat, of New York City, for the United States.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a suit against the government to recover \$34,012.90 as the remainder unpaid of an amount earned by 16 months' service

in carrying the mails by wagons in the city of St. Louis. After official advertisement, a bid was made by appellants April 4, 1911, and accepted April 20, 1911, for service on a particular route described by a schedule, for a certain annual gross sum, which being divided by the miles to be covered made a certain rate per mile. A contract was signed May 22d. The contract was for 4 years, beginning July 1, 1911. The route was for seven daily circuit trips from and back to the new St. Louis post office. That office was not ready for occupancy on July 1, 1911, or for 16 months thereafter, and the old post office, which was 13 blocks from the new one, continued to be used. The Post Office Department, relying on certain clauses in the contract, and upon a notice given to bidders, substituted another route and ordered the contractor to begin performance on July 1st, at what the department held to be the same rate per mile of service. The contractors protested, but threatened with suit upon their bond, performed the service and accepted periodical payments on the new route until October 28, 1912, the date of occupying the new post office, when the route bid upon and contracted for was initiated and the contractors did the work under it till the term ended. The cost to the contractors of doing the work on the substitute route was

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\$43,726.89, *and they were paid by the government \$24,289.62. Thus their loss was in round numbers \$19,500 during the 16 months of the substituted route. After October 12, 1912, on the original route the contractors made a profit of 42 per cent. on its cost in what remained of the term.

The contractors' claim was that the substitution of the new route for the one they bid on was not within the terms of the contract, but was unconscionable, and that they were entitled to recover for the work done on the new route on a quantum meruit. The Court of Claims (56 Ct. Cl. 15) held that it was not necessary to determine whether the new route was properly substituted for the old, because the contractors had acquiesced in this view by their performance, but that the government had not, in adapting the mileage rate of the original route under the contract to the new route, done justice to the contractors in the number of miles allowed, and on this basis gave judgment for \$7,346.66. From this the contractors appealed. The government brings a cross-appeal, claiming that, as the contractors accepted full pay under the contract as construed and expressed by the department, they should recover nothing.

It is, of course, wise and necessary that government agents in binding their principal in contracts for construction or service should make provision for alterations in the plans, or changes in the service, within the four corners of the contract, and thus avoid

the presentation of unreasonable claims for extras. This court has recognized that necessity and enforced various provisions to which it has given rise. But sometimes such contract provisions have been interpreted and enforced by executive officials as if they enabled those officers to remold the contract at will. The temptation of the bureau to adopt such clauses arises out of the fact that they avoid the necessity of labor, foresight, and care in definitely drafting the contract, and reserve power in the bureau. This does

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*not make for justice, it promotes the possibility of official favoritism as between contractors, and results in enlarged expenditures, because it increases the prices which contractors, in view of the added risk, incorporate in their bids for government contracts. These considerations, especially the first, have made this court properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application to what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into. These observations are justified and illustrated by decisions of this court in *United States v. Stage Co.*, 199 U. S. 414, 26 Sup. Ct. 69, 50 L. Ed. 251, and *Hunt Ex'rs v. United States*, 257 U. S. 125, 42 Sup. Ct. 5, 66 L. Ed. 163.

[1] The Court of Claims, after giving the two schedules in full, sums up the contrast between them as follows:

"The service bid upon was a circuit service on seven circuits, on a mileage basis, each circuit beginning and ending at the new post office and for which the contractor was paid for every mile traveled regardless of the quantity of mail carried or whether for any part of the distance no mail was carried. The restated service [i. e., on the new route] was a trip service for which payment was made on a mileage basis when mail was carried, but no payment was made for a return trip if mail was not carried, or for distance traveled by empty vehicles in going to a point from which mail was to be moved.

"The service bid upon involved the handling of the mails for a small area and was a comparatively light service. The restated service required the hauling of incoming and outgoing mails for the entire city and involved handling several times the weight of mail. The service bid on required 6 automobiles. The restated service required 18 wagons of different capacity exceeding several times in aggregate capacity that required for the bid on the service. The mileage of each wagon, when carrying

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*mail was allowed and paid for. The larger bulk of mail required proportionately more time in loading and unloading.

"The bid upon service, with the exception of one early trip on each of these circuits, was all to be performed within 12 hours from approximately 8 a. m. to 8 p. m. The restated service required trips during practically every hour of the 24."

By a note in the advertisement, by paragraph 10 in the contract, and by further somewhat more elaborate stipulation in the contract, provision was made for changes. The last contained all that was in the others and was as follows:

"It is hereby stipulated and agreed by said contractors and their sureties that the Postmaster General may change the schedule, vary, increase or decrease the trips on this route, or extend the trips to any new location of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange, with cable or electric cars named in the schedule for service for said route, in said advertisement, establish service to and from *like* offices, stations landings, or points not named therein, and vary, increase, or decrease the trips thereto, and discontinue service between any of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, or between any of them: Provided, that for any increase or decrease in the service authorized by the Second Assistant Postmaster General, the pay of the contractors shall be increased, as the case may be, at the rate per mile of travel agreed to be paid for service under this contract, as shown by the annual rate of compensation and the annual miles of travel, based on the frequency and

distances shown in the schedule of service for said route in said advertisement."

There are two limitations in this very broad provision which deserve notice. One

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is that the offices, stations, *landings, and points, not named in the schedule, to and from which the Postmaster General was permitted to establish service, were to be *like* those named in the schedule, and the other is that the substituted service was to be such that the method of fixing pay in the original contract could be applied to it. Now it is clear to us that the substituted route did not establish a route to like stations and points. The findings give the two schedules and we reproduce them in the margins.¹

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An examination *shows that the one was a light service of circuits from the post office and back again to take up collections from

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*letter carriers. The other was the heavy work of transporting all the arriving and departing mail of the city from the railway stations to the old post office and back again. On the one, the contractors received pay for every mile traveled. On the other, the pay was made dependent on the carriage of mail

¹ Route No. 445004. (Mileage Basis)—Regulation Screen-Wagon Service at St. Louis, Mo.—Mail-Station Service.

From—	By—	To—	Distance.	Number of trips daily except Sunday (306).	Number of trips on Sunday	Total number of trips holidays (7).	Running time.
			Miles.				Min.
Circuit No. 1: Post Office (new site).	Central Station (old post office).	Post office (new site) and 4 stops per trip en route to receive mail collections from letter carriers.	2.00	23	5	5	25
Circuit No. 2: Post Office (new site).	Cupples and Merchants stations.	Post office (new site) and 1 stop per trip en route to receive mail collections from letter carriers.	2.60	9	5	5	30
Circuit No. 3: Post Office (new site).	Progress and Bridge stations.	Post office (new site) and 7 stops per trip en route to receive mail collections from letter carriers.	3.00	9	5	5	30
Circuit No. 4: Post Office (new site).	Cupples and Merchants stations.	Post office (new site) and 6 stops per trip en route to receive mail collections from letter carriers.	2.80	11	0	0	30
Circuit No. 5: Post Office (new site).	Merchants and Central (old post office) stations.	Post office (new site) and 2 stops per trip en route to receive mail collections from letter carriers.	2.80	11	0	0	30
Circuit No. 6: Post Office (new site).	Bridge and Progress stations.	Post office (new site) and 2 stops per trip en route to receive mail collections from letter carriers.	3.00	11	0	0	30
Circuit No. 7: Post Office (new site).	Progress Station.	Post office (new site) and 5 stops per trip en route to receive mail collections from letter carriers.	2.20	11	0	0	30

and no empty trips of going or returning were included in the mileage paid for, although the schedule made many of them necessary. It is impossible, therefore, save by forcing, to adapt the rate per mile of one route to the other. What has been said shows how different was the equipment needed, how variant the tonnage carried, what disparity between the hours of readiness required, and the differing methods of calculating compensation. This substituted route was undoubtedly necessary in the transportation of mails in the city of St. Louis, but it was for a different purpose from that of the original route. The department merely took advantage of general words in the appellants' contract to meet an emergency presented by the delay in finishing the new post office and the refusal of another contractor to continue this indispensable service beyond his term, to thrust this entirely new task upon the appellants here.

It is sought in the argument for the government to distinguish this case from the Stage Company Case and the Hunt Case, on the ground that in them the compensation was for a lump sum, and the new work required was not to be paid for at all, while here the additional or variant work was to be done at a rate of so many cents per mile. We do not think this is a real difference. The radical change made in the character of the work to be done on the substituted route and the wholly inadequate price to be paid for it as found by the Court of Claims make the injustice just as clear as in the cited cases. We hold that the substitution of the new route and schedule for the one bid upon was not within the terms of the contract.

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[2] *But it is said that, in view of the attitude of the government, the conduct of the contractors constituted such an acceptance of the new route as within the original contract as to rebut any implication of a dif-

"Postoffice Department,
"Second Assistant Postmaster General,
"Washington, June 30, 1911.

"Postmaster, St. Louis, Mo.
"Sir: An order has been issued to-day on route No. 445004, screen-wagon service at St. Louis, Mo., re-stating the service from July 1, 1911, making total annual travel 57,679.60 miles and pay \$18,265.61 per annum, being prorata of original contract price.

From—	To—	Length of trip, miles.	No. of trips daily except Sundays and holidays (306).	No. of trips on Sunday (52).	Additional trips a week (52).
GPO	Union Depot	1.18	71	37	4
Union Depot	GPO	1.18	71. Holidays (7).	25	2
GPO	United Rys. of St. Louis (8th and Market)	0.21	32. Holidays (7).	6	.....
United Rys. of St. Louis (8th and Market)	GPO	0.21	29	4	.....
GPO	United Rys. of St. Louis (8th and Locust)	0.09	23. Holidays (7).	.....	.....
United Rys. of St. Louis (8th and Locust)	GPO	0.09	12. Holidays (7).	1	.....
GPO	Cupples Sta.	0.50	8 .....	.....	.....
Cupples Sta.	GPO	0.50	3. Holidays (7).	.....	.....
GPO	Merchants Sta.	0.50	10 .....	.....	.....
Merchants Sta.	GPO	0.50	5. Holidays (7).	.....	.....
GPO via Merchants Sta...	Bridge Sta.	0.76	10 .....	.....	.....
Bridge Sta. via Merchants Sta.	GPO	0.76	5. Holidays (7).	.....	.....
GPO	Bridge Sta.	0.60	9 .....	.....	.....
Bridge Sta.	GPO	0.60	4. Holidays (7).	.....	.....
GPO	Progress	0.70	9 .....	.....	.....
Progress	GPO	0.70	5. Holidays (7).	.....	.....
Progress Sta.	Annex Sta.	0.60	3. Holidays (7).	.....	.....
Merchants Sta. via Bridge Sta.	GPO	0.76	2 .....	.....	.....
18th and Olive (345001)...	Annex Sta.	0.50	2. Holidays (7).	.....	.....
18th and Clark (345001)...	Annex Sta.	0.09	3 .....	.....	.....

Respectfully,

[Signed] Joseph Stewart,
"Second Assistant Postmaster General,"

ferent contract for a reasonable price on the part of the government. Consideration of this argument requires a review of the circumstances. The findings show that the advertisement for bids referred bidders to the city postmaster for any additional information concerning the matter, and that he advised these contractors when they doubted whether they could get their equipment ready by July 1st, that the new post office could not be completed at that time, that the work bid for could not begin then, and that the department would take care of the situation. They, thereupon, made their bid, accompanying it as required with a bond for \$25,000. The bid was accepted by the department with a special notice as to the necessity of being ready with equipment July 1st, and inclosing the contract. The city postmaster being applied to again by the anxious bidders assured them that the matter would be adjusted in due time and urged them to sign the contract. Accordingly, on May 23d, the contractors signed and forwarded the contract to the department, with a request for extension of time. This was denied, and on application to the department June 20th for relief, because of the assurance of the postmaster, they were told that they would be given a substituted route then in the course of preparation. They objected that they could not prepare for this substituted route, which as already said was a mere continuance of old service by another contractor. They were told that they must be ready for the restated route at the time appointed and on June 30th they were furnished with a schedule of the new service. The contractors protested to the Second Assistant Postmaster General, to the postmaster at St. Louis, and to one Porter, a representative of the de-

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partment at *St. Louis, saying that they were not required to perform this service by the terms of the contract, because it was entirely different from that contemplated, and that they would be ruined financially. Porter, whose authority is not otherwise shown, told them that his business was to see that the service commenced on July 1st, and, if they did not begin, the contract would be re-advertised, and they would be sued on their bond. The contractors then hired the equipment and outfit of the old contractor, with the result, already stated, that they lost \$19,500 in 16 months.

We think that there was no acceptance of the new route under the circumstances which would bar a recovery for what the services were reasonably worth. The Hunt Case was not a stronger case than this, and in the Stage Company Case the right to recover for work not properly and legally included in the contract was not even questioned, although in both cases the work demanded was done and periodical payments accepted. It is said on behalf of the government that

those cases are to be distinguished from this because the contractor was in the midst of his work under his contract, and he could not be expected to throw it up, with all the uncertainties and certain losses he would sustain, while here the contractors had not begun work or extended preparation. But, while the cases are different, the difficulties faced by the contractors here were quite as formidable. They had been nursed into making the bid and giving the bond by the assurance as to the possible date of beginning the contract by the postmaster to whom they had been officially referred for information. They thus became bound under their bond to sign and complete the contract before they had been otherwise advised as to the actual date when their service would begin. At the time the contract was executed the department had formed the purpose to thrust on the contractors this burdensome route, but

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it did not advise them of it until 10 days before July 1st, and, indeed, did not give them the exact schedule until the day before they were to begin it. Then the only course open to them was either to engage the old contractor's equipment at a heavy loss, or throw up the original contract and run the risk of the government's reletting at a higher bid, and charging the possible heavy difference in cost to it against them on their bond for a 5-year contract. We cannot ignore the suggestion of duress there was in the situation, or the questionable fairness of the conduct of the government, aside from the illegality of the construction of the contract insisted on, and have no difficulty, therefore, in distinguishing this case from the so-called Railroad Mail Cases (*Eastern R. R. Co. v. United States*, 129 U. S. 391, 9 Sup. Ct. 220, 32 L. Ed. 730; *C. & St. P. Ry. Co. v. United States*, 198 U. S. 385, 25 Sup. Ct. 665, 49 L. Ed. 1094; *Atchison Railway v. United States*, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. Ed. 1236; *N. Y., N. H. & H. R. Co. v. United States*, 251 U. S. 123, 40 Sup. Ct. 67, 64 L. Ed. 182; *N. Y., N. H. & H. R. Co. v. United States*, 258 U. S. 32, 42 Sup. Ct. 209, 66 L. Ed. 448, decided by this court February 27, 1922), which are cited on behalf of the United States.

[3] We think that the contractors are entitled to recover the reasonable value of their services for the 16 months, including a fair profit.

This relieves us of considering the conclusion reached by the Court of Claims.

The judgment is reversed, the cross-appeal of the United States is dismissed, and the case is remanded to the Court of Claims, with directions to find the value of the services rendered by appellants on the substituted or restated route, including a fair profit, and to enter judgment for the balance found due.

(260 U. S. 212)

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. LOUISIANA PUBLIC SERVICE COMMISSION et al.

(Argued Nov. 13, 1922. Decided Nov. 20, 1922.)

No. 650.

1. Appeal and error ⇨488(2)—Supersedeas held not to continue temporary restraining order and ineffective for want of anything to supersede.

Where, pending the hearing of an application to three judges for an interlocutory injunction under Judicial Code, § 266 (Comp. St. § 1243), the District Judge granted a temporary restraining order, and on the hearing the application was denied by the three judges, a supersedeas allowed by the District Judge did not continue the restraining order pending an appeal, and there being no money decree, and an execution for costs being suspended by the appeal, there was nothing to supersede.

2. Courts ⇨101—Single judge cannot continue temporary restraining order pending appeal from denial of interlocutory injunction by three judges.

Under Judicial Code, § 266 (Comp. St. § 1243), requiring applications for interlocutory injunctions restraining the enforcement of state statutes, etc., to be heard by three judges, where the application is denied, a single judge has no power to continue a temporary restraining order pending an appeal, and his order to that effect is void, though it only continues the status quo, the disturbance of which will work irreparable injury, and all parties in interest are secured by a bond.

3. Courts ⇨101—Equity rule held not to authorize single judge to grant injunction pending appeal from its denial by three judges.

Equity rule 74 (33 Sup. Ct. xxxix), authorizing a justice or judge, taking part in a decision granting or dissolving an injunction, to suspend, modify, or restore the injunction pending an appeal, does not apply to an appeal from an order made by three judges, under Judicial Code, § 266 (Comp. St. § 1243), denying an interlocutory injunction restraining the enforcement of a state statute, etc.

4. Courts ⇨101—Expression of opinion, by one of three judges denying injunction, that District Judge had power to grant injunction pending appeal, of no force.

That one of the three judges participating in the denial of an application for an interlocutory injunction under Judicial Code, § 266 (Comp. St. § 1243), expressed the opinion to the District Judge that he had power to grant an injunction pending an appeal, without any attempt to participate in the granting of the injunction, did not validate the order granting the injunction.

5. Courts ⇨101—That judges denying interlocutory injunction discussed question of injunction pending appeal could not authorize single judge to grant it.

Judicial Code, § 266 (Comp. St. § 1243), requiring certain applications for interlocutory

injunctions to be heard by three judges, requires the assent of the three judges to the injunction, given after the application is made and evidenced by their signatures, or an announcement in open court with three judges sitting, followed by a formal order, and the fact that in denying the application they discussed the question of an injunction pending an appeal which had not then been applied for did not authorize a single judge thereafter to grant such injunction.

6. Appeal and error ⇨456—Notice should be given of application for injunction pending appeal.

Except in extraordinary circumstances, notice should be given opposing counsel of an application for an injunction pending appeal from an order denying an interlocutory injunction, under Judicial Code, § 266 (Comp. St. § 1243).

7. Appeal and error ⇨456—Supreme Court will generally refer question of injunction pending appeal to judges making the order appealed from denying an injunction.

The Supreme Court will generally refer applications for injunction pending appeal from the denial of an interlocutory injunction under Judicial Code, § 266 (Comp. St. § 1243), to the court of three judges who heard the application and are familiar with the record.

8. Appeal and error ⇨456—Grant by three judges pending appeal does not revive order of single judge.

The action of the District Court, consisting of the three judges, denying an application under Judicial Code, § 266 (Comp. St. § 1243), for an interlocutory injunction, in granting an injunction pending an appeal, will not revive or vitalize an order previously granted by a single judge.

Appeal from the District Court for the Eastern District of Louisiana.

Suit by the Cumberland Telephone & Telegraph Company against the Louisiana Public Service Commission and others. From an order denying an application for an interlocutory injunction, complainant appeals. On application for mandamus, treated as a motion to set aside supersedeas and injunction. Motion granted, order set aside, and application for injunction referred to the District Court.

See, also, 283 Fed. 215.

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*Mr. J. Blanc Monroe, of New Orleans, La., for appellants.

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*Mr. Huey P. Long, of Shreveport, La., for appellees.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a motion by the appellees to set aside the supersedeas and injunction granted by District Judge Foster at the time he allowed an appeal from an order of three judges, Circuit Judge Bryan, District Judge Clayton, and himself, denying an applica-

tion for an interlocutory injunction under section 266 of the Judicial Code. (Comp. St. § 1243).

The original bill was filed by the Cumberland Telephone & Telegraph Company against the Louisiana Public Service Commission seeking an injunction to prevent the latter, a state board of competent authority, from reducing the existing telephone rates, as it proposed, on the ground that such action would compel the plaintiff to furnish service at rates which would be confiscatory and violate its rights secured by the Fourteenth Amendment. District Judge Foster granted a restraining order as permitted by section 266, to remain in force until the application for an interlocutory injunction could be heard by three judges. The court, thus constituted, heard the application on voluminous evidence, and denied the application, Judge Foster dissenting. Upon the entry of the order, the complainant applied to the District Court for an appeal and for an injunction against the defendant commission, until the determin-

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ation of the cause on appeal. District Judge Foster, sitting alone, made an order in the District Court allowing the appeal, granted a supersedeas, and continued the original restraining order, made by him before the hearing by the three judges, until the appeal could be determined, in order to maintain the status quo. A bond was required in \$100,000, which is conditioned that appellant shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, and also that it shall repay to defendants such damages as they may suffer, and—

"for repayment to plaintiff's subscribers and to each of them of the excess charges collected from each of said subscribers as a result of the issuance and continuance of the preliminary restraining order issued herein, over and above what would have been collected from said subscribers had said restraining order not been rendered, the said payment to be made as, when, and if it shall have been finally determined herein that the order of the Louisiana Public Service Commission of May 13, 1922, is a legal order binding upon the plaintiff herein."

[1] The present motion is to set aside the supersedeas and the restraining order. That was the form of the application in the original proceeding for mandamus, which by order of the court has been treated in argument as a motion on this appeal. So far as the supersedeas to which the motion is directed, is concerned, it had no effect, because there was nothing to supersede, except an execution for costs, and that was suspended by the mere allowance of the appeal. There was no decree for money, there was no decree at all in favor of the complainants upon which execution could issue. Hovey v. McDonald, 109 U. S. 150, 160, 3 Sup. Ct. 136, 27 L. Ed. 888. The supersedeas would

not continue the injunction or maintain the status quo ante of restraint upon the defendant. Slaughter House Cases, 10 Wall. 273, 297, 19 L. Ed. 915; Hovey v. McDonald, supra 109 U. S. 150, 161, 3 Sup. Ct. 136, 27 L. Ed. 888; Leonard v. Ozark Land Co., 115 U. S. 465,

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468, 6 Sup. Ct. 127, 29 L. Ed. 445; Knox v. County v. Harshman, 132 U. S. 14, 16, 10 Sup. Ct. 8, 33 L. Ed. 249; Merrimack River Savings Bank v. Clay Center, 219 U. S. 527, 31 Sup. Ct. 295, 55 L. Ed. 320, Ann. Cas. 1912A, 513. The effective part of the order of Judge Foster, if valid, was the continuance of the restraining order, which is called in the motion and argument the injunction. The motion to set this aside must be granted.

[2] Section 266 of the Judicial Code is a codification of section 17 of the Act of June 18, 1910, c. 309, 36 Stat. 557, amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013. The legislation was enacted for the manifest purpose of taking away the power of a single United States judge, whether District Judge, Circuit Judge, or Circuit Justice holding a District Court of the United States, to issue an interlocutory injunction against the execution of a state statute by a state officer or of an order of an administrative board of the state pursuant to a state statute, on the ground of the federal unconstitutionality of the statute. Pending the application for an interlocutory injunction, a single judge may grant a restraining order to be in force until the hearing of the application, but thereafter, so far as enjoining the state officers, his power is exhausted. The wording of the section leaves no doubt that Congress was by provisions ex industria seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict between federal and state authority always to be deprecated. This court had occasion to consider the purport and significance of section 17 of the Act of June 18, 1910, embodied in section 266, in *Ex parte Metropolitan Water Co. of West Virginia*, 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575, and there held that after a District Judge had granted a

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preliminary *restraining order in such a case as provided, the same judge could not set aside his own order, and such act by him was without jurisdiction. This court, therefore, issued a mandamus directing him to annul the order of vacation. We are of opinion that a single judge has no power, in view of section 266, to affect the operation of the order of the court constituted by the three judges granting or denying the interlocutory injunction applied for. To hold that he may

grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity and work the result which Congress was at great pains to avoid. Arguments to show that the order only continued the status quo, that a disturbance of it will work irreparable injury and that the bond herein required secures all parties in interest are beside the point. This is a question of statutory power and jurisdiction, not one of judicial discretion or equitable consideration.

[3] Equity rule No. 74 (33 Sup. Ct. xxxix) which authorizes a justice or judge who took part in a decision of an equity suit granting or dissolving an injunction to make an order suspending, modifying, or restoring the injunction pending the appeal upon proper terms, does not apply to such an appeal or to such a case as this. This appeal is not from a final decree. It is a special proceeding, in which the power of a single judge is definitely limited.

It is argued that the order of injunction pending the appeal here was the act of the court of three judges. It is certain that Judge Foster was the only judge sitting in the District Court when the ex parte application was made by complainant company for the allowance of the appeal, the granting of the injunction, and the fixing of the amount of the bond. It is certain that these orders were signed only by him, and did not purport to be authorized by three judges. The claim is based on a quotation from remarks made by Judge Foster in overruling the application made to him by the defend-

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ant, the Public *Service Commission, to set aside the injunction. The judge said:

"Now let us go a little further. Here is a question submitted to three judges, let us say. This is not the action of an individual judge. The question of supersedeas was a matter of discussion among the court composed of Judge Bryan, Judge Clayton, and myself, and I showed you, Mr. Long (counsel for the Public Commission), Judge Bryan's letter in which he says that he thought the Cumberland Telephone Company would be entitled to a supersedeas in this case, but that was a matter to be taken up by the District Court, by myself.

"Now, when I granted an appeal with supersedeas, that is the action of the court, it is merely a matter of practice that I signed the order. Now that supersedeas ought always to be granted to prevent irreparable injury."

Clayton took part in the matter. A discussion in conference of the judges as to the granting of an injunction pending an appeal, before it was applied for, does not supply what is needed to give efficacy to such order by a single judge. Compliance with the statute requires the assent of the three judges given after the application is made, evidenced by their signatures or an announcement in open court with three judges sitting, followed by a formal order tested as they direct. Notice of application for the injunction to opposing counsel should be required, except in extraordinary circumstances. We have no proper evidence of the participation of the three judges in the injunc-

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tion here, and therefore grant the *motion to set it aside as void and made without jurisdiction.

[7, 8] The appellees ask that, if we conclude to set aside the injunction, we entertain a motion to grant one now to preserve the status quo. The fact that a majority of the three judges of the District Court denied the interlocutory injunction suggests the want of merit in the application here. We, of course, appreciate that, notwithstanding a denial of an injunction on its merits, a court may properly find that pending a final determination of the suit on the merits in a court of last resort, a balance of convenience may be best secured by maintaining the status quo and securing an equitable adjustment of the finally adjudicated rights of all concerned through the conditions of a bond. *Hovey v. McDonald*, 109 U. S. 150, 161, 3 Sup. Ct. 136, 27 L. Ed. 888; equity rule No. 74. But the court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and therefore is familiar with the record. Records in cases like this are often very voluminous. Such is the record in this case. Without abdicating our unquestioned power to grant such an application as this, and conceding that exceptional cases may arise, we are generally inclined to refer applications of this kind to the court of three judges who have heard the whole matter, have read the record, and can pass on the issue without additional labor. That was the course taken by this court in *Southern Railway Co. v. Watts*, 259 U. S. 576, 42 Sup. Ct. 585, 66 L. Ed. 1071 (No. 927, October Term, 1921, per curiam, decided May 29, 1922). A similar order will be made here. The action of the District Court thus constituted, however, will not revive or vitalize the order of injunction granted by Judge Foster, for that was void, and the parties affected by it must be left to such course as they may be advised. We are not now called upon to construe or determine the validity or effect of the bond taken in that proceeding.

[4-6] This statement does not make the order here in question the act of the three judges. John Bryan's letter, so far as we are able to judge from this reference, was a mere expression of opinion that Judge Foster, as District Judge, had the power to grant the injunction, an opinion with which we do not agree. The letter was not an attempt by Judge Bryan to become a participant in the order. Nor is there any showing that Judge

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*The orders in this court will be two:

First. The motion of appellees is granted and the order of injunction granted by Judge Foster when allowing the appeal is set aside as without jurisdiction.

Second. The application to this court for an injunction maintaining the status quo is referred to the District Court, constituted of three judges, for its determination.

The costs on this motion will be taxed to the appellant.

(260 U. S. 220)

UNITED STATES v. ATKINS et al.

ATKINS et al. v. UNITED STATES et al.

(Argued Oct. 11, 12, 1922. Decided Nov. 20, 1922.)

Nos. 45, 46.

Indians  13—Enrollment is judgment determining existence and right to membership, and can be impeached only under rules applicable to judgments.

The enrollment of one as a member of an Indian tribe by the Dawes Commission to the Five Civilized Tribes, when duly approved, amounts to a judgment in an adversary proceeding determining the existence of the individual and his right to membership, subject to impeachment only under the rules applicable when judgments are involved.

Appeals from United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against Minnie Atkins, now Minnie Folk, and others. A decree in favor of the defendant named and others was affirmed by the Circuit Court of Appeals (268 Fed. 923), and the United States and defendants Nancy Atkins and others separately appeal. Affirmed.

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*Mr. H. L. Underwood, of Washington, D. C., for the United States.

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*Messrs. Joseph M. Hill, of Ft. Smith, Ark., Napoleon B. Maxey and Malcolm E. Rosser, both of Muskogee, Okl., and Henry L. Fitzhugh, of Ft. Smith, Ark., for appellants Atkins and others.

Mr. C. B. Stuart, of Oklahoma City, Okl., for Minnie Atkins and others.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Under authority of Acts of Congress the [Dawes] Commission to the Five Civilized Tribes enrolled Thomas Atkins as a Creek Indian alive on April 1, 1899; the Secretary of the Interior approved; an allotment was selected for him; a patent issued and was

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recorded as required by *law. Minnie Atkins undertook, as his sole heir, to convey the land to certain named defendants. Alleging that

Thomas Atkins never existed and that his enrollment came about through fraud and gross mistake of law and fact, the United States brought this proceeding against many defendants to annul the allotment certificate and patent and to quiet title in the Tribe.

Minnie Atkins maintains that the enrolled Thomas was her son; that he was born prior to April 1, 1899, and died thereafter, leaving her as sole heir. Nancy Atkins claims to be the mother and sole heir. She filed a cross-bill asking that the title to the land be confirmed to her and those claiming through her. Henry Carter asserts that he is the individual enrolled as Thomas Atkins.

The trial court ruled that the enrollment by the Commission amounted to an adjudication that Thomas Atkins was a living person on April 1, 1899, entitled to membership; that this finding was not subject to collateral attack under a mere allegation of his non-existence; and that it could not be annulled for fraud, unless the fraud alleged and proved was such as to have prevented a full hearing within the doctrine approved by *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929, and *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. The relief asked by the United States was accordingly denied. Having considered the voluminous testimony, it found Minnie Atkins to be the mother of Thomas and owner of the land subject to the rights of those claiming under her. The Circuit Court of Appeals affirmed a final decree embodying these conclusions. *Folk v. United States*, 233 Fed. 177, 147 C. C. A. 183; *United States v. Atkins*, 268 Fed. 923.

In *United States v. Wildcat*, 244 U. S. 111, 118, 119, 37 Sup. Ct. 561, 564 (61 L. Ed. 1024), it was insisted that the Indian died prior to April 1, 1899, and that his enrollment as of that date was beyond the jurisdiction of the Dawes Commission and void within the doctrine of *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896. Much consideration was given to the statutes creating and

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defining *the powers of the Commission and the effect of an enrollment. This court said:

"There was thus constituted a quasi judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was established and endowed with au-

thority to hear and determine the matter.

* * *

"When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.

"We cannot agree that the case is within the principles decided in *Scott v. McNeal*, 154 U. S. 34, and kindred cases, in which it has been held that in the absence of a subject-matter of jurisdiction an adjudication that there was such is not conclusive, and that a judgment based upon action without its proper subject being in existence is void. * * * We think the decision of such tribunal, when not impeached for fraud or mistake, conclusive of the question of membership in the tribe, when followed, as was the case here, by the action of the Interior Department confirming the allotment and ordering the patents conveying the lands, which were in fact issued."

It must be accepted now as finally settled that the enrollment of a member of an In-

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dian tribe by the Dawes *Commission, when duly approved, amounts to a judgment in an adversary proceeding determining the existence of the individual and his right to membership subject, of course, to impeachment under the well established rules where such judgments are involved.

The questions of fact relating to the conflicting claims advanced by Minnie Atkins, Nancy Atkins, and Henry Carter have been determined in favor of Minnie by both courts below upon survey of all the evidence; and we find nothing which would justify us in overruling their well considered action.

The decree of the court below is affirmed.

(260 U. S. 226)

KLINE et al. v. BURKE CONST. CO.

(Argued Oct. 19 and 20, 1922. Decided Nov. 20, 1922.)

No. 81.

1. Courts ⇨508(1)—Statute as to injunction against state court proceedings to be read with statute authorizing writs necessary to jurisdiction.

Judicial Code, § 265 (Comp. St. § 1242), providing that the writ of injunction shall not be granted to stay proceedings in any state court except under the Bankruptcy Law (Comp. St. §§ 9585-9656), is to be construed in connection with section 262 (Comp. St. § 1239), authorizing the United States courts to issue all writs not specifically provided for by statute which may be necessary for the exer-

cise of their respective jurisdictions and agreeable to the practices and usages of law.

2. Courts ⇨508(1)—Federal court may enjoin proceeding in state court defeating or impairing jurisdiction of federal court.

Where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court.

3. Courts ⇨493(2)—Action in rem draws possession or control of the res and state court may not exercise jurisdiction over the same res.

Where an action in the federal court is in rem, the effect is to draw to such court the possession or control, actual or potential, of the res, and the exercise by a state court of jurisdiction over the same res necessarily impairs and may defeat the jurisdiction of the federal court.

4. Courts ⇨493(3)—When jurisdiction of state court has attached, federal court may not exercise jurisdiction over the same res.

Where the jurisdiction of a state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction.

5. Courts ⇨493(1)—Action in personam does not preclude action for same cause in another jurisdiction.

Where an action is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded, since a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such liability does not tend to impair or defeat the jurisdiction of the court in which the prior action is pending.

6. Judgment ⇨958(1)—When rendered in one of two actions pending at same time, effect on action still pending to be determined by court in which pending.

When actions in personam are brought in different jurisdictions for the same cause, and the judgment rendered in one of the courts is pleaded in the other, while the action therein is still pending, its effect is to be determined by the application of the principles of res judicata, by the court in which the action is still pending in the orderly exercise of its jurisdiction as it would determine any other question arising in the progress of the case.

7. Abatement and revival ⇨12—Courts ⇨508(1)—Action in federal court in personam does not abate action in state court or authorize injunction.

The pendency in a federal court of an action in personam is not ground for abating a subsequent action in the state court, nor for the issuance of an injunction against its prosecution.

8. Courts ⚡258—Jurisdiction of inferior courts may be granted, withheld, or withdrawn at discretion of Congress.

Const. art. 3, §§ 1 and 2, does not vest in inferior courts jurisdiction over the designated cases and controversies, but limits those questions in respect of which Congress may confer jurisdiction and Congress may give, withhold, or restrict such jurisdiction at its discretion within the constitutional limits and having conferred jurisdiction may take it away in whole or in part.

9. Courts ⚡493(1)—Right to bring action in federal court in case of diverse citizenship not constitutional right.

As the right to maintain an action in the federal court, where there is a controversy between citizens of different states, comes into existence only by virtue of an act of Congress, and may be withdrawn by an act of Congress after its exercise has begun, it cannot be properly described as a constitutional right as affecting concurrent jurisdiction of state courts of actions in personam.

10. Courts ⚡494—Duty of federal court to entertain case and proceed to judgment when diverse citizenship exists.

Where an action involved a controversy between citizens of different states, plaintiff had the undoubted right to invoke the jurisdiction of the federal court, and that court was bound to take the case and proceed to judgment, and could not abdicate its authority or duty in favor of state jurisdiction.

11. Courts ⚡508(1)—Though plaintiff had right to sue in federal court, state court had jurisdiction of suit by defendant against plaintiff and others and could not be enjoined.

While plaintiff had a right to sue in the federal court on a cause of action between citizens of different states, only a question of personal liability being involved, a state court had jurisdiction of a suit by defendants against plaintiff and others and was under the duty of taking the case and proceeding to judgment, and there was no question of judicial supremacy or superiority of individual right authorizing an injunction against the action in the state court.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Burke Construction Company against John P. Kline and others, as the Board of Improvement of Paving Improvement District No. 20, of the City of Texarkana, Ark. A decree denying an injunction was reversed by the Circuit Court of Appeals (271 Fed. 605), and defendants bring certiorari. Reversed and remanded.

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*Messrs. Wm. H. Arnold and F. S. Quinn, both of Texarkana, Ark., for petitioners.

Mr. James B. McDonough, of Fort Smith, Ark., for respondent.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The Burke Construction Company, a corporation organized under the laws of the state of Missouri, brought an action at law against petitioners in the United States District Court for the Western District of Arkansas on February 16, 1920. The jurisdiction of that court was invoked upon the ground of diversity of citizenship, the petitioners being citizens of the state of Arkansas. The action was for breach of a contract between the parties, whereby the Construction Company had engaged to pave certain streets in the town of Texarkana. A trial was had before the court and a jury which resulted in a disagreement.

Subsequent to the commencement of the action by the Construction Company, viz., on March 19, 1920, petitioners instituted a suit in equity against that company in a state chancery court of the state of Arkansas, upon the same contract, joining as defendants the sureties on the bond which had been given for the faithful performance of the contract. The bill in the latter suit alleged that the Construction Company had abandoned its contract and judgment was sought against the sureties as well as against the company. The bill asked an accounting with reference to the work which had been done and which remained to be done under the contract, and prayed judgment in the sum of \$88,000.

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*In the action brought by the Construction Company the petitioners filed an answer and cross-complaint, setting up, in substance, the same matters which were set forth in their bill in the state court. In the equity suit the Construction Company filed an answer and cross-complaint, setting up the matters charged in its complaint in the action at law. Thus the two cases presented substantially the same issues, the only differences being those resulting from the addition of the sureties as parties defendant in the equity suit. Both actions were in personam, the ultimate relief sought in each case being for a money judgment only.

The equity suit was removed to the United States District Court upon the petition of the Construction Company upon the ground that the company and the petitioners were citizens of different states and that the controversy between them was a separable controversy, and upon the further ground that a federal question was involved. Petitioners moved to remand. The District Court sustained the motion and the equity suit was thereupon remanded to the State Chancery Court, where it is still pending.

After the mistrial of the action at law in the United States District Court, the Construction Company filed a bill of complaint as a dependent bill to its action at law, by

which it sought to enjoin the petitioners from further prosecuting the suit in equity in the State Chancery Court. The United States District Court denied the injunction and an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. That court reversed the decision of the District Court and remanded the case with instructions to issue an injunction against the prosecution of the suit in equity in the State Chancery Court. From that decree the case comes here upon writ of certiorari.

[1-4] Section 265 of the Judicial Code (Comp. St. § 1242) provides:

"The writ of injunction shall not be granted

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by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

But this section is to be construed in connection with section 262 (Comp. St. § 1239) which authorizes the United States courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." See *Julian v. Central Trust Co.*, 193 U. S. 93, 112, 34 Sup. Ct. 399, 48 L. Ed. 629; *Lanning v. Osborne* (C. C.) 79 Fed. 657, 662. It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is in rem the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction.

This court in *Covell v. Heyman*, 111 U. S. 176, 182, 4 Sup. Ct. 355, 358 (28 L. Ed. 390), said:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the

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same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no com-

mon superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

And the same rule applies where a person is in custody under the authority of the court of another jurisdiction. *Ponzi v. Fessenden*, 258 U. S. 254, 42 Sup. Ct. 309, 66 L. Ed. 607, decided March 27, 1922.

[5, 6] But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983; *Gordon v. Gilfoil*, 99 U. S. 168, 178, 25 L. Ed. 383; *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 339, 27 Sup. Ct. 529, 51 L. Ed.

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821; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588, 592, 24 L. Ed. 737; *Merritt v. American Steel Barge Co.*, 79 Fed. 228, 24 C. C. A. 530; *Ball v. Tompkins* (C. C.) 41 Fed. 486; *Holmes County v. Burton Construction Co.* (C. C. A.) 272 Fed. 565, 567; *Standley v. Roberts*, 59 Fed. 836, 844, 845, 8 C. C. A. 305; *Green v. Underwood*, 86 Fed. 427, 429, 30 C. C. A. 162; *Ogden City v. Weaver*, 108 Fed. 564, 568, 47 C. C. A. 485; *Zimmerman v. So Relle*, 80 Fed. 417, 419, 420, 25 C. C. A. 518; *Baltimore & Ohio R. Co. v. Wabash Railroad Co.*, 119 Fed. 678, 680, 57 C. C. A. 322; *Guardian Trust Co. v. Kansas City Southern Railway Co.*, 146 Fed. 337, 340, 76 C. C. A. 615; *Guardian Trust Co. v. Kansas City Southern Railway Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620; *Woren v. Witherbee, Sherman & Co.* (D. C.) 240 Fed. 1013; *W. E. Stewart Land Co. v. Arthur* (C. C. A.) 267 Fed. 184.

In *Baltimore & Ohio Railroad Co. v. Wa-*

hash Railroad Co., *supra*, the Circuit Court of Appeals for the Seventh Circuit said:

"It is settled that, when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted. * * * The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.' *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390. The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. *Farmers' Loan & Trust Co. v. Lake Street El. R. Co.*, *supra*; *Merritt v. Steel Barge Co.*, 24 C. C. A. 530, 79 Fed. 228, 49 U. S. App. 85. The rule is limited to

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*actions which deal either actually or potentially with specific property or objects. Where a suit is strictly in personam, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law. *Stanton v. Embrey*, 93 U. S. 548."

In *Stewart Land Co. v. Arthur*, *supra*, where the plaintiff sued the defendant upon two checks and a promissory note in the United States District Court, and subsequently brought an action against him upon the same instruments in a state court and an injunction was sought against the latter action, the Circuit Court of Appeals for the Eighth Circuit disposed of the matter as follows:

"In the Iowa case there was no custody of property which might lawfully be protected by the injunctive process. It was purely in personam. The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course."

[7] Prior to the decision in the instant case, as an examination of the foregoing authorities, and others which might be added, will show, the rule was firmly established that the pendency in a federal court of an action in personam was neither ground for abating a subsequent action in a state court nor

for the issuance of an injunction against its prosecution. In the case now under consideration, however, the court below held

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otherwise, upon the ground *that:

"By the Constitution of the United States, article III, section 2, and the acts of Congress, 1 U. S. Comp. Stat. 1916, section 991, the constitutional right was granted to the Burke Company to ask and to have a trial and adjudication by the federal court."

It is said further that if the second suit may be prosecuted so as to secure an adjudication in a state court before the action of the federal court can be adjudicated, then the federal court's adjudication would be made futile because before it is rendered the controversy will have become *res adjudicata* by the adjudication of the state court. Such a result, it is urged, cannot be allowed because the Construction Company brought its action in the federal court in pursuance "of a grant of this right in the Constitution and the acts of Congress" and it may not be deprived of that constitutional right by a subsequent suit in a state court.

The force of the cases above cited is sought to be broken by the suggestion that in none of them was this question of constitutional right presented or considered.

[8-11] The right of a litigant to maintain an action in a federal court on the ground that there is a controversy between citizens of different states is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right granted by the Constitution. The applicable provisions, so far as necessary to be quoted here, are contained in article III. Section 1 of that article provides:

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

By section 2 of the same article it is provided that the judicial power shall extend to certain designated cases and controversies and, among them, "to controversies * * * between citizens of different states. * * * " The effect of these provisions is not to vest jurisdiction in the inferior courts over the

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designated *cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner v. Bank of North America*, 4 Dall. 8, 10, 1 L. Ed. 718; *United States v. Hudson & Goodwin*, 7

Cranch, 32, 3 L. Ed. 259; Sheldon v. Sill, 8 How. 441, 448, 12 L. Ed. 1147; Stevenson v. Fain, 195 U. S. 165.¹ The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. The Mayor v. Cooper, 6 Wall. 247, 252, 18 L. Ed. 851. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. Assessors v. Osbornes, 9 Wall. 567, 575, 19 L. Ed. 748. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right. The Construction Company, however, had the undoubted right under the statute to invoke the jurisdiction of the federal court and that court was bound to take the case and proceed to judgment. It could not abdicate its authority or duty in favor of the state jurisdiction. Chicot County v. Sherwood, 148 U. S. 529, 533, 13 Sup. Ct. 695, 37 L. Ed. 546; McClellan v. Carland, 217 U. S. 268, 282, 30 Sup. Ct. 501, 54 L. Ed. 762. But, while this is true, it is likewise true that the state court had jurisdiction of the suit instituted by petitioners. Indeed, since the case presented by that suit was such as to preclude its removal to the federal jurisdiction, the state jurisdiction in that particular suit was exclusive. It was,

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therefore, equally *the duty of the state court to take the case and proceed to judgment. There can be no question of judicial supremacy, or of superiority of individual right. The well-established rule, to which we have referred, that where the action is one in rem that court—whether state or federal—which first acquires jurisdiction draws to itself the exclusive authority to control and dispose of the res, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank. See Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 305, 5 Sup. Ct. 135, 28 L. Ed. 729. The rank and authority of the courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.

The decree of the Circuit Court of Appeals is therefore reversed and the case remanded to the District Court for further proceedings in conformity with this opinion.

(260 U. S. 245)

HEISLER v. THOMAS COLLIERY CO. et al.

(Argued Nov. 14 and 15, 1922. Decided Nov. 27, 1922.)

No. 541.

1. Constitutional law ⇨211 — Classification permissible for purposes of legislation.

Classification for purposes of legislation is permissible so long as there is no clear and hostile discrimination against particular persons and classes; discrimination alone not being prohibited.

2. Constitutional law ⇨229(f)—Statute taxing anthracite, and not bituminous, coal makes valid classification.

Though anthracite and bituminous coal are both fuels and sold in competition with each other, there are great and important differences between them affording a just basis for their different classification for purposes of taxation, and the distinction made by Act Pa. June 27, 1913 (P. L. 639), taxing anthracite, but not bituminous, coal when ready for the market, is not unreasonable or arbitrary so as to violate Const. U. S. Amend. 14.

3. Commerce ⇨72—Whether tax is regulation of interstate commerce not controlled by what Governor said about its effect.

In determining whether a state tax on anthracite coal is a regulation of interstate commerce, a declaration of the Governor of the state concerning its effect on consumers in other states is not material or pertinent, as the question whether a statute or action of a state impinges upon interstate commerce depends upon the statute or action, and not upon what is said about it or the motive which impelled it.

4. Commerce ⇨72—That state has monopoly of articles sought to be taxed immaterial.

A tax upon articles in one state destined for use in another state cannot be called a regulation of interstate commerce, whether imposed in the certainty of a return from a monopoly existing, or in the doubt and chances because of competition, and hence it is immaterial that the state has a monopoly of the article taxed.

5. Commerce ⇨16—Articles not subjects of commerce because destined to have a market in another state.

Though the products of a state have, or are destined to have, a market in other states, they are not subjects of interstate commerce until they commence their final movement for transportation from the state of their origin to that of their destination.

6. Commerce ⇨72 — Act taxing coal when ready for market not violative of commerce clause.

Act Pa. May 11, 1921 (P. L. 479), taxing anthracite coal, is not rendered violative of the

commerce clause because the tax is imposed when the coal is ready for shipment or market.

In Error to the Supreme Court of the State of Pennsylvania.

Suit by Roland C. Heisler against the Thomas Colliery Company and others. A decree dismissing the bill was affirmed by the Supreme Court of Pennsylvania (274 Pa. 448, 118 Atl. 394), and complainant brings error. Affirmed.

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*Messrs. Louis Marshall, of New York City, and H. S. Drinker, Jr., of Philadelphia, Pa., for plaintiff in error.

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*Mr. George E. Alter, of Pittsburgh, Pa., for defendants in error.

Mr. J. Weston Allen, of Boston, Mass., on behalf of nine States, *amicus curiæ*.

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*Mr. Justice McKENNA delivered the opinion of the Court.

In 1913 the commonwealth of Pennsylvania, by an act of its General Assembly (Act June 27, 1913 [P. L. 639]), imposed a tax of 2½ per cent. upon anthracite coal, and provided for the distribution of the tax.

The act was adjudged a violation of the Constitution of the commonwealth, which required uniformity of taxation. *Commonwealth v. Alden Coal Co.*, 251 Pa. 134, 96 Atl. 246, L. R. A. 1916F, 154, and *Commonwealth v. St. Clair*, 251 Pa. 159, 96 Atl. 254.

In 1921 the commonwealth passed the act here involved (Act May 11, 1921 [P. L. 479]). It provided that from and after its passage each ton of anthracite coal mined, "washed or screened, or otherwise prepared for market" in the commonwealth should be "subject to a tax of 1½ per cent. of the value thereof when prepared for market." It was provided that the tax should be assessed at the time when the coal has been subjected to the indicated preparation "and is ready for shipment or market."

Plaintiff in error, alleging himself to be a stockholder of the Thomas Colliery Company, brought this suit to have the act adjudged and decreed to be unconstitutional and void, and to enjoin that company and its directors from complying with the act, and to enjoin defendant in error, Samuel L. Lewis, Auditor General of the Commonwealth, and the defendant in error, Charles A. Snyder, Treasurer of the Commonwealth, from enforcing the act.

The trial court, court of common pleas, decided against the relief prayed, distinguishing the case from those in which the act of 1913 was declared void, and adjudged and decreed that the suit be dismissed. The ruling was affirmed.

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*by the Supreme Court of the state. The case is here on writ of error to that action.

The bill in the case, as far as we are concerned with it, assails the act of 1921 as of-

fensive to the Fourteenth Amendment of the Constitution of the United States, in that it denies to the Thomas Colliery Company, and other owners and operators of anthracite mines, the equal protection of the laws because it taxes such owners and anthracite coal, and does not tax the owners of bituminous mines and bituminous coal. The ultimate foundation of the contention is that anthracite coal and bituminous coal are fuels, and necessarily, therefore, must be associated in the same class for taxation, in disregard or in diminution of whatever other differences may exist between them in composition, qualities or uses, and that not to so associate them is arbitrary and unreasonable, having the consequences of inequality and illegality, and, therefore, within the ban of the Constitution of the United States.

The contention, therefore, concentrates attention upon the consideration of what resemblances or differences in objects justify their inclusion in, or their exclusion from, a particular class.

It would be commonplace and wearisome to enlarge much upon the principle that presides in and determines the classification of objects. It is too necessary and too familiar in the affairs of life. We cannot go far in thought or practice without its exercise. It is the process of considering objects together or in separation as determined by their properties or some of them, and the purpose we have in hand. If the properties and purpose have relation, the process is logically justified.

Illustrations readily occur. A farmer will classify plants differently from a botanist, but the classification of both may, notwithstanding the difference, be logically proper.

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[1] *And so classification has uses in government—indeed, we may say, necessities in government, for government as well as persons has purposes, varied and, at times, exigent, and its legislation must be accommodated to them, either in convenience or necessity. That government has the power to do so we have often pronounced, not, however, omitting to recognize the restraints upon the power while expressing its range and adaptation. In its exercise in taxation, we have said, it is competent for a state to exempt certain kinds of property and tax others, the restraints upon it only being against "clear and hostile discriminations against particular persons and classes." Discriminations merely are not inhibited, for, it was recognized, that there are "discriminations which the best interests of society require." *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. Ed. 892.

The principle of that case, and its concession to the power of a state, has received expression and illustration in cases which concerned the exercise of the power in the classification of objects for taxing purposes. In

Watson v. State Comptroller, 254 U. S. 122, 41 Sup. Ct. 43, 65 L. Ed. 170, it is said:

"Any classification is permissible which has a reasonable relation to some permitted end of governmental action. * * * It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.'"

In other cases it is said that facts which can be reasonably conceived of as having existed when the law was enacted will be assumed to justify it. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160, *Crescent Oil Co. v. Mississippi*, 257 U. S. 129, 137, 42 Sup. Ct. 42, 66 L. Ed. 166.

And "it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Rast v. Van Deman & Lewis*, 240 U. S. 342, 357, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455, and cases there cited.

And, further, the purpose of the legislation

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may not be the correction of some definite evil, but may be only to remove "obstacles to a greater public welfare." See, also, as to classification by legislation and its consonance to the requirements of the Fourteenth Amendment, *District of Columbia v. Brooke*, 214 U. S. 138, 150, 29 Sup. Ct. 560, 53 L. Ed. 941.

[2] Is there a guide in these cases to decision, or is it to be found in the cases cited by the plaintiff in error which express the admonition and restraint that a classification to be justified must not be unreasonable or arbitrary? To answer, a comparison of the coals becomes necessary. In making it, the first fact we encounter is a difference in their names, and as names of things are considered significant of their attributes, the names, it may be assumed, announce a difference in attributes, and as dependent upon it, a difference in uses. Resemblances, however, are alleged in the bill and not denied in the answer, which, it is alleged, essentially assimilate the coals and make arbitrary the selection of one for taxation and not the other.

The detail is interesting. It includes the description of the processes of nature in the formation of the coals, their particular properties, composition and appearances, and the localities of their production. Anthracite coal, it is said, is found only in 9 counties out of 67 in the state of Pennsylvania; bituminous coal in 24 counties. Both are sold, is the allegation, to places outside of the state and in competition for fuel purposes, and that the anthracite in certain sizes, termed steam sizes, competes with bituminous coal, and certain subgrades (intermediate grades) of the latter with certain subgrades of anthracite.

But we need not dwell further on these

considerations. The fact of competition may be accepted. Both coals, being compositions of carbon, are, of course, capable of combustion and may be used as fuels, but under different conditions and manifestations, and the

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difference determines a choice between them even as fuels. By disregarding that difference and the greater ones which exist, and by dwelling on competition alone, it is easy to erect an argument of strength against the taxation of one and not of the other. But this may not be done. The differences between them are a just basis for their different classification; and the differences are great and important. They differ even as fuels; they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel; bituminous coal has other uses. Products of utility are obtained from it. The fact is not denied and the products are enumerated, and the extent of their use.¹ They are, therefore, incentives to industries that the state in natural policy might well hesitate to obstruct or burden, and to yield to the policy or consider it is well within the concession of the power of the state expressed in the cases we have cited. The distinction in the treatment of the respective coals being within the power conceded by the cases to the state, it has logical and legal justification and is, necessarily, not unreasonable or arbitrary. We concur, therefore, in the decision of the Supreme Court of the state sustaining the act of 1921.

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*Anthracite coal, as we have observed, is asserted to be found in only nine counties in the state, and practically nowhere else in the United States. The fact, it is further said, gives the state a monopoly of it, and that a tax upon it is levying a tribute upon the consumption of other states, and nine of them have appeared by their Attorneys General to assail it as illegal and denounce it as an attempt to regulate interstate commerce. In emphasis of the contention, the Governor of the state is quoted as urging the tax because of that effect. The fact, tribute upon the consumers of the coal in other states, is pronounced inevitable, as, it is the assertion,

¹ The differences of the coals and their respective uses were found by the court of common pleas and the Supreme Court. One of the findings is as follows: "We find that anthracite coal differs from bituminous coal in its physical properties, namely, the amount of fixed carbon, the amount of volatile matter, color, luster, and structural character. The percentage of fixed carbon in anthracite is much higher and the percentage of volatile matter much lower than in bituminous coal. Anthracite coal is hard, compact, and comparatively clean and free from dust, while bituminous coal is softer, dusty and dirty." The court also observed that it was persuasive of the difference between the coals that the Congress of the United States and the Canadian Parliament in levying import taxes put the coals in different classes, and that the railroads of Pennsylvania so separated them, and that, therefore, quoting another, the classification was "one which actually exists in the business world."

80 per cent. of the total production is shipped to other states, and that this constitutes its "major 'market.'" And the dependency upon Pennsylvania is represented as impossible of evasion or relief. Anthracite coal, is the assertion, has become a prime necessity of those states, "particularly for domestic purposes" and even "municipal laws and ordinances have been passed forbidding the use of other coal for heating purposes."

The representation is graphic, but the first impression it makes is that it is in contradiction of the contention of the plaintiff in error that the tax discriminates against anthracite coal, for certainly there cannot be that complete competition and identity of use as a fuel between that coal and bituminous coal when there is such a difference between them as fuels that the use of one is enjoined by law and the other, in effect, prohibited.

This, however, only in passing. We will consider the contentions of the Attorneys General, independently of the contentions of plaintiff in error and assume that the antagonism, if existing, between the contentions, may in some way, not now appearing, have reconciliation.

[3, 4] The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the state of its effect upon con-

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*sumers in other states. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it, and a tax upon articles in one state that are destined for use in another state cannot be called a regulation of interstate commerce whether imposed in the certainty of a return from a monopoly existing, or in the doubt and chances because of competition. The action of the state as a regulation of interstate commerce does not depend upon the degree of interference; it is illegal in any degree.

[5] We may, therefore, disregard the adventitious considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the products of a state that have, or are destined to have, a market in other states are subjects of interstate commerce, though they have not moved from the place of their production or preparation.

The reach and consequences of the contention repels its acceptance. If the possibility, or indeed certainty, of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or pro-

duction, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their produc-

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tion or *growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet "on the hoof," wool yet unshorn, and coal yet unmined because they are in varying percentages destined for and surely to be exported to states other than those of their production.

However, we need not proceed further in speculation and argument. Ingenuity and imagination have been exercised heretofore upon a like contention. There is temptation to it in the relation of the states to the federal government, being yet superior to the states in instances or rather, having spheres of action exclusive of them. The instances cannot in all cases be precisely defined. And the uncertainty attracts disputes, and is availed of to assert or suppose collisions which, in fact, do not exist. There is illustration in the cases. In *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, the precise contention here made was passed upon and rejected. It involved the taxing power of a state, and the property subject to it (timber cut in its forests) was intended for exportation and had progressed nearer to exportation than the coal in the present case.

The question in the case was said to be:

"Whether the products of a state (in this case timber cut in its forests) are liable to be taxed like other property within the state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another state."

And again:

"Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation."

In answer to the questions, the point of time when goods cease to be under power of the state and come under the protection of the Constitution was considered. To express it as the court did:

"There must be a point of time when they [goods] cease to be governed exclusively by

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the domestic law and *begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination."

And again:

"Nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state."

Until then, it was said, they were a part of the general mass of property of the state, and subject to its jurisdiction.

Other cases have decided the same and afford illustrations of it. *Cornell v. Coyne*, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. Ed. 504; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 33 Sup. Ct. 712, 57 L. Ed. 1015; *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615; *General Oil Co. v. Crain*,

209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975.

[6] The effect of these cases is attempted to be evaded by the assertion that the statute in imposing the tax when the coal "is ready for shipment or market" is a plain and intentional fraud upon the commerce clause. We cannot accept the accusation as justified, or that the situation of the coal can be changed by it and as moving in interstate commerce when it is plainly not so moving. The coal, therefore, is too definitely situated to be misunderstood and the cases cited to establish a different character and subjection need not be reviewed.

Decree affirmed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1922

(260 U. S. 696)

No. 41. The PEOPLE OF the STATE OF NEW YORK ex rel. PIERCE-ARROW MOTOR CAR COMPANY, plaintiff in error, v. Walter H. KNAPP et al., etc. Oct. 16, 1922. In error to the Supreme Court of the State of New York. For opinion below, see 229 N. Y. 629, 129 N. E. 935, which affirms order, 191 App. Div. 255, 181 N. Y. Supp. 456. Messrs. Joseph G. Dudley and Ansley W. Sawyer, both of Buffalo, N. Y., and Charles P. Spooner, of New York City, for plaintiff in error. Mr. Charles D. Newton and C. T. Dawes, of Albany, N. Y., for defendants in error.

PER CURIAM. Affirmed upon the authority of *Kansas City, etc., R. R. Co. v. Stiles*, 242 U. S. 11, 118, 37 Sup. Ct. 58, 61 L. Ed. 176; *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 157, 38 Sup. Ct. 295, 62 L. Ed. 632; *Northwestern Life Ins. Co. v. Wisconsin*, 247 U. S. 132, 139, 38 Sup. Ct. 444, 62 L. Ed. 1025.

(260 U. S. 697)

No. 48. Ira B. MILLS et al., appellants, v. NORTHERN PACIFIC RAILWAY COMPANY et al.;

No. 49. RAILROAD & WAREHOUSE COMMISSION OF MINNESOTA et al., appellants, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; and

No. 50. RAILROAD & WAREHOUSE COMMISSION OF MINNESOTA et al., appellants, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY. Oct. 16, 1922. Appeals from the District Court of the United States for the District of Minnesota. See, also, 43 Sup. Ct. 14. Mr. Clifford L. Hilton, Atty. Gen., and Henry C. Flannery, Asst. Atty. Gen., for appellants. Messrs. Charles W. Bunn, Dennis F. Lyons and Benjamin W. Scandrett,

all of St. Paul, Minn., for appellees Northern Pac. R. Co. and others. Messrs. Richard L. Kennedy, of St. Paul, Minn., and R. N. Van Doren, of Milwaukee, Wis. (James B. Sheean and F. W. Sargent, both of Chicago, Ill., of counsel), for appellees Chicago, St. P., M. & O. R. Co. and another.

PER CURIAM. Affirmed upon the authority of *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co.*, 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371.

(260 U. S. 697)

No. 55. Sarah F. DONLEY, plaintiff in error, v. Erwin Ray VAN HORN; and

No. 56. Sarah F. DONLEY, plaintiff in error, v. Prescott WEST. Oct. 16, 1922. In error to the District Court of Appeals, Second Appellate District, of the State of California. For opinions below, see 193 Pac. 514, 519, which reversed 189 Pac. 1052, on rehearing. Mr. A. Haines, of San Diego, Cal., for plaintiffs in error. Messrs. Charles R. Pierce and John M. Sutton, both of Washington, D. C., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Schlosser v. Hemphill*, 198 U. S. 173, 175, 25 Sup. Ct. 654, 49 L. Ed. 1000; *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, 226 U. S. 99, 101, 33 Sup. Ct. 78, 57 L. Ed. 138; *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 418, 35 Sup. Ct. 625, 59 L. Ed. 1027; *Bruce v. Tobin*, 245 U. S. 18, 19, 38 Sup. Ct. 7, 62 L. Ed. 123.

(260 U. S. 754)

No. 65. Robert J. GAFFNEY et al., appellants, v. James M. HOYT et al. Oct. 16, 1922. Appeal from the District Court of the United States for the Northern District of Illinois.

Mr. L. A. Stebbins, of Chicago, Ill. (E. L. Garey, of Chicago, Ill., of counsel), for appellees Hoyt and Little. Mr. Edward Everett, of Chicago, Ill., for appellee Andrews & Co. Dismissed with costs, pursuant to the 16th rule.

(260 U. S. 697)

No. 76. The UNITED STATES of America, petitioner, v. Wesley L. SISCHO. Oct. 16, 1922. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 270 Fed. 958. Rehearing granted, 260 U. S. 701, 43 Sup. Ct. 93, 67 L. Ed. —. James M. Beck, Sol. Gen., and William C. Herron, both of Washington, D. C., for the United States. Mr. Cletus Keating, of New York City, for John Reed, amicus curiæ. Judgment affirmed with costs by an equally divided court.

(260 U. S. 753)

No. 286. STATE OF LOUISIANA et al., appellants, v. J. D. O'KEEFE, Receiver of the New Orleans Railway & Light Company, et al. Oct. 16, 1922. Appeal from the District Court of the United States for the Eastern District of Louisiana. Mr. Paul A. Sompayrac, of New Orleans, La., for appellants. Dismissed with costs, on motion of counsel for the appellants.

(260 U. S. 725)

No. 319. Henry P. REED et al., plaintiffs in error, v. VILLAGE OF HIBBING et al. Oct. 16, 1922. For opinion below, see 150 Minn. 130, 184 N. W. 842. Mr. H. V. Mercer, of Minneapolis, Minn., for plaintiffs in error. Petition for a writ of certiorari herein denied.

(260 U. S. 725)

No. 449. Charles G. BINDERUP, petitioner, v. PATHÉ EXCHANGE (Inc.), et al. Oct. 16, 1922. For opinion below, see 280 Fed. 301. Messrs. C. P. Anderberg, of Minden, Neb., and Norris Brown, Irving F. Baxter and Dana B. Van Dusen, all of Omaha, Neb., for petitioner. Mr. William Marston Seabury, of New York City (Mr. Charles B. Samuels, of New York City, of counsel for Pathé Exchange, Inc. Mr. Elek John Ludvig, of New York City, of counsel for Famous Players Lasky Corporation. Mr. S. F. Jacobs, of New York City, of counsel for First National Exhibitors Circuit, Inc. Mr. Saul E. Rogers, of New York City, of counsel for Fox Film Corporation. Mr. William Marston Seabury, of New York City, of counsel for Vitagraph, Inc. Mr. Karl W. Kirchwey, of New York City, of counsel for Select Pictures Corporation. Mr. Gabriel Hess, of New York City, of counsel for Goldwyn Pictures Corporation. Mr. Siegfried F. Hartman, of New York City, of counsel for Universal Film Mfg. Co. Mr. Oscar M. Bate, of New York City, of counsel for W. W. Hodkinson Corporation. Mr. J. Robert Rubin, of New York City, of counsel for Metro Pictures Corporation. Mr. John J. Sullivan, of Omaha, Neb., of counsel for the individual respondents. Mr. Arthur F. Mullen, of Omaha, Neb., of counsel for A. H. Blank. Mr. Eugene N. Blazer, of Omaha, Neb., of counsel for Omaha Film Board of Trade), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 712)

No. 454. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, petitioner, v. HURNI PACKING COMPANY. Oct. 16, 1922. For opinion below, see 230 Fed. 18. Mr. F. L. Allen, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(260 U. S. 725)

No. 455. Guiseppe MORETTI, petitioner, v. John WILEY, Marble City Quarry Company, et al. Oct. 16, 1922. For opinion below, see 279 Fed. 558. Mr. Malcolm S. McN. Watts, of New York City, Mr. Allan S. Lacke, of New York City, of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 712)

No. 457. The UNITED STATES of America, petitioner, v. Frederick L. MERRIAM. Oct. 16, 1922. For opinion below, see 282 Fed. 851. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(260 U. S. 713)

No. 458. The UNITED STATES of America, petitioner, v. Henry B. ANDERSON. Oct. 16, 1922. For opinion below, see 282 Fed. 851. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(260 U. S. 725)

No. 460. The SHENANGO FURNACE COMPANY et al., petitioners, v. The VILLAGE OF BUHL et al. Oct. 16, 1922. For opinion below, see 280 Fed. 798. Messrs. Alfred Jaques, Dist. Atty. and W. D. Bailey, both of Duluth, Minn., for petitioners. Messrs. Warner E. Whipple and William E. Culkin, both of Duluth, Minn., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 713)

No. 462. James C. DAVIS, Director General of Railroads, etc., petitioner, v. George WECHSLER. Oct. 16, 1922. For opinion below, see 239 S. W. 554. Messrs. H. M. Langworthy, O. H. Dean and Roy B. Thomson, all of Kansas City, Mo., for petitioner. Messrs. Wm. S. Hogsett and M. T. Prewitt, both of Kansas City, Mo., for respondent. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri granted.

(260 U. S. 726)

No. 465. MOBILE SHIPBUILDING COMPANY, petitioner, v. FEDERAL BRIDGE & STRUCTURAL COMPANY. Oct. 16, 1922. For opinion below, see 280 Fed. 292. Messrs. Amos C. Miller, of Chicago, Ill., and William E. Black, of Milwaukee, Wis., for respondent. Mr. James M. Beck, Sol. Gen., of Washington, D. C. (Messrs. Elmer Schlesinger, of Washington, D. C., Chauncey G. Parker, of Newark, N. J., and Henry M. Ward, of New York City,

of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 726)

No. 466. RANGER REFINING & PIPE LINE COMPANY et al., petitioners, v. J. E. DRYDEN et al. Oct. 16, 1922. For opinion below, see 280 Fed. 257. Messrs. George H. Imbrie, of Kansas City, Mo., Cooke, Dedmon & Potter and Goree, Odell & Allen, all of Fort Worth, Tex., Francis C. Downey, I. J. Ringolsky and M. L. Friedman, all of Kansas City, Mo., and Bernard Titcher, of New Orleans, La., for petitioners. Messrs. Francis Marion Etheridge and Joseph Manson McCormick, both of Dallas, Tex. (Joseph Manson McCormick, of Dallas, Tex., of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 713)

No. 467. DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA et al., petitioners, v. A. J. HERTZ et al., Receivers, etc. Oct. 16, 1922. For opinion below, see Hertz v. Lion Bonding & Surety Co., 280 Fed. 540. See, also, 260 U. S. 696. 43 Sup. Ct. 90, 67 L. Ed. — Messrs. John F. Stout, Halleck F. Rose, Arthur R. Wells and Paul L. Martin, all of Omaha, Neb., for appellants. Messrs. Sanborn, Graves & Ordway, of St. Paul, Minn., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(260 U. S. 713)

No. 468. James C. DAVIS, as Agent, etc., petitioner, v. Lee A. WOLFE. Oct. 16, 1922. For opinion below, see Wolfe v. Payne, 241 S. W. 915. Mr. T. P. Littlepage, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted.

(260 U. S. 726)

No. 470. Jess SHIPLEY et al., petitioners, v. The UNITED STATES of America. Oct. 16, 1922. For opinion below, see 281 Fed. 134. Messrs. Waters Davis and Jackson & Fryer, all of El Paso, Tex., for petitioners. Messrs. James M. Beck, Sol. Gen., of Washington, D. C., Mrs. Mabel Walker Willebrandt, Asst. Atty. Gen., and George E. Boren, Sp. Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 714)

No. 471. CANUTE STEAMSHIP COMPANY (Limited) et al., petitioners, v. PITTSBURGH & WEST VIRGINIA COAL COMPANY et al. Oct. 16, 1922. For opinion below, see In re Diamond Fuel Co., 283 Fed. 108. Messrs. Chas. R. Hickox and D. M. Tibbetts, both of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(260 U. S. 714)

No. 474. The SALEM TRUST COMPANY, petitioner, v. MANUFACTURERS' FINANCE COMPANY et al. Oct. 16, 1922. For opinion below, see 280 Fed. 803. Mr. Alex Whiteside, of Boston, Mass., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(260 U. S. 726)

No. 475. VICTOR TALKING MACHINE COMPANY, petitioner, v. The STARR PIANO COMPANY. Oct. 16, 1922. For opinion below, see 281 Fed. 60. Messrs. Wm. Houston Kenyon, of New York City, John D. Myers, of Camden, N. J., and George T. Bean and Edgar F. Baumgartner, both of New York City, for petitioner. Messrs. Parker W. Page, Drury W. Cooper and Thomas J. Byrne, all of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 714)

No. 476. Theodore A. HEYER, doing business as T. A. Heyer Duplicator Company, petitioner, v. DUPLICATOR MANUFACTURING COMPANY. Oct. 16, 1922. For opinion below, see 284 Fed. 242. Messrs. Samuel W. Banning and Thos. A. Banning, both of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

(260 U. S. 726)

No. 479. ALABAMA & VICKSBURG RAILWAY COMPANY et al., plaintiffs in error, v. Louis F. DENNIS. Oct. 16, 1922. For opinion below, see 128 Miss. 298, 91 South. 4. See, also, 260 U. S. 755, 43 Sup. Ct. 94, 67 L. Ed. — Messrs. J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La., for plaintiffs in error. Petition for a writ of certiorari herein denied.

(260 U. S. 727)

No. 481. UNION ELECTRIC WELDING COMPANY, petitioner, v. John P. CURRY et al. Oct. 16, 1922. For opinion below, see 279 Fed. 465. Messrs. Tracy, Chapman & Welles, of Toledo, Ohio, and Hull, Brock & West, of Cleveland, Ohio (Chas. E. Brock, of Cleveland, Ohio, and Thos. H. Tracy and George D. Welles, both of Toledo, Ohio, of counsel), for petitioner. Messrs. Samuel Owen Edmonds, of New York City, and Wilber Owen, of Toledo, Ohio, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(260 U. S. 727)

No. 486. Focsaneanu ALEXANDER et al., petitioners, v. GENERAL ELECTRIC COMPANY. Oct. 16, 1922. For opinion below, see 280 Fed. 852. Messrs. Patrick P. Curran, of Providence, R. I., and Charles J. Holland, of New York City, for petitioners. Messrs. Frederick P. Fish, of Boston, Mass., Hubert Howson, of New York City, and Albert G. Davis, of Boston, Mass., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 714)

No. 488. Charles L. CRAIG, petitioner, v. William C. HECHT, U. S. Marshal. Oct. 16, 1922. For opinion below, see 282 Fed. 138. Messrs. John P. O'Brien, of New York City, Geo. Sutherland, of Salt Lake City, Utah, and E. L. Mooney, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(260 U. S. 727)

No. 489. PRODUCERS' WAREHOUSE ASSOCIATION, petitioner, v. PHILIPPINE NATIONAL BANK. Oct. 16, 1922. Mr. Henry Breckinridge, of New York City (Messrs. Clement L. Bouve and A. Warner Parker, both of Washington, D. C., and John T. Vance, Jr., of Santo Domingo, West Indies, of counsel), for petitioner. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(260 U. S. 727)

No. 490. J. H. RILEY, petitioner, v. O. C. McRANEY. Oct. 16, 1922. For opinion below, see 128 Miss. 665, 91 South. 399. Mr. William H. Watkins, of Jackson, Miss. (Watkins, Watkins & Eager, of Jackson, Miss., of counsel), for petitioner. Mr. Robert H. Thompson, of Jackson, Miss., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied.

(260 U. S. 728)

No. 493. BEER, SONDHEIMER & COMPANY, Inc., petitioner, v. AMERICAN & CUBAN STEAMSHIP LINE, Inc. Oct. 16, 1922. For opinion below, see 281 Fed. 725. Messrs. William W. Miller and D. Roger Englar, both of New York City, for petitioner. Mr. Frank V. Barns, of New York City (Mr. Ernest E. Baldwin, of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 714)

No. 494. The MATTHEW ADDY COMPANY, petitioner, v. The UNITED STATES of America. Oct. 16, 1922. For opinion below, see 281 Fed. 298. Mr. Nelson B. Cramer, of Cincinnati, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

(260 U. S. 715)

No. 495. Benjamin N. FORD, petitioner, v. The UNITED STATES of America. Oct. 16, 1922. For opinion below, see 281 Fed. 298. Mr. Nelson B. Cramer, of Cincinnati, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

(260 U. S. 728)

No. 496. George M. EMBIRICOS, petitioner, v. STUYVESANT INSURANCE COMPANY. Oct. 16, 1922. For opinion below, see 283 Fed. 415. Messrs. Robert S. Erskine and Delbert M. Tibbetts, both of New York City (Messrs.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, of counsel), for petitioner. Mr. Ezra P. Prentice, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 696)

No. 557. DEPARTMENT OF TRADE & COMMERCE OF THE STATE OF NEBRASKA et al., appellants, v. A. J. HERTZ et al., receivers, etc. Oct. 16, 1922. Appeal from the District Court of the United States for the District of Nebraska. For opinion below, see Hertz v. Lion Bonding & Surety Co., 280 Fed. 540. See, also, 260 U. S. 713, 43 Sup. Ct. 89, 67 L. Ed. —. Messrs. John F. Stout, Halleck F. Rose, Arthur R. Wells, and Paul L. Martin, all of Omaha, Neb., for appellants. Messrs. Sanborn, Graves & Ordway, of St. Paul, Minn., for respondents.

PER CURIAM. Dismissed for want of jurisdiction, upon the authority of (1) Louisville Trust Company v. Knott, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159; Bogart v. Southern Pacific Co., 228 U. S. 137, 144, 33 Sup. Ct. 497, 57 L. Ed. 768; De Rees v. Costaguta, 254 U. S. 166, 173, 41 Sup. Ct. 69, 65 L. Ed. 202; (2) Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 37, 14 Sup. Ct. 4, 37 L. Ed. 986; Brown v. Alton Water Co., 222 U. S. 325, 332-334, 32 Sup. Ct. 156, 56 L. Ed. 221; Metropolitan Water Co. v. Kaw Valley District, 223 U. S. 519, 521-522, 32 Sup. Ct. 246, 56 L. Ed. 533; Shapiro v. United States, 235 U. S. 412, 415-416, 35 Sup. Ct. 122, 59 L. Ed. 291.

(260 U. S. 713)

No. 574. LION BONDING & SURETY COMPANY, petitioner, v. A. H. KARATZ. Oct. 16, 1922. For opinion below, see 280 Fed. 532. Messrs. H. F. Rose and A. R. Wells, both of Omaha, Neb., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(260 U. S. 754)

No. 79. Frank BRUNO, appellant, v. George E. WILLIAMS, Criminal Sheriff, etc. Oct. 19, 1922. Appeal from the District Court of the United States for the Eastern District of Louisiana. Mr. Donelson Caffery, of New Orleans, La., for appellant. Dismissed with costs, pursuant to the 18th rule.

(260 U. S. 698)

No. —, original. Ex parte In the matter of Huey P. LONG et al., etc., petitioners; and No. 650. CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, appellant, v. LOUISIANA PUBLIC SERVICE COMMISSION et al., etc. Oct. 23, 1922. The mandamus asked in this motion relates to the granting of a supersedeas by the judge of the District Court of the United States for the Eastern District of Louisiana in case No. 650 on the docket of this court. The court considers the application for mandamus as a motion to set aside the supersedeas and injunction granted by the district judge in this case, and a rule will issue to the appellants in case No. 650 to show cause

on Monday, November 13 next, why the super-sedeas and injunction should not be set aside and the injunction dissolved.

(260 U. S. 698)

No. 18. CORONA COAL COMPANY, appellant, v. SOUTHERN RAILWAY COMPANY. Oct. 23, 1922. Appeal from the District Court of the United States for the Northern District of Alabama. For opinion below, see 266 Fed. 726. Mr. Forney Johnston, of Washington, D. C., for appellant.

PER CURIAM. Affirmed on authority of Lambert Run Coal Co. v. Baltimore & O. R. Co., 258 U. S. 377, 42 Sup. Ct. 349, 66 L. Ed. 671.

(260 U. S. 699)

No. 43. CAPITOL LIFE INSURANCE COMPANY, plaintiff in error, v. Mary C. ROSS. Oct. 23, 1922. In error to the Kansas City Court of Appeals of the State of Missouri. For opinion below, see 205 Mo. App. 243, 228 S. W. 889. Messrs. James C. Jones, of St. Louis, Mo., and Jules C. Rosenberger, of Kansas City, Mo., for plaintiff in error.

PER CURIAM. Affirmed upon the authority of Mutual Life Ins. Co. v. Liebong, 259 U. S. 209, 42 Sup. Ct. 467, 66 L. Ed. 900.

(260 U. S. 754)

No. 47. The UNITED STATES of America, appellant, v. The WESTERN UNION TELEGRAPH COMPANY. Oct. 23, 1922. Appeal from the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 272 Fed. 893. The Attorney General, for the United States. Messrs. John Bassett Moore, Rush Taggart, Francis Raymond Stark and Joseph P. Cotton, all of New York City, for respondent. Decree of Circuit Court of Appeals reversed in accordance with the stipulation filed herein; and cause remanded to the District Court of the United States for the Southern District of New York with directions to enter a decree dismissing the bill without prejudice and without costs to either party.

(260 U. S. 699)

No. 60. SOUTHERN LIGHTERAGE & WRECKING COMPANY, appellant, v. The UNITED STATES of America. Oct. 23, 1922. Appeal from the District Court of the United States for the Eastern District of Louisiana. For opinion below, see 284 Fed. 978. Mr. B. Howard McCaleb, of New Orleans, La., for appellant. The Attorney General and Mr. George H. Terriberry, of New Orleans, La., for the United States. Affirmed, by an equally divided court.

(260 U. S. 699)

No. 66. James C. DAVIS, Director General of Railroads, etc., plaintiff in error, v. Cena I. BAECHTEL et al. Oct. 23, 1922. In error to the Court of Appeals of the State of Maryland. For opinion below, see 137 Md. 513, 113 Atl. 126. Messrs. Frederic D. McKenney and John Spalding Flannery, both of Washington, D. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Johnson v.

New York Life Ins. Co., 187 U. S. 491, 496, 23 Sup. Ct. 194, 47 L. Ed. 273; Ireland v. Woods, 246 U. S. 323, 330, 38 Sup. Ct. 319, 62 L. Ed. 745; Erie R. R. Co. v. Hamilton, 248 U. S. 369, 371-372, 39 Sup. Ct. 95, 63 L. Ed. 307.

(260 U. S. 700)

No. 70. PORTO RICO RAILWAY, LIGHT & POWER COMPANY, appellant, v. Manuel CAMUNAS et al., etc., et al. Oct. 23, 1922. Appeal from the United States Circuit Court of Appeals for the First Circuit. For opinion below, see 272 Fed. 924. Mr. Carroll G. Walter, of New York City, for appellant. Mr. Grant T. Trent, of Washington, D. C., for respondent.

PER CURIAM. Dismissed for want of jurisdiction. El Banco Popular v. Wilcox, 255 U. S. 72, 41 Sup. Ct. 312, 65 L. Ed. 510; Inter Island Steam Navigation Co. v. Ward, 242 U. S. 1, 37 Sup. Ct. 1, 61 L. Ed. 113.

(260 U. S. 700)

No. 73. Thomas HUNT et al., etc., plaintiffs in error, v. The CITY OF NEW ORLEANS et al. Oct. 23, 1922. In error to the Supreme Court of the State of Louisiana. For opinion below, see 148 La. 754, 87 South. 736. See, also, 43 Sup. Ct. 93. Mr. Charles Louque, of New Orleans, La., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Lehigh Water Co. v. Easton, 121 U. S. 388, 392, 7 Sup. Ct. 916, 30 L. Ed. 1059; New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, 350-351, 22 Sup. Ct. 691, 46 L. Ed. 936; Hubert v. New Orleans, 215 U. S. 170, 175, 30 Sup. Ct. 40, 54 L. Ed. 144; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 639, 32 Sup. Ct. 577, 56 L. Ed. 924.

(260 U. S. 699)

No. 180. WEST SIDE IRRIGATING COMPANY, plaintiff in error, v. Marvin CHASE, as Hydraulic Engineer of the State of Washington, et al. Oct. 23, 1922. In error to the Supreme Court of the State of Washington. For opinion below, see 115 Wash. 146, 196 Pac. 666. Messrs. John P. Hartman and Carroll B. Graves, both of Seattle, Wash., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Toop v. Ulysses Land Co., 237 U. S. 580, 583, 35 Sup. Ct. 739, 59 L. Ed. 1127; Piedmont Power & Light Co. v. Town of Graham, 253 U. S. 193, 195, 40 Sup. Ct. 453, 64 L. Ed. 855.

(260 U. S. 723)

No. 499. AUTOMATIC PENCIL SHARPENER COMPANY, petitioner, v. BOSTON PENCIL POINTER COMPANY. Oct. 23, 1922. For opinion below, see 279 Fed. 40. Mr. Geo. L. Wilkinson, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(260 U. S. 728)

No. 501. **Harry GOLDBERG et al.**, petitioners, v. **The UNITED STATES of America**. Oct. 23, 1922. For opinion below, see 280 Fed. 89. Mr. Neyle Colquitt, of Washington, D. C., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 728)

No. 502. **The ANDREW JERGENS COMPANY**, petitioner, v. **WILLIAM A. WOODBURY DISTRIBUTORS (Inc.)**, et al. Oct. 23, 1922. For opinion below, see 279 Fed. 1016. Mr. W. A. De Camp, of Cincinnati, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(260 U. S. 729)

No. 503. **Mrs. Essie Lee JONES**, Administratrix, etc., petitioner, v. **CENTRAL OF GEORGIA RAILWAY COMPANY**. Oct. 23, 1922. For opinion below, see 152 Ga. 92, 108 S. E. 618; (Ga. App.) 110 S. E. 914. Mr. T. S. Felder, of Macon, Ga., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the State of Georgia denied.

(260 U. S. 729)

No. 504. **James C. DAVIS**, Federal Agent of Railways, et al., etc., petitioners, v. **Mrs. Walter MORGAN**, Administratrix, etc. Oct. 23, 1922. For opinion below, see 239 S. W. 934. Mr. F. C. Dillard, of Sherman, Tex., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied.

(260 U. S. 729)

No. 505. **IPONMATSU UKICHI et al.**, petitioners, v. **The UNITED STATES of America**. Oct. 23, 1922. For opinion below, see 231 Fed. 525. Mr. E. A. Douthitt, of San Francisco, Cal., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 729)

No. 506. **William T. PRICE et al.**, petitioners, v. **MAGNOLIA PETROLEUM COMPANY et al.** Oct. 23, 1922. For opinion below, see 206 Pac. 1033. Messrs. E. E. Blake, A. T. Boys, C. B. Stuart, J. F. Sharpe, and M. K. Cruce, all of Oklahoma City, Okl., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(260 U. S. 729)

No. 507. **MORGENSTERN & COMPANY (Inc.)**, petitioner, v. **The HOFFMAN-LA ROCHE CHEMICAL WORKS (Inc.)**. Oct. 23, 1922. For opinion below, see 281 Fed. 923. Mr. C. A. L. Massie, of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 730)

No. 508. **Ernest W. KOKENOR**, petitioner, v. **The UNITED STATES of America**. Oct. 23, 1922. For opinion below, see Sharp v. United States, 280 Fed. 86. Mr. C. S. Herbert, of New Orleans, La., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 715)

No. 512. **Samuel A. MYERS et al.**, petitioners, v. **INTERNATIONAL TRUST COMPANY**. Oct. 23, 1922. For opinion below, see 135 N. E. 697. Mr. E. F. McClennen, of Boston, Mass., for petitioners. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts granted.

(260 U. S. 715)

No. 513. **BOARD OF TRADE OF the CITY OF CHICAGO**, et al., petitioners, v. **E. H. JOHNSON**, Trustee, etc. Oct. 23, 1922. For opinion below, see 283 Fed. 374. Mr. H. S. Robbins, of Chicago, Ill., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

(260 U. S. 730)

No. 514. **The FARISH COMPANY**, petitioner, v. **SOUTH SIDE TRUST COMPANY**. Oct. 23, 1922. For opinion below, see 281 Fed. 825. Mr. H. M. Stephens, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(260 U. S. 730)

No. 516. **Ella HOWEY**, petitioner, v. **William J. HOWEY**. Oct. 23, 1922. For opinion below, see 240 S. W. 450. Mr. C. W. Prince, of Kansas City, Mo., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

(260 U. S. 730)

No. 517. **Sylvester CAROLLO**, petitioner, v. **The UNITED STATES of America**. Oct. 23, 1922. For opinion below, see Sharpe v. United States, 280 Fed. 86. Mr. E. H. McCaleb, of New Orleans, La., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 730)

No. 519. **Clair D. JONES**, Petitioner, v. **INTER-MOUNTAIN LIFE INSURANCE COMPANY et al.** Oct. 23, 1922. For opinion below, see 206 Pac. 269. Mr. Frank K. Nebeker, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Utah denied.

(260 U. S. 715)

No. 520. **WEBSTER ELECTRIC COMPANY**, petitioner, v. **SPLITDORF ELECTRICAL COMPANY**. Oct. 23, 1922. For opinion below, see 283 Fed. 83. Mr. H. B. Moses, of Washington, D. C., for petitioner. Messrs.

Charles L. Sturtevant and Eugene G. Mason, both of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

(260 U. S. 731)

No. 521. WOOLWINE METAL PRODUCTS COMPANY, petitioner, v. Willis J. BOYLE, Sr. Oct. 23, 1922. For opinion below, see 279 Fed. 609. Mr. F. S. Lyon, of Los Angeles, Cal., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 731)

No. 523. Manuel BISKIND, petitioner, v. The UNITED STATES of America. Oct. 23, 1922. For opinion below, see 281 Fed. 47. Mr. Ben. B. Wickham, of Cleveland, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(260 U. S. 731)

No. 524. Samuel REMBRANDT, petitioner, v. The UNITED STATES of America. Oct. 23, 1922. For opinion below, see 281 Fed. 122. Mr. Ben. B. Wickham, of Cleveland, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(260 U. S. 731)

No. 527. WHITING MANUFACTURING COMPANY, petitioner, v. ALVIN SILVER COMPANY (Inc.). Oct. 23, 1922. For opinion below, see 283 Fed. 75. Messrs. Livingston Gifford, of New York City, H. C. Beatty, of Syracuse, N. Y., and Hugo Mock, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 731)

No. 531. Harry O. PHILLIPS, petitioner, v. PENNSYLVANIA RAILROAD COMPANY. Oct. 23, 1922. For opinion below, see 283 Fed. 381. Messrs. W. D. Corrigan, of Milwaukee, Wis., and John H. Kay and C. W. Miller, both of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 715)

No. 532. Simon HECHT et al., Trustees, petitioners, v. John F. MALLEY, Former Collector of Internal Revenue;

No. 533. Arthur L. HOWARD et al., Trustees, petitioners, v. John F. MALLEY, Former Collector of Internal Revenue; and

No. 534. Arthur L. HOWARD et al., Trustees, petitioners, v. Andrew J. CASEY, Former Acting Collector of Internal Revenue. Oct. 23, 1922. For opinion below, see 281 Fed. 363. Messrs. E. F. McClennen, of Boston, Mass., for petitioners. Petition for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(260 U. S. 716)

No. 535. FEDERAL TRADE COMMISSION, petitioner, v. RAYMOND BROS.—CLARK COMPANY. Oct. 23, 1922. For opinion below, see 280 Fed. 529. The Attorney General, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(260 U. S. 732)

No. 538. Frank P. HELM, petitioner, v. AMERICAN HAWAIIAN STEAMSHIP COMPANY. Oct. 23, 1922. For opinion below, see 279 Fed. 72. Messrs. Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 732)

No. 539. John G. CROSLAND, petitioner, v. Benjamin E. DYSON, U. S. Marshal, etc. Oct. 23, 1922. For opinion below, see 280 Fed. 105. Mr. Bart A. Riley, of Miami, Fla., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 73. Carleton HUNT et al., plaintiffs in error, v. The CITY OF NEW ORLEANS et al. Oct. 18, 1922. See, also, 148 La. 754, 87 South. 736. Mr. Charles Louque, of New Orleans, La., for plaintiffs in error. Death of Carleton Hunt suggested, and Thomas Hunt, Robert Hunt, and Edward Livingston Hunt, heirs at law of Carleton Hunt, deceased, substituted as parties plaintiffs in error herein, on motion of Mr. Charles Louque for the plaintiffs in error.

(260 U. S. 701)

No. 76. The UNITED STATES of America, petitioner, v. Wesley L. SISCHO. Nov. 13, 1922. For former opinion, see 260 U. S. 697, 43 Sup. Ct. 88, 67 L. Ed. —. Petition for rehearing in this cause granted, and cause restored to the docket for hearing before a full bench.

(260 U. S. 754)

No. 127. The UNITED STATES of America, plaintiff in error, v. Samuel KROHNBERG et al. Nov. 13, 1922. In error to the District Court of the United States for the Southern District of New York. Mr. Solicitor General Beck, for the United States. Mr. Samuel Krohnberg, for defendants in error. Dismissed, on motion of Mr. Solicitor General Beck for the plaintiff in error.

(260 U. S. 755)

No. 140. The UNITED STATES of America, plaintiff in error, v. Charles MILANESE. Nov. 13, 1922. In error to the District Court of the United States for the Southern District of New York. Mr. James M. Beck, Sol. Gen., of Washington, D. C., for plaintiff in error. Dismissed, on motion of Mr. Solicitor General Beck for the plaintiff in error.

(260 U. S. 755)

No. 170. SALMON RIVER CANAL COMPANY, Limited, plaintiff in error, v. Thomas SANDERSON. Nov. 13, 1922. In error to the Supreme Court of the State of Idaho. For opinions below, see 34 Idaho, 145, 199 Pac. 999; 34 Idaho, 303, 200 Pac. 341. Messrs. Jas. H. Richards and Oliver O. Haga, both of Boise, Idaho, for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

No. 171. The UNITED STATES of America ex rel. the WORKINGMEN'S COOPERATIVE PUBLISHING ASSOCIATION, plaintiff in error, v. Albert S. BURLESON, Postmaster General of the United States. Nov. 13, 1922. See, also (D. C. App.) 274 Fed. 749. Mr. S. John Block, of New York City, for plaintiff in error. Mr. Horace S. Whitman, of Washington, D. C., for defendants in error. Resignation of Albert S. Burleson as Postmaster General suggested, and Hubert Works, present Postmaster General, substituted as the party defendant in error herein, on motion of Mr. Horace S. Whitman in that behalf.

(260 U. S. 716)

No. 328. Eli BUNCH, plaintiff in error, v. J. B. COLE et al. Nov. 13, 1922. For opinion below, see (Okla.) 204 Pac. 119. Mr. Dennis T. Flynn, of Oklahoma City, Okla., for plaintiffs in error. Petition for a writ of certiorari herein granted.

(260 U. S. 755)

No. 461. CENTRAL POWER & LIGHT COMPANY, petitioner, v. TOWN OF POCAHONTAS et al. Nov. 13, 1922. For opinion below, see 244 S. W. 712. On petition for a writ of certiorari to the Supreme Court of the State of Arkansas. Dismissed with costs, on motion of counsel for the petitioner.

(260 U. S. 732)

No. 473. Isadore GLANS et al., petitioners, v. The UNITED STATES of America. Nov. 13, 1922. For opinion below, see Luteran v. United States, 281 Fed. 374. Messrs. E. K. Trent, of Pittsburgh, Pa., and J. P. Tumulty, of Washington, D. C., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(260 U. S. 755)

No. 479. ALABAMA & VICKSBURG RAILWAY COMPANY et al., plaintiffs in error, v. Louis F. DENNIS. Nov. 13, 1922. In error to the Supreme Court of the State of Mississippi. For opinion below, see 128 Miss. 298, 91 South. 4. See, also, 260 U. S. 726, 43 Sup. Ct. 89, 67 L. Ed. —. Dismissed, per stipulation.

(260 U. S. 732)

No. 540. R. C. WOOD et al., petitioners, v. F. G. NOYES, as Receiver, etc. Nov. 13, 1922. For opinion below, see 279 Fed. 321. Messrs. W. H. Metson and Robert W. Jennings, both of San Francisco, Cal., and Louis P. Shackelford, of Los Angeles, Cal., for peti-

tioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 733)

No. 544. STANDARD OIL COMPANY (Indiana), petitioner, v. James R. HENRY. Nov. 13, 1922. For opinion below, see 133 N. E. 742. Mr. S. D. Miller, of Indianapolis, Ind., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Indiana denied.

(260 U. S. 733)

No. 547. CUDAHY PACKING COMPANY OF NEBRASKA, plaintiff in error, v. Mary Ann PARRAMORE, as widow and guardian, etc., et al. Nov. 13, 1922. For opinion below, see Cudahy Packing Co. of Nebraska v. Industrial Commission of Utah, 207 Pac. 148. Mr. G. T. Buckingham, of Chicago, Ill., for plaintiff in error. Petition for a writ of certiorari herein denied.

(260 U. S. 733)

No. 548. STANDARD OIL COMPANY OF LOUISIANA, petitioner, v. Ray P. PARHAM. Nov. 13, 1922. For opinion below, see 279 Fed. 945. Mr. Hunter C. Leake, of New Orleans, La., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 738)

No. 551. Henry E. DEKAY, petitioner, v. The UNITED STATES of America. Nov. 13, 1922. For opinion below, see 280 Fed. 465. Mr. Wm. L. Wemple, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied because of failure to file the petition within the time prescribed by the statute.

(260 U. S. 733)

No. 553. B. F. TRAPPEY & SONS, petitioners, v. McILHENNY COMPANY. Nov. 13, 1922. For opinion below, see 281 Fed. 23. Mr. William L. Symons, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 716)

No. 554. SOUTHERN POWER COMPANY, petitioner, v. NORTH CAROLINA PUBLIC SERVICE COMPANY et al. Nov. 13, 1922. For opinion below, see 282 Fed. 837. Mr. Wm. P. Bynum, of Greensboro, N. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted.

(260 U. S. 733)

No. 558. FARM MORTGAGE & LOAN COMPANY, petitioner, v. John R. HAZEL, Judge, etc. Nov. 13, 1922. Mr. Frank Gibbons, of Buffalo, N. Y., for petitioner. For opinion of District Court, see 285 Fed. 42. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 754)

No. 559. Samuel M. GROSSMAN, petitioner, v. The UNITED STATES of America. Nov. 13, 1922. For opinion below, see 282 Fed. 790. Messrs. B. C. Bachrach and D. D. Stansbury, both of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 734)

No. 567. W. H. GOFF COMPANY, petitioner, v. LAMBORN & COMPANY. Nov. 13, 1922. For opinion below, see 281 Fed. 613. Messrs. F. T. Saussy, of Savannah, Ga., and Edgar Watkins, of Atlanta, Ga., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 716)

No. 568. RED CROSS LINE, petitioner, v. ATLANTIC FRUIT COMPANY. Nov. 13, 1922. For opinion below, see 233 N. Y. 373, 135 N. E. 821, which reversed order 191 N. Y. Supp. 949. Mr. H. L. Loomis, of New York City, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of New York granted.

(260 U. S. 738)

No. 571. Harry MICHELSON, petitioner, v. Charles F. DITTMAR, as trustee, etc. Nov. 13, 1922. For opinion below, see 281 Fed. 116. Mr. D. H. Bilder, of Newark, N. J., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied because of failure to file the petition within the time prescribed by the statute.

(260 U. S. 717)

No. 573. James C. DAVIS, as Agent, etc., petitioner, v. The PORTLAND SEED COMPANY. Nov. 13, 1922. For opinion below, see 281 Fed. 10. Messrs. A. C. Spencer and Chas. E. Cochran, both of Portland, Or., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(260 U. S. 717)

No. 577. The BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, petitioner, v. Guernsey O. BURTCH. Nov. 13, 1922. For opinion below, see 134 N. E. 858. Mr. M. R. Waite, of Cincinnati, Ohio, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Indiana granted.

(260 U. S. 739)

No. 578. The UNITED STATES, petitioner, v. LIPPMANN, SPIER & HAHN. Nov. 13, 1922. For opinion below, see — Court of Customs Appeals, —. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Court of Customs Appeals denied because of failure to file the petition within the time prescribed by the statute.

(260 U. S. 717)

No. 579. The QUEEN INSURANCE COMPANY OF AMERICA, petitioner, v. GLOBE & RUTGERS FIRE INSURANCE COMPANY. Nov. 13, 1922. For opinion below, see 282 Fed. 976. Mr. D. Roger Englar, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(260 U. S. 734)

No. 580. Axel MATSON, petitioner, v. Walker D. HINES, Director General of Railroads. Nov. 13, 1922. For opinion below, see 207 Pac. 474. Mr. H. Lowndes Maury, of Butte, Mont., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Montana denied.

(260 U. S. 734)

No. 582. Mary Jeannette McNAMARA et al., petitioners, v. John Hamilton McNAMARA, a minor, etc. Nov. 13, 1922. For opinion below, see 303 Ill. 191, 135 N. E. 410. Misses Mary J. McNamara and Margaret J. McNamara, pro se. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied.

(260 U. S. 717)

No. 583. James C. DAVIS, as Agent, etc., petitioner, v. E. M. MATTHEWS, Administrator, etc. Nov. 13, 1922. For opinion below, see Matthews v. Payne, 113 S. E. 381. Mr. Henry E. Davis, of Florence, S. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted.

(260 U. S. 734)

No. 584. Ben RUDNER et al., petitioners, v. The UNITED STATES of America. Nov. 13, 1922. For opinion below, see 281 Fed. 516. Mr. Edmond H. Moore, of Youngstown, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(260 U. S. 735)

No. 586. The BACON BROTHERS COMPANY, petitioner, v. E. Frank GRABLE, individually, etc., Nov. 13, 1922. For opinion below, see 282 Fed. 185. Messrs. Thomas H. Tracy and George D. Welles, both of Toledo, Ohio, for petitioner. Messrs. Geo. E. Brand, of Detroit, Mich., Harold W. Fraser, of Toledo, Ohio, and U. S. Bratton, of Detroit, Mich., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(260 U. S. 717)

No. 587. Alvah CROCKER et al., Trustees, petitioners, v. John F. MALLEY, Collector, etc. Nov. 13, 1922. For opinion below, see 281 Fed. 363. Mr. Felix Rackemann, of Boston, Mass., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(260 U. S. 718)

No. 589. THOMSON SPOT WELDER COMPANY, petitioner, v. FORD MOTOR COMPANY. Nov. 13, 1922. For opinion below, see 281 Fed. 680. Mr. Frederick P. Fish, of Boston, Mass., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

(260 U. S. 735)

No. 592. SULZBERGER & SONS COMPANY, petitioner, v. Steamship HELLIG OLAV et al. Nov. 13, 1922. For opinion below, see 282 Fed. 534. Mr. Chas. R. Hickox, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 735)

No. 596. Benjamin B. KAUFMANN et al., petitioners, v. The UNITED STATES of America. Nov. 13, 1922. For opinion below, see 282 Fed. 776. Mr. E. N. Zoline, of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(260 U. S. 735)

No. 597. Graciano L. CABRERA et al., petitioners, v. The PEOPLE OF the PHILIPPINE ISLANDS. Nov. 13, 1922. Mr. Adam C. Carson, of New York City, for petitioners. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(260 U. S. 735)

No. 598. The TEXAS COMPANY et al., petitioners, v. Steamship SANTA RITA, etc., et al. Nov. 13, 1922. For opinion below, see 281 Fed. 760. Mr. John D. Grace, of New Orleans, La., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 736)

No. 599. Fred M. HARDEN, petitioner, v. Manuel Arias RODRIGUEZ et al. Nov. 13, 1922. Mr. Clement L. Bouve, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(260 U. S. 736)

No. 600. The PYLE-NATIONAL COMPANY, petitioner, v. OLIVER ELECTRIC MANUFACTURING COMPANY. Nov. 13, 1922. For opinion below, see 281 Fed. 632. Mr. Francis W. Parker, Jr., of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 701)

No. 601. BORDER NATIONAL BANK OF EAGLE PASS, TEXAS, plaintiff in error, v. AMERICAN NATIONAL BANK OF SAN

FRANCISCO, CALIFORNIA. Nov. 13, 1922. In error to the United States Circuit Court of Appeals for the Fifth Circuit. For opinion below, see 282 Fed. 73. Mr. Wm. M. Pardue, of San Antonio, Tex., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 530, 24 Sup. Ct. 174, 48 L. Ed. 287; *Shulthis v. McDougal*, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205; *Hull v. Burr*, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; *Roman Catholic Church of St. Anthony v. Pennsylvania R. R. Co.*, 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119. The petition for a writ of certiorari herein is denied.

(260 U. S. 736)

No. 604. ST. LOUIS ELECTRICAL WORKS et al., petitioners, v. FORE ELECTRICAL MANUFACTURING COMPANY et al. Nov. 13, 1922. For opinion below, see 280 Fed. 49. Mr. John H. Bruninga, of St. Louis, Mo., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 736)

No. 605. Mary BANKS, petitioner, v. The STATE OF ALABAMA. Nov. 13, 1922. For opinion below, see 93 South. 472. Mr. H. H. Swift, of Columbus, Ga., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied.

(260 U. S. 736)

No. 608. PENNSYLVANIA RAILROAD COMPANY, petitioner, v. The UNITED STATES of America. Nov. 13, 1922. For opinion below, see 283 Fed. 937. Mr. Shirley Carter, of Baltimore, Md., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(260 U. S. 737)

No. 609. AMERICAN MERCHANT MARINE INSURANCE COMPANY OF NEW YORK, petitioner, v. LIBERTY SAND & GRAVEL COMPANY (Inc.). Nov. 13, 1922. For opinion below, see 282 Fed. 514. Mr. T. Catesby Jones, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(260 U. S. 739)

No. 611. SIMMONS HARDWARE COMPANY, petitioner, v. SOUTHERN RAILWAY COMPANY. Nov. 13, 1922. For opinion below, see 279 Fed. 929. Messrs. L. L. Leonard and Shepard Barclay, both of St. Louis, Mo., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied because of failure to file the petition within the time prescribed by the statute.

(260 U. S. 737)

No. 613. AKTIESELSKABET FIDO, petitioner, v. The LLOYD BRAZILEIRO et al;

No. 614. AKTIESELSKABET FIDO, petitioner, v. GANO, MOORE & COMPANY (Inc.);

No. 615. AKTIESELSKABET CHRISTIANSSAND, petitioner, v. CIA COMMERCIO E NAVEGACAO COMPANY et al.;

No. 616. AKTIESELSKABET CHRISTIANSSAND, petitioner, v. GANO, MOORE & COMPANY (Inc.);

No. 617. SKIBSAKTIES GLOMMEN, petitioner, v. The CHESAPEAKE & OHIO COAL & COKE COMPANY et al.;

No. 618. SKIBSAKTIES GLOMMEN, petitioner, v. The CHESAPEAKE & OHIO COAL & COKE COMPANY;

No. 619. SKIBSAKTIES CLYDE, petitioner, v. John S. SORENSON et al.;

No. 620. SKIBSAKTIES CLYDE, petitioner, v. John S. SORENSON et al.;

No. 621. BECHS REDERI AKTIES, petitioner, v. The AMERICAN COAL EXPORTING COMPANY et al.;

No. 622. BECHS REDERI AKTIES, petitioner, v. The AMERICAN COAL EXPORTING COMPANY;

No. 623. CHRISTIANSSAND SHIPPING COMPANY, Limited, petitioner, v. The AMERICAN COAL EXPORTING COMPANY et al.;

No. 624. CHRISTIANSSAND SHIPPING COMPANY, Limited, petitioner, v. The AMERICAN COAL EXPORTING COMPANY;

No. 625. AKTIESELSKABET CHRISTIANSSAND, petitioner, v. BERWIND-WHITE COAL MINING COMPANY; and

No. 626. AKTIESELSKABET CHRISTIANSSAND, petitioner, v. BERWIND-WHITE COAL MINING COMPANY.

For opinion below, see 283 Fed. 62. Mr. John W. Griffin, of New York City, for petitioner. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 738)

No. 631. The TRUSTS & GUARANTEE COMPANY, Limited, Executor, etc., petitioner, v. The HOOSIER VENEER COMPANY. Nov. 13, 1922. For opinion below, see 283 Fed. 1. Messrs. George T. Buckingham, Marquis Eaton, Donald Deerees, and Don Kenneth Jones, all of Chicago, Ill., for petitioner. Messrs. W. T. Alden, C. R. Latham, and H. P. Young, all of Chicago, Ill. (Mr. Charles Martin, of Chicago, Ill., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 718)

No. 637. FEDERAL TRADE COMMISSION, petitioner, v. STANDARD OIL COMPANY (New Jersey);

No. 638. FEDERAL TRADE COMMISSION, petitioner, v. GULF REFINING COMPANY; and

No. 639. FEDERAL TRADE COMMISSION, petitioner, v. MALONEY OIL MANUFACTURING COMPANY. Nov. 13, 1922.

For opinion below, see 282 Fed. 81. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(260 U. S. 739)

No. 641. Louis WEISS, petitioner, v. The UNITED STATES of America. Nov. 13, 1922. For opinion below, see 283 Fed. 785. Mr. Solomon P. Roderick, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied because of failure to file the petition within the time prescribed by the statute.

(260 U. S. 738)

No. 647. Hannah Canard BARNETT et al., appellants, v. W. A. KUNKEL et al. Nov. 13, 1922. For opinion below, see 283 Fed. 24. Petition for a writ of certiorari herein denied.

No. 98. LIBERTY OIL COMPANY, petitioner, v. The CONDON NATIONAL BANK et al. Nov. 14, 1922. See, also, 271 Fed. 928 and 260 U. S. 235, 43 Sup. Ct. 118, 67 L. Ed. —. Mr. J. J. Jones, of Kansas City, Mo., for the motion. Death of C. M. Ball, one of the interveners herein, suggested, and Cora G. Ball, executrix of C. M. Ball, deceased, substituted as the said intervener herein, on motion of Mr. J. J. Jones in that behalf.

No. 100. CHARLES A. RAMSAY COMPANY, plaintiff in error, v. ASSOCIATED BILLPOSTERS OF THE UNITED STATES AND CANADA et al. Nov. 15, 1922. For opinion below, see 271 Fed. 140. Messrs. John A. Hartpence and Thomas G. Haight, both of Jersey City, N. J., for plaintiff in error. Mr. Richard T. Greene, of New York City, for defendant in error. Writ of error dismissed as to defendants Kings County Trust Company, Annie Link, and Kerwin H. Fulton, executors of the estate of Barney Link, deceased, without costs to either party, on motion of Mr. Thomas G. Haight for the plaintiff in error.

No. 101. WILLIAM H. RANKIN COMPANY, plaintiff in error, v. ASSOCIATED BILLPOSTERS OF THE UNITED STATES AND CANADA et al. Nov. 15, 1922. For opinion below, see 271 Fed. 140. Messrs. John A. Hartpence and Thomas G. Haight, both of Jersey City, N. J., for plaintiff in error. Mr. Richard T. Greene, of New York City, for defendant in error. Writ of error dismissed as to defendants Kings County Trust Company, Annie Link, and Kerwin H. Fulton, executors of the estate of Barney Link, deceased, without costs to either party, on motion of Mr. Thomas G. Haight for the plaintiff in error.

(260 U. S. 701)

No. —, original. Ex parte in the matter of Rose WEISS, as next friend, etc. Nov. 20, 1922. Motion for leave to file petition for writ of habeas corpus herein denied, without prejudice to the right of the petitioner to apply for a writ of habeas corpus to the District

Court of the United States for the Western District of Washington directed to the officers in charge of the McNeil Island Penitentiary.

(260 U. S. 702)

No. 30. **PEOPLE'S NATIONAL BANK OF KINGFISHER, OKLAHOMA, et al.**, plaintiffs in error, v. **BOARD OF EQUALIZATION OF KINGFISHER COUNTY, OKLAHOMA.** Nov. 20, 1922. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 79 Okl. 312, 193 Pac. 622. Messrs. Horace G. McKeever and J. C. Roberts, both of Enid, Okl., for plaintiff in error.

PER CURIAM. Affirmed upon the authority of *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *National Bank v. Commonwealth*, 9 Wall. 353, 359, 19 L. Ed. 701.

(260 U. S. 702)

No. 133. **BILL MOORE**, plaintiff in error, v. **THE STATE OF GEORGIA.** Nov. 20, 1922. In error to the Supreme Court of the State of Georgia. For opinion below, see 151 Ga. 648, 108 S. E. 47. Mr. Max Isaac, of Brunswick, Ga., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Hulbert v. Chicago*, 202 U. S. 275, 280, 26 Sup. Ct. 617, 50 L. Ed. 1026; *Cleveland & Pittsburgh R. R. Co. v. Cleveland*, 235 U. S. 50, 53, 35 Sup. Ct. 21, 59 L. Ed. 127; *Hiawassee Power Co. v. Carolina-Tennessee Co.*, 252 U. S. 341, 344, 40 Sup. Ct. 330, 64 L. Ed. 601.

(260 U. S. 742)

No. 409. **UNION STOCK YARDS COMPANY OF OMAHA (Ltd.)** plaintiff in error, v. **MAYHALL & NEIBLE**, a copartnership, et al., etc. Nov. 20, 1922. For opinion below, see *Mayhall & Neible v. Chicago, B. & Q. R. Co.*, 185 N. W. 326. Mr. Norris Brown, of Omaha, Neb., for plaintiff in error. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied, because of failure to file the petition within the time prescribed by the statute.

(260 U. S. 739)

No. 433. **THE NEW YORK CENTRAL RAILROAD COMPANY**, petitioner, v. **MIDLEPORT GAS & ELECTRIC LIGHT COMPANY.** Nov. 20, 1922. The petition for certiorari in this case was denied on the ground that it was not filed in time. 260 U. S. 724, 43 Sup. Ct. 13, 67 L. Ed. —. For opinion below, see 232 N. Y. 622, 134 N. E. 597, which affirms judgment 193 App. Div. 273, 184 N. Y. Supp. 221. Mr. Maurice C. Spratt, of Buffalo, N. Y., for petitioner. Petitioner now moves for a rehearing on the ground that its petition arrived in the clerk's office on the afternoon of the day before it was filed, in seasonable time. Without considering or deciding this question the court has examined the petition on its merits and denies it.

(260 U. S. 718)

No. 585. **THE PENNSYLVANIA RAILROAD COMPANY**, appellant, v. **UNITED STATES RAILROAD LABOR BOARD et al.** Nov. 20, 1922. For opinion below, see 282 Fed. 701.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

(260 U. S. 742)

No. 590. **ONEPIECE BIFOCAL LENS COMPANY**, petitioner, v. **Harold J. STEAD**, doing business as **H. J. Stead Optical Company.** Nov. 20, 1922. For opinion below, see 280 Fed. 382. Mr. V. H. Lockwood, of Indianapolis, Ind., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied, because of failure to file the petition within the time prescribed by the statute.

(260 U. S. 740)

No. 636. **Theodore ARENZ**, Bankrupt, petitioner, v. **ASTORIA SAVINGS BANK.** Nov. 20, 1922. For opinion, below, see 281 Fed. 530. Messrs. Alfred A. Hampson and Sidney Teiser, both of Portland, Or., for petitioner. Messrs. G. C. Fulton, of Astoria, Or., and W. W. Banks, of Portland, Or., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 740)

No. 643. **J. H. REEVES**, Trustee, etc., petitioner, v. **The McWILLIAMS COMPANY et al.** Nov. 20, 1922. For opinion below, see 280 Fed. 100. Mr. F. C. Mullinix, of Jonesboro, Ark., for appellant. Mr. L. Clyde Going, of Memphis, Tenn. (Messrs. Edward C. Craig, Donald B. Craig, and Fred H. Kelly, all of Mattoon, Ill., of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 740)

No. 644. **Oliver J. OLSEN et al.**, petitioners, v. **Frank CAMPBELL et al.** Nov. 20, 1922. For opinion below, see 283 Fed. 11. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 740)

No. 645. **Sue M. JERNIGAN**, Administratrix of **Ike Jernigan**, deceased, petitioner, v. **James C. DAVIS**, Federal Agent. Nov. 20, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied.

(260 U. S. 741)

No. 649. **Joseph FEIGIN**, petitioner, v. **THE UNITED STATES of America.** Nov. 20, 1922. For opinion below, see 279 Fed. 107. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 741)

No. 654. **ADAMS-FLANIGAN COMPANY**, petitioner, v. **Charles KLING et al.** Nov. 20, 1922. For opinion below, see 234 N. Y. 497, 138 N. E. 421, which affirms order 198 App. Div. 717, 191 N. Y. Supp. 32. Petition for a writ of certiorari to the Municipal Court, City of New York, Borough of Bronx, Second District, of the State of New York, denied.

(260 U. S. 718)

No. 655. Margaret C. LYNCH, Executrix of E. J. Lynch, Collector, etc., petitioner, v. TILDEN PRODUCE COMPANY. Nov. 20, 1922. For opinion below, see 282 Fed. 54. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(260 U. S. 741)

No. 671. Don J. CASEY, petitioner, v. The UNITED STATES of America. Nov. 20, 1922. For opinion below, see 281 Fed. 897. Mr. Allyn Smith, of Cotter, Ark., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 741)

No. 675. Clarence E. REED et al., petitioners, v. HUGHES TOOL COMPANY. Nov. 20, 1922. For opinion below, see 282 Fed. 807. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 741)

No. 681. Hon. George P. HARVEY, as Judge, etc., et al., petitioners, v. S. SHIOJI. Nov. 20, 1922. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands, denied.

(260 U. S. 742)

No. 689. John Hall JONES et al., petitioners, v. Ellen H. Phinney TAYLOR. Nov. 20, 1922. For opinion below, see 136 N. E. 382.

Messrs. Robert G. Dodge and Harold S. Davis, both of Boston, Mass., for petitioners. Messrs. Roland Gray and F. Delano Putnam, both of Boston, Mass., for respondent. Petition for a writ of certiorari to the Probate Court for Plymouth County, State of Massachusetts, denied.

No. 130. Thomas B. STOCKER, plaintiff in error, v. NEMAHA DRAINAGE DISTRICT NO. 2. Nov. 23, 1922. For opinion below, see 105 Neb. 684, 181 N. W. 617. Messrs. C. E. Roach, Halleck F. Rose, of Omaha, Neb., and T. P. R. Stocker and George N. Foster, both of Lincoln, Neb., for plaintiff in error. Mr. R. E. Evans, of Dakota City, Neb., for defendant in error. Death of Thomas B. Stocker suggested and Harriet Stocker and T. P. R. Stocker substituted as the parties plaintiffs in error herein, on motion of Mr. C. E. Roach for the plaintiff in error. Passed, to be restored to the call pursuant to section 9, rule 26, on motion of Mr. C. E. Roach for the plaintiffs in error.

(260 U. S. 755)

No. 131. AMERICAN RAILWAY EXPRESS COMPANY, plaintiff in error, v. Hanna R. KRISTIANSON, etc. Nov. 24, 1922. In error to the Supreme Court of the State of South Carolina. For opinion below, see 115 S. E. 899. Messrs. Robert C. Alston and Blair Foster, both of Atlanta, Ga., and Mark Reynolds, of Sumter, S. C., for plaintiff in error. Messrs. L. D. Jennings and A. S. Harby, both of Sumter, S. C., for defendant in error. Dismissed per stipulation.

(260 U. S. 230)

UNITED STATES v. OREGON LUMBER CO. et al.

(Argued Oct. 9, 1922. Decided Nov. 27, 1922.)

No. 40.

1. Public lands §113—Sale voidable when lands acquired by fraud.

A sale of lands under Timber and Stone Act, June 3, 1878 (Comp. St. § 4671 et seq.), was voidable, where the lands were acquired by the patentee by fraud.

2. Public lands §120—Government could disaffirm sale for fraud, or recover damages, but could not do both.

Where a sale of lands under Timber and Stone Act, June 3, 1878 (Comp. St. § 4671 et seq.), was voidable for fraud, the government could either disaffirm and recover the lands, or affirm the contract and recover damages for the fraud, but could not do both.

3. Election of remedies §7(1)—Any decisive action with knowledge of facts is election.

Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based on one or the other of the inconsistent remedies.

4. Public lands §120—Government proceeding with suit to cancel patent after filing of plea of limitations precluded from afterwards suing for damages.

Where the government brought suit to cancel patents under the Timber and Stone Act for fraud, and defendant pleaded limitations, the government had the option of abandoning the suit and suing at law, or having the pending suit transferred to the law side of the court, or of proceeding with the original case on the issues as they stood, and where it deliberately chose the latter alternative, with knowledge of the facts, its election, if not final before, then became final and irrevocable, and it could not, after judgment against it on the ground of limitations, sue at law for damages, especially where the action at law was not brought until 18 years after the transfer of the lands.

5. Judgment §145(4)—Defense is substantial and meritorious.

The defense of limitations is not a technical defense, but substantial and meritorious.

6. Limitation of actions §1—Statute raises presumption rendering proof unnecessary.

Statutes of limitations are not only statutes of repose, but supply the place of evidence lost or impaired by lapse of time, by raising a presumption which renders proof unnecessary.

7. Election of remedies §7(1) — Determined by bringing and maintenance of suit, and not by its disposition.

The election of remedies is determined by the bringing and maintenance of the suit, and not by the final disposition of the case by the court.

8. Election of remedies §1—Judgment §540—Doctrine of election and of res judicata based on same maxim.

The doctrine of election of remedies and that of res judicata are not the same, but each is based on the maxim forbidding that one shall be twice vexed for one and the same cause.

Mr. Justice Brandeis, the Chief Justice, and Mr. Justice Holmes dissenting.

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the United States against the Oregon Lumber Company and others. Judgment dismissing the suit, and the United States brought error to the Circuit Court of Appeals, which certified questions to the Supreme Court. Questions answered in part.

Mr. Assistant Attorney General Riter, for the United States.

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*Mr. W. Lair Thompson, of Portland, Or., for defendants in error.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

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*This case is here upon a certificate from the Circuit Court of Appeals for the Ninth Circuit, under section 239 of the Judicial Code (Comp. St. § 1216).

The plaintiff in error brought an action at law against the defendant in error in the United States District Court for the District of Oregon to recover damages for the fraudulent acquisition of certain lands. The complaint was filed in February, 1918, and alleged that the Oregon Lumber Company, a corporation, and certain of its officers, named as co-defendants, unlawfully conspired to acquire certain tracts of land in Oregon, under the Timber and Stone Act of June 3, 1878 (20 Stat. 89 [Comp. St. § 4671 et seq.]). The lands were patented in 1900, subsequently conveyed by the patentees to an officer of the defendant corporation, and thereafter (with the exception of a small tract) transferred by such officer to the corporation. The value of the lands was alleged to be \$65,000 and judgment was asked for this amount.

The answer denied the material allegations of the complaint and pleaded, among other things, as separate defenses:

"(1) That pro tanto to the measure of damages the United States received from the several entrymen named in the complaint the aggregate sum of \$16,400, which was the price fixed by law and the practices in the Land Office for the lands described in the complaint; (2) that in October, 1912, the United States brought suit in equity to set aside the patents for the lands, and alleged that it owned the property described in the complaint herein and that the patents for the lands which are the same as are involved in this action were secured through fraud of the defendants named in the present action and others, and prayed for

the cancellation of the patents; that in the equity suit substantially the same facts were pleaded as are pleaded by the United States in this action; that issue was joined in the equity suit; that in 1916, after trial upon the merits, the District Court dismissed the equity

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*suit, for the reason that the United States had had full knowledge of the matters complained of in its complaint for more than 6 years before the equity suit was instituted, and that no appeal was ever taken from the decree dismissing the complaint of the United States."

The plaintiff in error demurred to these separate defenses, and the District Court having overruled the demurrer and the plaintiff in error having declined to plead further, the court dismissed the complaint and judgment was entered.

The District Court, in rendering its judgment, decided that, inasmuch as the suit in equity was brought by the United States with knowledge of all the facts, it constituted an election final and conclusive.

Upon these facts the following questions are propounded by the Circuit Court of Appeals:

"1. Is an action by the United States for the value of lands as damages, against the patentees for the lands for fraudulent acquisition of the lands patented under the Timber and Stone Act, barred where more than 6 years have elapsed after the United States, with knowledge of the fraud, brought a suit in equity to cancel the patents for the same lands, in which equity suit decree of dismissal was made against the United States on the ground that the suit was barred by the statute of limitations?"

"2. If the foregoing question be answered in the negative, should any damages recoverable be reduced by such amounts as the United States may have received from the entrymen, as the price fixed by law for the lands described in the patents?"

[1-3] Upon the facts stated the sale was voidable (*Moran v. Horsky*, 178 U. S. 205, 212, 20 Sup. Ct. 856, 44 L. Ed. 1038), and the plaintiff in error was entitled either to disaffirm the same and recover the lands, or affirm it and recover damages for the fraud. It could not do both. Both remedies were appropriate to the facts, but they were in-

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consistent, since the first was founded *upon a disaffirmance and the second upon an affirmation of a voidable transaction. *Robb v. Vos*, 155 U. S. 13, 43, 15 Sup. Ct. 4, 39 L. Ed. 52; *Connihan v. Thompson*, 111 Mass. 270, 272; 2 Black on Rescission and Cancellation, § 562, and cases cited. The rule is applicable to the government in cases where patents have been procured by fraud. *United States v. Kolenko*, 226 Fed. 180, 183, 141 C. C. A. 178. Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the

bringing of a suit based upon one or the other of these inconsistent conclusions. *Robb v. Vos*, supra.

[4] It is suggested in the brief for the plaintiff in error that there is not such inconsistency between a suit to recover lands patented because of fraud and an action to recover damages for the fraud as to bar the latter, citing *Friederichsen v. Renard*, 247 U. S. 207, 38 Sup. Ct. 450, 62 L. Ed. 1075. That case, however, lends no support to the suggestion. The petitioner, *Friederichsen*, brought suit to cancel a contract for the exchange of lands, on the ground of fraud practiced upon him. Upon the coming in of the report of the master it appeared that petitioner, pending suit, had cut a considerable amount of timber growing upon the lands which he had taken in exchange. Thereupon the court found that he was not entitled to equitable relief, because, by cutting the timber, he had ratified the contract and had rendered it impossible to put the defendant in statu quo, but his remedy was at law for damages. The court ordered that the master's report be vacated and the case transferred to the law side of the court, pursuant to equity rule 22 (33 Sup. Ct. xxiv), and "that the parties 'file amended pleadings to conform with an action at law.'" The question was there presented for decision whether this was the commencement of a new action, so as to bring it within the bar of the statute of limitations, and it was determined in the negative. Holding fur-

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ther *that under the circumstances the doctrine of election of remedies did not apply, this court said:

"Thus, we are brought to the conclusion that since the two remedies asserted by the petitioner were alternative remedies, and since the order made, requiring the conversion of the suit in equity into one at law, was entered by the court sitting in chancery, for us to affirm the judgment of the Circuit Court of Appeals that the petitioner, in obeying the order of the trial court, made a fatal choice of an inconsistent remedy, would be to subordinate substance to form of procedure, with the result of defeating a claim which the respondents stipulated had been sufficiently established to justify a verdict against them. This we cannot consent to do."

But here in the equity suit the plaintiff in error, upon the coming in of the defendant's plea of the statute of limitations, made no offer to amend or request to transfer the case to the law docket, but proceeded to trial and judgment upon the original bill, with knowledge of all the facts for more than 6 years prior to the filing of its bill. Defeated in its equity suit, it brought its action at law upon the same allegations of fact. We think it is not admissible to thus speculate upon the action of the court, and having met with an adverse decision, to again vex

the defendant with another and inconsistent action upon the same facts.

The justice of enforcing the doctrine of election of remedies in this case is emphasized by a consideration of the facts. The lands in question were conveyed by the United States in the year 1900. It was not until 1912 that the first suit was brought. The judgment, dismissing the bill in that suit, was rendered in 1916, and the present action was brought 2 years later. Thus a period of 18 years had elapsed since the transfer of the lands before the present action was begun, during more than two-thirds of which time the United States had pos-

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essed *knowledge of all the facts upon which the plea of the statute of limitations was founded and sustained.

The mere filing of the bill in the first suit, according to many authorities, did not constitute an irrevocable election. But upon ascertaining from their plea that the defendants intended to rely upon the statute of limitations, and having knowledge of the facts upon which that plea was founded, and thereafter sustained, the plaintiff in error had fairly presented to it the alternative: (a) Of abandoning that suit and beginning an action at law or transferring it to the law side of the court and making the necessary amendments to convert it into an action for damages, as a "mere incident in the progress of the original case" (247 U. S. 210, 38 Sup. Ct. 451, 62 L. Ed. 1075); or (b) of proceeding with the original case upon the issues as they stood. The plaintiff in error deliberately chose the latter alternative. If the election was not final before, it became final and irrevocable then. *Rehfield v. Winters*, 62 Or. 299, 305, 306, 125 Pac. 289; *Bowker Fertilizer Co. v. Cox*, 106 N. Y. 555, 558, 559, 13 N. E. 95; *Moss v. Marks*, 70 Neb. 701, 703, 97 N. W. 1031.

The case of *Bistline v. United States*, 229 Fed. 546, 144 C. C. A. 6, relied upon by the plaintiff in error, is not in conflict with this conclusion. That was an action by the government to recover damages for the fraudulent acquisition of certain public lands. A prior suit had been brought in equity to cancel the patent, but the defendant's answer showed that the land had been conveyed to persons not made parties to the suit. The government thereupon promptly dismissed its suit in equity, and on the same day commenced the action at law for damages. If, in the instant case, a like course had been followed upon the coming in of the defendant's answer pleading the statute of limitations, the case just referred to would have been in point.

Northern Assurance Co. v. Grand View Building Association, 203 U. S. 106, 27 Sup. Ct. 27, 51 L. Ed. 109, *William W. Bierce, Limited, v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828, and *Southern Pacific*

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Co. v. Bogert et al., 250 U. S. 483, 39 Sup. Ct. 533, 63 L. Ed. 1099, cited by plaintiff in error in support of its contention, are all distinguishable from the case now under consideration. In *Northern Assurance Co. v. Grand View Building Association*, supra, an action at law had been brought to enforce an insurance policy, but it was held that no recovery could be had on the policy as it stood. Thereupon a suit was brought to reform the policy and enforce it as reformed. It was held that there was no inconsistency between these two remedies, and clearly there was not, since both cases proceeded in affirmance of the contract. In *Bierce v. Hutchins*, supra, there had been a conditional sale. Plaintiff first undertook to enforce a lien upon the property and later brought an action in replevin. It was held there was no election because plaintiff could not enforce a lien upon property to which it had title. This court said:

"It [appellant] could not obliterate the condition and leave the contract in force. It may be that it had an election to avoid the contract altogether, but, if so, it did not attempt to do it. It insisted on the contract as the ground of its claim to a lien for the price of the goods. The election supposed and relied upon is an election to keep the contract in force, but to leave out the reservation of title. * * * But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election but an hypothesis."

In *Southern Pacific Co. v. Bogert et al.*, supra, there had been much prior litigation over the same subject-matter. It was contended that the plaintiffs were bound as privies to this litigation. As appears by the decision of the lower court (*Bogert et al. v. Southern Pacific Co.*, 244 Fed. 61, 156 C. C. A. 489) the grievance alleged in the prior suits was a corporate grievance. Each of the suits was dismissed on the ground that the decree

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of fore*closure involved could not be attacked collaterally. The *Bogert* suit, however, was a suit on behalf of the minority stockholders, asserting no corporate right of the railway company, but only the right of minority stockholders. The right asserted in the prior suits and that asserted in the *Bogert* suit were, therefore, the rights of different parties.

It is further urged that the judgment of the District Court was not upon the merits, but upon the plea in bar, and that therefore, when the equity suit was begun, plaintiff in error had no choice of remedies, since the judgment rendered established that in fact there was no remedy in equity at all. The contention, we think, is unsound.

[5] The defense of the statute of limita-

tions is not a technical defense but substantial and meritorious. The great weight of modern authority is to this effect. *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, 106 Pac. 715, 21 Ann. Cas. 1279, and *Wheeler v. Castor*, 11 N. D. 347, 353, 92 N. W. 381, 61 L. R. A. 746, et seq., where the authorities are reviewed.

[6] Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time, by raising a presumption which renders proof unnecessary. *Bell v. Morrison*, 1 Pet. 351, 360, 7 L. Ed. 174; *Hanger v. Abbott*, 6 Wall. 532, 538, 18 L. Ed. 939; *Wood v. Carpenter*, 101 U. S. 135, 139, 25 L. Ed. 807; *Riddlesbarger v. Hartford Insurance Co.*, 7 Wall. 386, 390, 19 L. Ed. 257. And see *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, 450, 28 Sup. Ct. 579, 52 L. Ed. 881.

In *Wood v. Carpenter*, this court said:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is con-

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stantly destroying the evidence *of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

In *Riddlesbarger v. Hartford Insurance Company*:

"They are founded upon the general experience of mankind that claims which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth."

In *Parkes v. Clift*, 9 Lea (Tenn.) 524, it was held that a decree dismissing a bill on the ground of lapse of time was a judgment upon the merits. The court said (pages 531, 532):

"In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined 'on the merits,' in the moral or abstract sense of these words. It is sufficient that the status of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases. * * * A finding against a party, either upon final hearing or demurrer, that his cause of action as shown by him, is barred by the stat-

ute of limitations or by laches is a decision upon the merits, concluding the right of action."

See, also, *People ex rel. Best v. Preston*, 62 Hun, 185, 188, 189, 16 N. Y. Supp. 488; *Black v. Miller*, 75 Mich. 323, 329, 42 N. W. 837.

[7] Whether based on a plea of the statute of limitations or on a failure to prove sub-

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stantive allegations of fact, therefore, the result of the judgment is the same, viz. that plaintiff has no case, and to hold that plaintiff may then invoke another and inconsistent remedy is not to recognize an exception to the general operation of the doctrine of election of remedies but to deny the doctrine altogether. Here, upon the facts as stated in the bill in equity and later in the action at law, both remedies were available to the plaintiff in error. In electing to sue in equity plaintiff in error proceeded with full knowledge of the facts, but it underestimated the strength of its cause, and if that were sufficient to warrant the bringing of a second and inconsistent action the result would be to confine the defense of election of remedies to cases where the first suit had been won by plaintiff and to deny it in all cases where plaintiff had lost. But the election was determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court. See, for example, *Bolton Mines Co. v. Stokes*, 82 Md. 50, 59, 33 Atl. 491, 31 L. R. A. 789.

[8] The distinguishing feature of the instant case is that, after the coming in of the answer pleading the statute of limitations, and the plain warning thus conveyed of the danger of continuing the equity suit further, the plaintiff in error persisted in pursuing it to final judgment, instead of promptly reforming the cause or dismissing the bill and seeking the alternative remedy, not subject to the same defense. The doctrine of election of remedies and that of res adjudicata are not the same, but they have this in common: That each has for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause. The policy embodied in this maxim we think requires us to hold that the plaintiff in error, in bringing the original suit, and in continuing after the plea in bar to follow it to a final determination, made an irrevocable election, and that it is now estopped from maintaining the present inconsistent action.

Question No. 1 is somewhat ambiguous, but, taken in connection with the facts, it is

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clear that what the Circuit *Court of Appeals desires to know is whether the action at law by the United States to recover the value of lands, the title to which was fraudulently obtained, is barred for the reason that the United States, with knowledge of the fraud, had previously prosecuted, upon the same facts, a suit in equity to final judgment of dismissal rendered on the ground that the

suit was barred by the statute of limitations? This question we answer in the affirmative, and, as this disposes of the case, no answer to question No. 2 is required.

It will be so certified.

Mr. Justice BRANDEIS dissenting, with whom the Chief Justice and Mr. Justice HOLMES concur.

The general rule that statutes of limitation do not run against the United States often works hardship. The rule proved so oppressive when applied to proceedings to annul patents to land, that Congress erected for such suits the six-year bar. Act March 3, 1891, c. 561, § 8, 26 Stat. 1095, 1099 (Comp. St. § 5114). In *Exploration Co., Limited, v. United States*, 247 U. S. 435, 38 Sup. Ct. 571, 62 L. Ed. 1200, the act was construed to mean that the 6 years do not begin to run until the cause of action is discovered. This statute did not in terms extend the bar to the government's remedy at law. *United States v. Whited & Wheless*, 246 U. S. 552, 38 Sup. Ct. 367, 62 L. Ed. 879, held that the law gave two remedies to protect the single right, and that the act of 1891 left intact the remedy at law for deceit practiced in securing the patent. The court, therefore, permitted recovery at law, although the remedy in equity had been barred.

The fraud here involved was practiced in connection with the acquisition of land patented in 1900. To obtain redress the government brought in 1912 a bill in equity to annul the patent. Defendants pleaded the statutory bar. The government might then have dismissed its bill; and if it had done so, it could then unquestionably have com-

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menced an action at law for deceit.¹ Or the government might, under the act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. §§ 1251a-1251c), and equity rule 22 (33 Sup. Ct. xxiv), have then had the case transferred to the law side of the court, and have thus freed itself from the possibility of a statutory bar. It did not do either. Instead, it proceeded to a hearing in the equity suit, presumably because it considered the legal remedy inadequate and believed that it could establish its right to pursue the equitable remedy by showing that the fraud had been discovered within the 6 years. In this the government proved to be mistaken. The court found that the United States had full knowledge of the matters complained of more than 6 years before the suit was begun, and for that reason could not have the relief sought in equity. Even then—after the adverse decision, but before entry of a decree—it was not too late to transfer the pending suit to the law side of the court, and to proceed there with the action for deceit. Such a transfer, after full hearing on the merits

and a decision that relief in equity could not be had, was made without loss of any right in *Friederichsen v. Renard*, 247 U. S. 207, 38 Sup. Ct. 450, 62 L. Ed. 1075. But the government made no such application; the court entered a decree dismissing the bill; and no appeal was taken. Then, in 1918, the government brought the present action at law. The question now presented for decision is whether it had lost the right to do so.

The thing adjudged in the equity case was solely that the fraud had been discovered by the government more than 6 years before the commencement of the suit, and that, for this reason, the patent could not be annulled. There was no adjudication of the government's substantive right. And since it had two remedies to protect that right, and the fact found is not a bar to an action at law, no suggestion is made that the decree of dismissal bars this action as *res judicata*.

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There is likewise no suggestion of an estoppel in pais. Nor is there a suggestion that by proceeding to a hearing in the equity suit, or by failing to ask that the case be transferred to the law side of the court, the government subjected defendants to any annoyance or expense, other than that necessarily incident to unproductive litigation. The remedy at law is denied solely on the ground that the so-called doctrine of election of remedies applies; that the government had two remedies; that the two remedies were inconsistent; that, when the statutory bar was pleaded in equity, the plaintiff was obliged at its peril to make a final choice between the two remedies; and that, since it selected the one which proved not to be available, it shall have no remedy whatsoever.

The doctrine of election of remedies is not a rule of substantive law. It is a rule of procedure or judicial administration. It is technical, and, as applied in some jurisdictions, has often sacrificed substantial right to supposed legal consistency.² The doctrine has often been invoked in this court, but never before successfully. Its existence has been recognized; but in every case in which the question presented was actually one of election of remedies, this court held that the doctrine did not apply, giving as a reason that one or the other of its essential elements was absent. These essentials are that the party must have actually had two remedies and that the remedy in question must be inconsistent with the other previously invoked. Here neither of these essential elements was present.

The government did not have a remedy in equity when the suit to annul the patent was begun or at any time thereafter. That this

¹ See *Bistline v. United States*, 229 Fed. 546, 144 C. C. A. 6.

² See *Election of Remedies, A Criticism*, by Charles P. Hine, 26 *Harvard Law Review*, 707; *Election between Alternative Remedies*, by Walter Hussey Griffith, 16 *Law Quarterly Review*, 160; *Id.*, by F. W. Galbraith, 16 *Law Quarterly Review*, 269.

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is true was established by the de*cree in the equity suit. The government's alleged choice of the equitable remedy was, therefore, "not an election, but an hypothesis." *Northern Assurance Co. v. Grand View Building Association*, 203 U. S. 106, 108, 27 Sup. Ct. 27, 28 (51 L. Ed. 109); *Wm. W. Bierce, Ltd., v. Hutchins*, 205 U. S. 340, 347, 27 Sup. Ct. 524, 51 L. Ed. 828. For "it is impossible to conceive of a right of election in a case where no such right existed." *Friend v. Talcott*, 228 U. S. 27, 37, 38, 33 Sup. Ct. 505, 507 (57 L. Ed. 718). Thus the mere fact that the remedy first invoked was at the time unavailable precludes application of the doctrine. The reason why it was unavailable is immaterial. A party is equally free to try another remedy, whether the earlier proceeding was futile because of inability to establish assumed facts essential to the existence of the remedy then pursued or because the assumed facts did not as matter of law entitle him to the relief sought.³ In the *Northern Assurance Case*, supra, the earlier action at law was held not to be an election, because the facts there relied on could not be proved. In the *Bierce Case*, supra, filing an earlier lien suit was held not to be an election, because one cannot have a lien on one's own property. In *Friederichsen v. Renard*, supra, suing to set aside the conveyance was not an election, because the right to rescind had been lost. In *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 490, 491, 39 Sup. Ct. 533, 63 L. Ed. 1099, the earlier unsuccessful suits were not an election, because facts there essential could not be established. So, in the case at bar, because the equitable remedy, theretofore invoked was not in fact available to the govern-

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ment, its right to pro*ceed at law was not lost, under the doctrine of election of remedies.⁴

Moreover, an action at law for deceit is not inconsistent with a prior unsuccessful suit to annul the patent. This case must not be confused with those in which it has been held that a prior action at law on a contract, or other proceeding arising out of it, bars a

later suit to rescind, as where an action on a purchase money note has been held to bar a later suit by the vendor to set aside the conveyance for fraud. There the reason why the conveyance cannot be set aside is that by suing at law the vendor exercises his option to affirm the voidable transaction, and cannot thereafter disaffirm it. In so doing he makes a choice of substantive rights. But where the vendor's first attempt to obtain redress was by way of rescission, and there was in fact then no right to rescind, his substantive rights have not been changed.⁵ This is the situation presented in the case at bar. The government said, in effect:

"We wish to rescind and get back the land; but if the facts or the law are such that we cannot rescind, then we wish to recover damages for the deceit."

Certainly that is not taking inconsistent positions. See *United States v. Whited & Wheless*, supra, 246 U. S. 562, 564, 38 Sup. Ct. 367, 62 L. Ed. 879. Indeed, an action for damages might be permissible as a supplemental remedy, even if the equitable relief had been granted.⁶ For annulling the pat-

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ent may fail to give the government *full relief. The land may have been stripped, meanwhile, of its trees or its mineral, or the deceit may have involved the government in expenses which are recoverable. It is true that under such circumstances equity, if it annulled the patent, would probably retain the cause to award recovery for all damages as suffered. But it might leave the vendor to his remedy at law; and conversely the vendor might, if he chose, limit his suit in equity to the recovery of the property. In either event he could recover his damages at law. Compare *Brady v. Daly*, 175 U. S. 148, 161, 20 Sup. Ct. 62, 44 L. Ed. 109; *Thomas v. Sugarman*, 218 U. S. 129, 30 Sup. Ct. 650, 54 L. Ed. 967, 29 L. R. A. (N. S.) 250; *Zimmerman v. Harding*, 227 U. S. 489, 493, 33 Sup. Ct. 387, 57 L. Ed. 608. There is, therefore, lacking here inconsistency of remedies; and for that reason, also, the doctrine of election of remedies does not apply.

There are some cases in this court, earlier than those discussed above, in which the doctrine of election of remedies was referred to when denying the relief sought. But in those cases, of which *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, is an example, relief

³ *Barnsdall v. Waltemeyer*, 142 Fed. 415, 420, 73 C. C. A. 515; *Water, Light & Gas Co. v. Hutchinson*, 160 Fed. 41, 43, 90 C. C. A. 547, 19 L. R. A. (N. S.) 219; *Harrill v. Davis*, 168 Fed. 187, 195, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153; *Brown v. Fletcher*, 182 Fed. 963, 971-974, 105 C. C. A. 425; *Rankin v. Tygard*, 198 Fed. 795, 806, 119 C. C. A. 591; *Union Central Life Ins. Co. v. Drake*, 214 Fed. 536, 548, 131 C. C. A. 82; *Agar v. Winslow*, 123 Cal. 587, 590, 56 Pac. 422, 69 Am. St. Rep. 84; *Capital City Bank v. Hilson*, 64 Fla. 206, 60 South. 189, Ann. Cas. 1914B, 1211; *Asher v. Pegg*, 146 Iowa, 541, 543, 123 N. W. 739, 30 L. R. A. (N. S.) 890; *Hillerich v. Franklin Ins. Co.*, 111 Ky. 255, 63 S. W. 592; *Clark v. Heath*, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144; *Wilson v. Knapp*, 143 Mich. 64, 106 N. W. 695; *Kelsey v. Agricultural Insurance Co.*, 78 N. J. Eq. 378, 383, 79 Atl. 539.

⁴ In *Strong v. Strong*, 102 N. Y. 69, 73, 5 N. E. 799, an earlier proceeding to rescind was held not to be an election because by reason of laches and lack of tender there was then no right to rescind.

⁵ *Zimmerman v. Robinson & Co.*, 128 Iowa, 72, 102 N. W. 814, 5 Ann. Cas. 960; *Marshall v. Gilman*, 52 Minn. 88, 97, 53 N. W. 811; *Tullos v. Mayfield* (Tex. Civ. App.) 198 S. W. 1073; *Griffin v. Williams* (Tex. Civ. App.) 142 S. W. 981. Compare *McGibbon v. Schmidt*, 172 Cal. 70, 155 Pac. 460; *Glover v. Radford*, 120 Mich. 542, 544, 79 N. W. 803; *Freeman v. Fehr*, 132 Minn. 384, 388, 157 N. W. 587. See *Cahoon v. Fisher*, 146 Ind. 533, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693.

⁶ See *Crockett v. Miller*, 112 Fed. 729, 736, 50 C. C. A. 447; *Lenox v. Fuller*, 39 Mich. 268, 273.

was not denied because of a previous election of an inconsistent remedy. The party failed because he had theretofore made a choice of an alternative substantive right, as where one by his conduct ratifies and makes valid an unauthorized transaction otherwise void. In such cases the mere fact that the conduct relied upon consisted, in whole, or in part, of legal proceedings, is of no legal significance in this connection.⁷

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*Because the government had, as now appears, no remedy except the action at law for deceit, and also because this remedy is not inconsistent with an earlier vain attempt to rescind, a denial of the right to prosecute the present action cannot, consistently with the earlier decisions of this court, rest upon the doctrine of election of remedies. Support for the denial is sought in the fact that the government did not abandon its futile attempt to annul the patent, when it was advised by the defendants' answer that they proposed to rely upon the statutory bar. But it is well settled that a party may disregard such a warning. If he deems it doubtful which one of several possible courses will lead to relief, he may (even where the courses are inconsistent) follow one to defeat, and still pursue thereafter another remedy until he ultimately finds the one which will afford him redress, provided always that the facts do not create an equitable estoppel.⁸ There is, of

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course, no suggestion here that the *government acted in bad faith in refusing to abandon the equitable remedy until the trial court had decided the issue of knowledge against it. The government gained nothing, the defendants lost nothing, by the bringing of the futile suit in equity to annul the patent. However stupid or stubborn a party may have been, he is not deprived of the right to try another remedy; for, whatever the cause of his earlier futile attempt, his failure proves him to have been mistaken. To hold that this action for deceit is barred, because the government did not dismiss the earlier equity suit when it was advised by the answer that the statutory bar would be relied on, lays down a rule new in this court—a rule inconsistent with the principles heretofore established, and opposed to a long line of well considered decisions in state courts. To do this seems to me regrettable.

(260 U. S. 261)

GENERAL INV. CO. v. LAKE SHORE & M. S. RY. CO. et al.

(Argued Oct. 6, 1922. Decided Nov. 27, 1922.)

No. 34.

1. Removal of causes 114—Overruling of objection to service by state court does not prevent re-examination of the question after removal.

The overruling by a state court of a defendant's objection to the service on it was interlocutory, and subject to reconsideration in that court up to the passing of a final decree, and did not preclude a federal District Court, to which the case was removed, from re-examining and passing on the objection, though in the federal court the ruling was to be treated with respect.

2. Railroads 33(2)—Foreign railroad corporation held not doing business in state, authorizing service on agent of connecting road.

Where a New York railroad corporation owned no road in Ohio, but ran through trains over the road of another company, and ticket agents for both companies sold tickets good over either or both lines, the proceeds being divided on periodical settlements, the New York company *held* not doing business in Ohio, and the agents of other company in Ohio not its agents, and hence service on one of such agents was not valid service on it.

⁷ Thus in *Robb v. Vos*, 155 U. S. 13, 34, 39, 15 Sup. Ct. 4, 39 L. Ed. 52, the question was whether Robb and Strong, trustees, by filing an answer and cross-petition in another suit had ratified Kebler's want of authority, and therefore made the title of Vos and Stix to the land in question good. In *Van Winkle v. Crowell*, 146 U. S. 42, 51, 13 Sup. Ct. 18, 36 L. Ed. 880, the commencement of a suit to enforce a mechanic's lien was an election to treat the title to property sold under conditional sale as having passed to the purchaser. In *Stuart v. Hayden*, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639, commencement of an action which was deemed in effect an action for the purchase price, was held to have ratified a sale of real estate, which the plaintiff later attempted to rescind. In *Peters v. Bain*, 133 U. S. 670, 683, 695, 10 Sup. Ct. 354, 33 L. Ed. 696, it was held that there was no election of remedies. *Green v. Bogue*, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061, was a case of res judicata. In *Dickson v. Patterson*, 160 U. S. 584, 588, 592, 16 Sup. Ct. 373, 40 L. Ed. 543, there was only one remedy involved. The question was whether plaintiff had elected to ratify the transaction after knowledge of the fraud. In *Dahn v. Davis*, 258 U. S. 421, 42 Sup. Ct. 320, 66 L. Ed. 696, the question was one of statutory construction, namely, whether an employee injured during federal control of the railroad had a right to compensation under both the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½p) and the Compensation Act (Comp. St. §§ 8932a-8932uu), or only under one.

⁸ *Strong v. Strong*, 102 N. Y. 69, 73, 5 N. E. 799; *Henry v. Herrington*, 193 N. Y. 218, 86 N. E. 29, 20 L. R. A. 249; *Snow v. Alley*, 156 Mass. 193, 195, 30 N. E. 691; *Clark v. Heath*, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144; *Wilson v. Knapp*, 143 Mich. 64, 106 N. W. 695; *Glover v. Radford*, 120 Mich. 542, 544, 79 N. W. 803; *Sullivan v. Ross' Estate*, 113 Mich. 311, 319, 71 N. W. 634, 76 N. W. 309;

Lenox v. Fuller, 39 Mich. 268; *Marshall v. Gilman*, 52 Minn. 88, 97, 53 N. W. 811; *Garrett v. Farwell Co.*, 199 Ill. 436, 65 N. E. 361; *Zimmerman v. Robinson & Co.*, 128 Iowa, 72, 102 N. W. 814, 5 Ann. Cas. 960; *American Pure Food Co. v. Elliott & Co.*, 151 N. C. 393, 66 S. E. 451, 31 L. R. A. (N. S.) 910; *Tullos v. Mayfield* (Tex. Civ. App.) 198 S. W. 1073; *Griffin v. Williams* (Tex. Civ. App.) 142 S. W. 981; *Rankin v. Tygard*, 198 Fed. 795, 119 C. C. A. 591.

3. Removal of causes ☞112—Petition is only special appearance, and petitioner may there-after attack service.

A petition for removal of a cause to a federal court amounts only to a special appearance, and the party securing it has the same right to invoke the decision of the United States court on the validity of the prior service that he has to ask its judgment on the merits, especially where the petition reserves all questions of service, jurisdiction, and want of service.

4. Appearance ☞10—Stipulation for use of evidence heard in state court on motion to set aside service held not to waive objection to the service.

Where one defendant appeared specially in the state court and moved to set aside the service on it, and, after removal of the case to the federal court, applied for a new hearing on the motion declaring that it was appearing specially for that purpose, this declaration qualified every step subsequently taken in bringing the question to a hearing and decision, and a stipulation by it making the evidence heard on such motion in the state court available in the District Court was not a waiver of its objection to the service, or a submission to the jurisdiction of the court, though the stipulation did not in terms restrict the use of the evidence to the hearing on such motion.

5. Removal of causes ☞112—Use of plural in subscription to brief held not to show waiver by one defendant of its objections to the service.

Where, in a suit against the L. Company, the N. Company, and other defendants not served, the service on the N. Company was set aside, and plaintiff thereafter moved to remand, and the brief in opposition to such motion stated that the N. Company was no longer a defendant, and that the L. Company was the only real and actual defendant, and otherwise indicated that its authors were acting only for the L. Company, the fact that they subscribed it as solicitors for "defendants" did not show that the N. Company waived the defect in service and submitted itself to the court's jurisdiction.

6. Courts ☞276—Venue statute creates mere personal privilege, which may be waived, and is waived, by entering appearance without claiming privilege.

Judicial Code, § 51 (Comp. St. § 1033), providing that no civil suit shall be brought against any person by original process or proceeding in any other district than that whereof he is an inhabitant, does not affect the general jurisdiction of a District Court over a particular cause, but merely establishes a personal privilege of defendant, which he may insist on or may waive at his election, and does waive where suit is brought in a different district, if he appears without claiming his privilege.

7. Removal of causes ☞12—"Proper district" to which cause is removable is that including the place where the suit is pending.

Under Judicial Code, § 28 (Comp. St. § 1010), providing for the removal of suits pend-

ing in any state court to the District Court of the United States for the "proper district," construed in connection with section 29 (section 1011), the "proper district" is the district including the county or place where the suit is pending at the time of the removal.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Proper District.]

8. Removal of causes ☞12—Case of which District Courts in general have jurisdiction removable, though under venue provisions it could not be brought in court to which removed.

Under Judicial Code, § 28 (Comp. St. § 1010), providing that any suit arising under the United States Constitution, laws, or treaties, of which the District Courts of the United States are given original jurisdiction by that title, may be removed by defendant, a suit which is within the jurisdiction conferred on District Courts in general is removable, though under section 51 (Comp. St. § 1033) or Clayton Act, § 12 (Comp. St. § 8835k), it could not have been brought in the particular District Court to which it is sought to remove it, because of the citizenship or places of inhabitance of the defendants.

9. Removal of causes ☞12—No limitation with respect to residence or right to remove case arising under United States Constitution, laws, or treaties.

The omission, in Judicial Code, § 28 (Comp. St. § 1010), of any limitation, with respect to residence, on the right to remove suits arising under the Constitution, laws, or treaties of the United States, when contrasted with the express imposition of such limitation on suits not so arising, indicates that Congress intended there should be no such limitation as to suits arising under the Constitution, laws, or treaties.

10. Statutes ☞231—No change in meaning by rearrangement of sections or parts by Judicial Code.

Under Judicial Code, §§ 294, 295 (Comp. St. §§ 1271, 1272), no change in the meaning of Act Aug. 13, 1888, relative to the jurisdiction of District Courts and the removal of causes, was wrought by the mere rearrangement of its sections or parts.

11. Courts ☞276—Statute prescribing district in which suit to be brought gives mere privilege, which may be waived.

Like Judicial Code, § 51 (Comp. St. § 1033), Clayton Act, § 12 (Comp. St. 8835k), relative to the district in which suits under the Anti-Trust Laws may be brought, does not affect the general jurisdiction of the District Courts, but merely establishes a personal privilege, which defendant is free to waive.

12. Courts ☞344—Statute as to special service on nonresident defendants inapplicable to suit to enjoin railroads from consolidating.

Judicial Code, § 57 (Comp. St. § 1039), providing for special service on defendants not found within the district in suits to enforce any legal or equitable lien on, or claim to, or to remove any incumbrance or lien or cloud on the title to, property within or partly within

the district, if applicable at all to suits removed from state courts, has no application to a stockholder's suit to enjoin railroad companies from consolidating, and incidentally to annul the consolidation, if consummated pending the suit, as such a suit is essentially in personam, and strictly transitory.

13. Appeal and error $\S$ 959(2)—**Equity** $\S$ 267—**Leave to file supplemental bill discretionary, and ruling not disturbed, unless discretion abused.**

An application for leave to file a supplemental bill is addressed to the discretion of the court, and the ruling thereon will not be disturbed on appeal, unless the discretion has been abused.

14. Courts $\S$ 347—**Denial of leave to file supplemental bill held not abuse of discretion.**

Under equity rule 34 (33 Sup. Ct. xxviii) permitting supplemental pleadings, alleging material facts occurring after the former pleading, or of which the pleader was ignorant when the former pleading was made, it was not an abuse of discretion, in a stockholder's suit to enjoin two railroad companies from consolidating, to deny leave to file a supplemental bill, alleging that the consolidation had been effected, and seeking to so change the suit that plaintiff would be suing on behalf of one of the companies to have its property within the district freed from the claim of the consolidated company and restored to it, and of having mortgages executed by the consolidated company declared void, and bringing in various new parties as defendants, especially where plaintiff held only a few shares, acquired after the consolidation agreement was signed, and under such agreement could surrender them on favorable terms, and no other shareholder was seeking to join with it, and public and private interests might be seriously disturbed by dismembering the line of railroad in the way desired.

15. Appeal and error $\S$ 1099(6), 1194(2)—**Reversal held not to preclude District Court or Circuit Court of Appeals from considering objections to bill.**

The reversal in part of a decree dismissing a bill, on the ground that the District Court had erred in holding that a defendant not served was an indispensable party, was not such an adjudication of the sufficiency of so much of the bill as fell within the reversal as prevented the District Court, or the Circuit Court of Appeals on a second appeal, from examining and passing on other objections to its sufficiency.

16. Injunction $\S$ 114(3)—**Company proposing to consolidate with another an indispensable party to suit to enjoin consolidation.**

In a suit against the N. Company and the L. Company, in which the N. Company owned stock, to prevent their consolidation pursuant to an agreement made between them, subject to ratification by the stockholders, the N. Company was an indispensable party, so far as the bill sought to enjoin it from voting its stock in the L. Company and to enjoin the L. Company from permitting such stock to be voted, but not as to so much of the bill as sought

to enjoin the L. Company from entering or consummating the proposed consolidation.

17. Monopolies $\S$ 24(1)—**Private corporation cannot maintain suit for injunction in its own interest under Sherman Act.**

Under the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830), as it stood prior to the Clayton Act, a private corporation cannot, in its own interest, sue for an injunction to restrain the consolidation of railroad companies, on the ground that such consolidation would violate such act, as the only remedies thereunder are suits for injunctions by the government in the public interest, under section 4, (Comp. St. § 8823), and private actions for damages, under section 7 (Comp. St. § 8829.)

18. Courts $\S$ 489(8)—**Suit for injunction by persons damaged cannot be brought in state court.**

While Clayton Act, § 16 (Comp. St. § 8835o), enables persons and corporations threatened with loss or damage through violations of that act, or of the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830), to maintain suits to enjoin such violations, save in the instances specified in the proviso, it grants the right only to sue in the federal courts, and a state court cannot entertain such a suit.

19. Removal of causes $\S$ 112—**Does not cure state court's want of jurisdiction.**

When a cause is removed from a state court into a federal court, the latter takes it as it stood in the former, and a want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated.

20. Removal of causes $\S$ 108—**Dismissal of suit because of state court's lack of jurisdiction should be without prejudice.**

The dismissal of a suit to enjoin the consolidation of two railroad companies as in violation of the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830) and the Clayton Act, on the ground that such suit could not be maintained in the state court from which it was removed, should be without prejudice; the dismissal being for want of jurisdiction.

21. Injunction $\S$ 118(1)—**In suit to enjoin consolidation of railroads, plaintiff required to show with certainty respects in which law violated or private rights injured.**

Where the proposed consolidation of two railroad companies and other companies, sought to be enjoined by a stockholder, was only a new formulation of a situation existing for years, and the control of parallel and competing lines complained of had been accomplished and maintained for years by stock ownership and control, and, so far as appeared, public authorities had not objected, and were not objecting, and plaintiff owned only an insignificant part of the capital stock, acquired after the consolidation contract was made, and no other stockholder had accepted its invitation to join in the suit, a court of equity will require plaintiff to point out with precision and certainty in his bill the respects in which the law

is about to be violated, and to show clearly and positively substantial and irreparable injury to its private rights.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Suit by the General Investment Company against the Lake Shore & Michigan Southern Railway Company and others. A decree of dismissal was affirmed by the Circuit Court of Appeals (269 Fed. 235), and complainant appeals. Modified and affirmed.

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*This suit in equity was begun in the court of common pleas of Cuyahoga county, Ohio, to enjoin a proposed consolidation of the New York Central & Hudson River Railroad Company, the Lake Shore & Michigan Southern Railway Company, and nine other companies, not identified in the bill, and to secure other relief of an incidental nature. The suit was brought by the General Investment Company, a Maine corporation, and the New York Central & Hudson River Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Central Trust Company, and three individuals, called the "Read committee," were named as defendants.

The principal ground on which the proposed consolidation was assailed was that it would contravene the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830) and the Clayton Act (38 Stat. 730)—both laws of the United States. There were also charges that it would be contrary to the Constitution and laws of Ohio and other states, but the general tenor of the bill made it evident that these charges were to be taken as of secondary importance. The plaintiff's right to sue was based on allegations that it was a stockholder in the New York Central Company and the Lake Shore Company, and,

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as such, *would be subjected to irreparable loss and damage, should the consolidation be effected.

Process was duly served on the Lake Shore Company and there was a purported service on the New York Central Company; but there was neither service on nor appearance by the other defendants. The New York Central Company, appearing specially for the purpose, promptly challenged the validity of the service on it by moving to set the same aside; but the state court overruled the motion.

In due time the two railroad companies caused the suit to be removed into the District Court of the United States for the Northern District of Ohio. The plaintiff objected to this and reserved an exception to the order allowing it. The removal was sought and allowed on the ground that the suit, according to the claim made in the bill, was one arising under the laws of the United States, and of which the District Courts of the United States are given original juris-

isdiction. Diversity of citizenship was shown, but not specified as a ground for removal.

Shortly after the removal the New York Central Company, again appearing specially for the purpose, sought and obtained in the District Court another hearing on its objection to the purported service on it, and on that hearing the objection was sustained and the service set aside. 226 Fed. 976. Afterwards motions by the plaintiff to remand the suit to the state court, to direct special service on the New York Central Company and other defendants in the mode provided in section 57 of the Judicial Code (Comp. St. § 1039), and for leave to file a supplemental bill and make new parties defendant, were severally overruled. And lastly a motion by the Lake Shore Company, the only defendant then before the court, to dismiss the suit, was sustained on the ground that the New York Central Company was an indispensable party,

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had not voluntarily ap*peared, and was not within the reach of the court's process.

From the decree of dismissal the plaintiff appealed to the Circuit Court of Appeals. That court upheld the rulings setting aside the service on the New York Central Company, denying the motion to remand to the state court, declining to direct special service on the New York Central Company and other defendants, and refusing leave to file a supplemental bill and make new parties. It also sustained the decree of dismissal as to much of the bill, with the qualification that it be without prejudice, and reversed it as to other parts of the bill to which that court thought the Lake Shore Company was the only necessary defendant. 250 Fed. 160, 162 C. C. A. 296.

When the cause was returned to the District Court, the plaintiff, complying with a direction that the bill be made certain in a particular in which the Circuit Court of Appeals deemed it uncertain, so amended it as to show the date on which the directors of the Lake Shore and other companies adopted the agreement for the proposed consolidation. The Lake Shore Company then moved that the bill, as left by the decision of the Circuit Court of Appeals, be dismissed on the grounds: (a) That in so far as it was directed to securing an injunction against alleged or threatened violations of the Sherman Anti-Trust Act, or the Clayton Act, the plaintiff had no right or standing to maintain it, or, if having such a right or standing, could not bring it in a state court, as was done; and (b) that in so far as it was directed against alleged or threatened violations of state Constitutions or laws it did not show a right in equity to the relief sought or any part thereof. This motion was sustained and a decree of dismissal entered. The plaintiff again appealed to the Circuit Court of Appeals, and that court affirmed the decree, but without prejudice to the institution in a proper court

of a new suit, based only on infractions of

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state *Constitutions or laws. 269 Fed. 235. A further appeal brings the case here.

Messrs. F. A. Henry, of Cleveland, Ohio, and Elijah N. Zoline, of New York City, for appellant.

Messrs. Walter C. Noyes, of New York City, and Samuel H. West, of Cleveland, Ohio, for appellees.

Mr. Justice VAN DEVANTER, after stating the case as above, delivered the opinion of the Court.

Complaint is made of each of the rulings alluded to in the foregoing statement together with some others. We take them up in their order.

The setting aside of the purported service on the New York Central Company.

[1] While the state court considered the objection to the service and overruled it before the removal, this was not an obstacle to an examination of the question by the District Court after the removal. The state court's ruling was purely interlocutory, and its status in this regard was not affected by the removal. Being interlocutory, it was subject to reconsideration, and would continue to be so up to the passing of a final decree. Had the cause remained in the state court, the power to reconsider would have been in that court, but when the removal was made the power passed with the cause to the District Court. Of course in the latter the ruling was to be treated with respect, but not as final or conclusive. *Garden City Manufacturing Co. v. Smith*, 9 Fed. Cas. p. 1153, No. 5,217; *Bryant v. Thompson* (C. C.) 27 Fed. 881. And see *Goldrey v. Morning News*, 156 U. S. 518, 522, 15 Sup. Ct. 559, 39 L. Ed. 517.

[2] The sheriff returned that he had served the summons on the New York Central Company in Cuyahoga county by delivering a copy to "W. A. Barr, regular ticket agent, in charge of the business of said company."

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As grounds *for assailing this service the company alleged that it was a New York corporation, had no railroad in Ohio, was not doing business there, did not maintain a place of business or office in that state, and had not made Barr its agent or employé. From the evidence adduced on that issue the District Court, as also the Circuit Court of Appeals, found that the grounds of the company's objection were all true in point of fact. We have examined the evidence and discover no occasion for disturbing the finding. Indeed, we think a different one would have been quite inadmissible. The substance of the evidence is accurately set forth in the opinion of the Circuit Court of Appeals (250 Fed. 165, 162 C. C. A. 296), and need not be repeated here.

It follows that the purported service on this company was invalid and rightly set aside. *Philadelphia & Reading R. Co. v.*

McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710, and cases cited.

Alleged submission by New York Central Company to court's jurisdiction.

[3] The plaintiff contends that, even if the service was not good, the company waived the fault and submitted to the court's jurisdiction. Three things are relied on as constituting or showing such a waiver and submission. They are the petition for removal, a stipulation bringing before the District Court evidence presented in the state court, and a brief filed in opposition to the motion to remand. We think the contention has no support in any of them.

In fact, the petition for removal contained an express declaration that the company was "not intending to waive any question of the sufficiency of service or the want of service," but was "reserving all questions of service, jurisdiction, and want of service." Besides, it is well settled that a petition for removal, even if not containing such a reservation, does not amount to a general appearance, but only a special appearance, and that after the removal the party securing it has the

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same right to invoke the decision *of the United States court on the validity of the prior service that he has to ask its judgment on the merits. *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 279, 17 Sup. Ct. 126, 41 L. Ed. 431; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 441, 30 Sup. Ct. 125, 54 L. Ed. 272; *Cain v. Commercial Publishing Co.*, 232 U. S. 124, 131, 34 Sup. Ct. 284, 58 L. Ed. 534. The plaintiff insists that, even if that be the usual rule, it is not applicable here, because by this petition the company sought and secured a removal into a District Court other than the one designated by law. But, as will be shown presently, the court to which removal was asked and effected was the proper one. So, whether the petition be judged by what it says or by its legal effect, it did not amount to a general appearance or a waiver of any invalidity in the service.

[4] The stipulation relied on was made between the plaintiff and the New York Central Company and related to the use of specific evidence bearing directly on the validity of the service on the latter. The evidence had been presented at the hearing in the state court on that question, and the purpose of the stipulation was merely to make it, or a report of it, available at a new hearing in the District Court on the same question. The stipulation did not in terms restrict the use to that hearing, but such a restriction inhered in the nature of the evidence specified, and was implied. In the application whereon the new hearing was granted the company had declared that it was appearing specially for the purpose only of questioning the validity of the service. That declaration, made at the outset, applied to and qualified every step taken by the com-

pany in bringing the question to a hearing and decision. Joining in the stipulation was merely such a step.

[5] After the service on the New York Central Company was held invalid and set aside, the plaintiff moved that the cause be remanded to the state court. At that time the Lake Shore Company was the only defendant be-

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fore the court. A brief by solicitors subscribing themselves as "Solicitors for Defendants" was filed in opposition to the motion. The plaintiff insists this was a general appearance by the New York Central Company. In the body of the brief its authors referred to the absence of any process against or appearance by the Central Trust Company and the members of the Read committee, recited the proceedings and order whereby the service on the New York Central Company was set aside, said of that company that it "is not now a defendant," spoke of the Lake Shore Company as "now the only real and actual defendant," and otherwise indicated that in filing the brief they were acting for the Lake Shore Company, and for it alone. The plaintiff attaches much weight to the plural term "defendants" in the subscription and gives little consideration to the prior proceedings and the plain purport of the body of the brief. We think all should be considered, and that, when this is done, it is apparent, as was said by the Circuit Court of Appeals, that the use of the plural term was an inadvertence; the singular being intended. Certainly the plural had no particular reference to the New York Central Company, and yet the plaintiff treats it as including that company, but not the Central Trust Company or the members of the Read committee. This serves to show the fallacy of the claim. If the term included any defendant not then before the court, it included all—one as much as another. But if it be reconciled, as we think it should be, with the prior situation and the general purport of the brief, it becomes evident that it referred, and was intended to refer, to the Lake Shore Company, the only defendant then in the suit, and to it alone.

Refusal to remand to state court.

A restatement of the facts bearing on the propriety of this ruling will be helpful. The suit, according to the plaintiff's statement of

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its case as made in the bill, was one arising under the laws of the United States, and this was so, although the claim to the relief sought was based in part on local Constitutions and laws. It also appeared that the matter in controversy exceeded, exclusive of interest and costs, the sum or value of \$3,000. Because the suit possessed these elements, it was removed from the common pleas court of Cuyahoga county, Ohio, where it had been brought and was pending, into the District Court of the United States for the Northern District of Ohio, which in-

cluded Cuyahoga county. The removal, which was over the plaintiff's objection and exception, was had on the petition of two defendants, the only ones attempted to be brought before the state court. One of these, the New York Central Company, was a corporate citizen of New York, and therefore not an inhabitant of the Northern district of Ohio,¹ while the other, the Lake Shore Company, was a corporate citizen of Ohio and an inhabitant of the Northern district of that state.

The ground on which the plaintiff moved that the cause be remanded to the state court was that, as the New York Central Company, one of the defendants, was not an inhabitant of the Northern district of Ohio, the suit could not have been originally brought in the District Court for that district, and therefore could not be removed into it from the state court. The motion was denied.

As we shall show, the argument advanced against that ruling confuses venue with general jurisdiction, and also confuses the venue prescribed for cases begun in the District Courts with that prescribed for cases removed into them from state courts.

Section 24, subd. 1, of the Judicial Code (Comp. St. § 991) declares that—

"The District Courts shall have original jurisdiction * * * of all suits of a civil na-

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ture, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states. * * *

This provision covers two distinct classes of suits. In one the distinctive feature consists in the fact that the suit arises under the Constitution, or a law or treaty, of the United States, the citizenship of the parties not being an element; while in the other the distinctive feature consists in the fact that the parties are citizens of different states, the particular basis or ground of the suit not being an element. This suit was within the first class, and, the requisite amount being involved, it came within the general jurisdiction of the District Courts as defined by section 24.

[6] Section 51 (Comp. St. § 1033) deals with the venue of suits begun in those courts and provides, subject to exceptions not material here, that—

"* * * No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of

¹ See *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768.

different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This restriction, as repeatedly has been held, does not affect the general jurisdiction of a District Court over a particular cause, but merely establishes a personal privilege of the defendant, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98; *Interior Construction, & Impro. Co. v. Gibney*, 160 U. S. 217, 16 Sup.

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Ct. 272, 40 L. Ed. 401; *In re Moore*, *209 U. S. 490, 501, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; *United States v. Hvoslef*, 237 U. S. 1, 12, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; *Camp v. Gress*, 250 U. S. 308, 311, 39 Sup. Ct. 478, 63 L. Ed. 997.

It therefore cannot be affirmed broadly that this suit could not have been brought against the New York Central Company in the District Court for the Northern District of Ohio, but only that it could not have been brought and maintained in that court over a seasonable objection by the company to being sued there. And the inability of the court to proceed with the cause in the presence of such an objection would not have resulted from any want of power to entertain and determine such a suit between such parties, if they were before it, but only because the company declined to yield the necessary jurisdiction of its person. *Macon Grocery Co. v. Atlantic Coast Line R. Co.*, 215 U. S. 501, 503, 508, 30 Sup. Ct. 184, 54 L. Ed. 300.

[7] Respecting the jurisdiction of the district courts on removal from state courts, section 28 of the Judicial Code (Comp. St. § 1010) declares:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. * * *

The next section (29 Comp. St. § 1011) provides that the removal shall be "into the District Court to be held in the district where

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*such suit is pending," and section 53 (Comp. St. § 1035) provides that, where the district

is separated into distinct divisions, the removal shall be into the District Court "in the division in which the county is situated from which the removal is made."

Shortly after the original enactment of the removal provisions now embodied in sections 28 and 29 the meaning of the words "the proper district," found in section 28, was drawn in question, and the courts, on examining the entire statute, very generally reached the conclusion that the words mean the district which includes the county or place where the suit is pending at the time of the removal. Subject to exceptional departures soon disapproved, that view has prevailed ever since,² and we regard it as obviously right.

[8] From what has been said it seems plainly to follow that this suit was removable and that the removal was to the District Court for the proper district. But the plaintiff insists that this view does not give due effect to the clause in section 28, "of which the District Courts of the United States are given original jurisdiction," and the provision in section 51 respecting the place of suit or venue. These, it is argued, show that removability is not to be determined by inquiring merely whether the particular suit is one of which section 24 says the District Courts "shall have original jurisdiction," but by inquiring also whether it is one which under section 51 could be brought, over the defendant's objection, in the District Court for the particular district

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within which *it is pending in a state court. The argument means, and counsel for plaintiff so claim, that a suit arising under the Constitution, or a law or treaty, of the United States and brought in a state court within a particular federal district is removable if the defendant be an inhabitant of that district, but not if he be an inhabitant of some district in another state—in other words, that in respect of the right to remove such a suit the statute discriminates against defendants who are inhabitants of other states and in favor of those who are inhabitants of the state and district where the suit is pending. We think the contention runs counter to both the letter and spirit of the statute.

Section 24 contains a typical grant of original jurisdiction to the District Courts in gen-

* See *Ex parte State Insurance Co.*, 18 Wall. 417, 21 L. Ed. 904; *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927; *Knowlton v. Empire Spring Co.*, 14 Fed. Cas. p. 796, Fed. Cas. No. 7,903; *Hyde v. Victoria Land Co. (C. C.)* 125 Fed. 970; *Rubber & Celluloid Harness Trimming Co. v. Whiting-Adams Co. (D. C.)* 210 Fed. 893, 395; *St. John v. Taintor (D. C.)* 220 Fed. 457; *Pavick v. Chicago, Milwaukee & St. Paul Ry. Co. (D. C.)* 225 Fed. 395; *Eddy v. Chicago & Northwestern Ry. Co. (D. C.)* 226 Fed. 120; *New York Coal Co. v. Sunday Creek Co. (D. C.)* 230 Fed. 295; *Ostrom v. Edison (D. C.)* 244 Fed. 228; *Matarazzo v. Hustis (D. C.)* 256 Fed. 882, 885, 892.

eral of "all suits" in the classes falling within its descriptive terms, save certain suits by assignees of particular choses in action. Section 51 does not withdraw any suit from that grant, but merely regulates the place of suit, its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found. Like similar state statutes, it accords to defendants a privilege which they may, and not infrequently do, waive.

Coming to the removal section (28), it is apparent that the clause, "of which the District Courts of the United States are given original jurisdiction," refers to the jurisdiction conferred on the District Courts in general, for it speaks of them in the plural. That it does not refer to the venue provision in section 51 is apparent, first, because that provision does not except or take any suit from the general jurisdiction conferred by section 24; next, because there could be no purpose in extending to removals the personal privilege accorded to defendants by section 51, since removals are had only at the instance

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of defendants; and, lastly, *because the venue on removal is specially dealt with and fixed by section 29.

[9] There are still other reasons for thinking the venue provision of section 51 has no bearing on removals. First, its own words confine it to suits begun in the District Courts; and, next, it cannot be regarded as limiting the right of removal without disregarding the plain import of section 28. That section provides for the removal of suits falling within any one of several classes and declares who shall have the right to remove them. As to the first class, which comprises suits arising under the Constitution, or a law or treaty, of the United States, the right is given to the defendant or defendants without any qualification, while as to the other classes the right is given to the defendant or defendants if he or they be nonresidents of the state. Evidently the question of what, if any, limitation in that regard should be attached to the right was considered when the section was in process of enactment and was dealt with therein to the extent that Congress deemed a limitation advisable. Of course, the omission of such a limitation as to suits of the first class, when contrasted with the express imposition of one as to suits of the other classes, means that Congress intended there should be none as to the former.

Prior to the adoption of the Judicial Code, with its present arrangement of sections, the jurisdictional provisions of section 24 and the venue provision of section 51 constituted the first section of the Act of August 13, 1888, c. 866, 25 Stat. 443, the jurisdictional provisions preceding the other. The removal provision of section 28, with the

clause, "of which the Circuit Courts³ of the United States are given original jurisdiction," constituted the second section of the

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same *act. Speaking of that act, and particularly of the meaning of the clause just quoted, this court on different occasions said the clause referred "to the first part of section 1 by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought," and that "the clause vesting jurisdiction should not be confounded with the clause determining the particular courts in which the jurisdiction must be exercised." *Mexican National R. Co. v. Davidson*, 157 U. S. 201, 208, 15 Sup. Ct. 563, 566 (39 L. Ed. 672); *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 259, 26 Sup. Ct. 55, 58 (50 L. Ed. 178). There were also many decisions to the same effect in the Circuit Courts.⁴

True, that view was departed from in the case of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, where the provision relating to the district in which suit may be brought was treated as strictly jurisdictional, not avoidable even by the consent of both parties, and applicable to removals. But much that was said in that case was afterwards disapproved in the case of *In re Moore*, 209 U. S. 490, 501, 28 Sup. Ct. 585, 588 (52 L. Ed. 904, 14 Ann. Cas. 1164), where the court returned to its former view, saying:

"The contention is that as this action could not have been originally brought in the Circuit Court for the Eastern District of Missouri by reason of the last provision quoted from section 1, it cannot under section 2 be removed to that court, as the authorized removal is only of those cases of which by the prior section original jurisdiction is given to the United States Circuit Courts. But this ignores the distinction between the general description of the jurisdiction of the United States courts

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and the clause naming *the particular district in which an action must be brought."

[10] That no change in the meaning of the act of 1888 was intended or wrought by the mere rearrangement of its sections or parts as incorporated into the Judicial Code is shown by sections 294 and 295 of the Code (Comp. St. §§ 1271, 1272). See *Brown v. Fletcher*, 235 U. S. 589, 597, 35 Sup. Ct. 154, 59 L. Ed. 374; *United States v. Cress*, 243 U. S. 316, 331, 37 Sup. Ct. 380, 61 L. Ed. 746; *J.*

³ At that period the jurisdiction here discussed was lodged in the Circuit Courts. Afterwards they were abolished by the Judicial Code and the same jurisdiction was lodged in the District Courts.

⁴ *Fales v. Chicago, Milwaukee & St. Paul R. Co.* (C. C.) 32 Fed. 673; *Vinal v. Continental Construction Co.* (C. C.) 34 Fed. 228; *Wilson v. Western Union Telegraph Co.* (C. C.) 34 Fed. 561, 564; *Cooley v. McArthur* (C. C.) 35 Fed. 372; *Kansas City & Terminal Co. v. Interstate Lumber Co.* (C. C.) 37 Fed. 3; *Baltimore & Ohio R. Co. v. Meyers*, 62 Fed. 367, 372, 10 C. C. A. 485; *Duncan v. Associated Press* (C. C.) 81 Fed. 417; *Rome Petroleum & Iron Co. v. Hughes Specialty Co.* (C. C.) 130 Fed. 585.

Homer Fritch, Inc., v. United States, 248 U. S. 458, 463, 39 Sup. Ct. 158, 63 L. Ed. 359.

The plaintiff cites the cases of *Tennessee v. Bank of Commerce*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, 4 Ann. Cas. 451, and *In re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873, as holding that, to be removable into a particular federal court, a suit must be one which as of right could have been brought originally in that court. But those cases are not fairly susceptible of that interpretation. In each a right of removal was claimed and was denied. In the first and third the right was claimed on the ground that the suit was one arising under the laws of the United States, and the denial was put on the ground that the plaintiff's statement of his cause of action, apart from any anticipation of defenses, did not show that it arose under those laws. Because of this, it was said in both cases that the suit could not have been brought originally in the Circuit Court, and therefore could not be removed into it. In the second case the right was claimed on the ground of diversity of citizenship coupled with prejudice and local influence, and the denial was put on the ground that the requisite diversity of citizenship did not exist; the plaintiff and one of the defendants being citizens of the same state. Thus the turning point in each case was that the suit was not one of which the Circuit Courts were given original jurisdiction—in other words, that it could not have been brought in any of them, and not that there was any special obstacle to the exercise of jurisdiction by the particular one to which removal was sought. The

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opin^{ions} in the cases show that the real holding was that the suit was not removable, because not within the original jurisdiction conferred on the Circuit Courts in general. Indeed, in the second case it was said to be the established rule that "those suits only can be removed of which the Circuit Courts are given original jurisdiction," and the first case was cited as so holding. 199 U. S. 269, 26 Sup. Ct. 61, 50 L. Ed. 182, 4 Ann. Cas. 451.

We conclude that, as the present suit was one arising under the laws of the United States, of which the District Courts are given original jurisdiction by section 24, the defendants were entitled under sections 28 and 29 to remove it from the state court where it was begun into the District Court for that district, regardless of their citizenship or places of inhabitation, and therefore that the motion to remand was rightly denied.

[11] In presenting this question counsel have treated section 51 of the Judicial Code as regulating the district in which suits under the anti-trust laws may be brought, and our discussion of the question has proceeded on that line. To avoid any misapprehension

it should be observed that section 12 of the Clayton Act (38 Stat. 736 [Comp. St. § 8835k]) alters that venue provision in respect of such suits, but not in a way which is material here. Like section 51, the special provision in section 12 does not affect the general jurisdiction of the District Courts, but merely establishes a personal privilege which a defendant is free to waive.

Refusal to direct special service under section 57 of the Judicial Code on New York Central Company and other defendants.

[12] This section is in terms restricted to suits "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property" located within the district of suit or partly within that district and partly within another district "within the same state." As to such a suit it provides that where a defendant is not an inhabi-

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tant of the district, nor found within the same, and does not voluntarily appear, the court may make an order directing such defendant to appear and plead by a day certain, to be fixed in the order; that personal service of the order, if practicable, shall be made on such defendant wherever found, and, if that mode of service be not practicable, service may be had by publication; that the order shall also be served on the person in possession or charge of the property, if any there be; and that after the order has been properly served the court may proceed with the cause, but with the qualification that as against any such defendant not appearing the adjudication shall affect only the property which shall have been the subject of the suit and so located as to be under the court's jurisdiction therein.

It has been doubted that this section applies to suits begun in state courts and removed into federal courts;⁵ but this question was not noticed in argument, and we find its decision is not essential here.

Obviously the section is confined to suits which are local in the sense of relating directly to specific property, real or personal, within the district of suit or partly therein and partly in another district of the same state. This suit was not within that category. It was not brought to enforce a claim to or lien upon specific property so located, nor to cancel an incumbrance or lien thereon nor to remove a cloud upon the title. On the contrary, as the original bill plainly disclosed, it was brought to enjoin two railroad companies—one having lines both within and without the state in which the suit was begun, and the other having lines without that state—from consolidating, along with nine other companies, into a single corporation. Such a suit is essentially in personam and

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strictly transitory, and is not made any the

⁵ See *Adams v. Heckscher* (C. C.) 80 Fed. 742, 744.

less so by including in the bill, as was done here, an incidental prayer that the consolidation be annulled if consummated pending the suit. So, tested by the original bill, this suit was not one wherein special service could be had under section 57.

Denial of leave to file supplemental bill and make new parties.

The original bill showed that the plaintiff was suing in its own right as a stockholder in the New York Central and the Lake Shore Companies to prevent loss and damage which it apprehended would come to it as such stockholder if the consolidation were effected. By the supplemental bill, proffered for filing eight months after the suit was begun, the plaintiff sought, first, to show that in the meantime the consolidation had been effected, that the properties of the consolidating companies had been turned over to the consolidated company, and that two mortgages had been executed and delivered by the latter covering all the property received from the Lake Shore Company; secondly, to change the character and object of the suit in such way that the plaintiff would be suing in the right and on behalf of the Lake Shore Company, of which it was a stockholder, with the purpose (a) of having so much of that company's property as was within that district freed from the claim of the consolidated company, (b) of enforcing a restoration of that part of the property to the Lake Shore Company, and (c) of having the two mortgages executed by the consolidated company pronounced void and of no effect as to that part of the property; and, thirdly, to bring in various new parties as defendants.

[13, 14] An application for leave to file a supplemental bill is addressed to the discretion of the court, and the ruling thereon will not be disturbed on appeal unless the discretion has been abused. Under equity rule 34 (33 Sup. Ct. xxviii) the office of a supplemental bill is to introduce matters

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occurring after the filing of the original bill, or not then known to the plaintiff. Much more was attempted by the supplemental bill tendered in this instance. By it, as we have shown, the plaintiff sought to shift the right in which it was suing and to change the character and object of the suit. Other matters also had a bearing on the propriety of granting leave to file it. The railroad of the Lake Shore Company extended from Buffalo, N. Y., to Chicago, Ill. Its maintenance and operation as a through line was a matter of general concern. To dismember it might work a serious disturbance of both public and private interests. If its inclusion in the consolidation was unlawful, it was so in respect of the entire line. The supplemental bill sought to deal with only a minor part, and, if sustained, would result in restoring that part to the Lake Shore Company, while leaving the major part with the consolidated

company. At a meeting of the stockholders of the Lake Shore Company, at which 459,461 shares were represented, the holders of 459,379 shares had voted to ratify the consolidation. The plaintiff held but 5 shares, and had purchased these knowing that the directors had signed the agreement for the consolidation two months before. The ownership of these shares was put forward as entitling the plaintiff to proceed in the right of the Lake Shore Company. No other shareholder was seeking to join in the proceeding. Under the terms of the consolidation the plaintiff could surrender its shares and take five times their par value in stock of the consolidated company, or under a supplemental arrangement it could surrender its shares and receive five times their par value in cash—a sum not alleged to be less than the actual or market value. The shareholders represented by the Read committee availed themselves of the latter alternative. The Circuit Court of Appeals, considering all these matters, concluded that the action of the District Court in refusing leave to file

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the supplemental bill was *within the limits of a reasonable discretion and should not be disturbed. We concur in that conclusion.

Dismissal of original bill on motions of Lake Shore Company.

In so far as the allegations of fact in the bill need be noticed here they may be summarized as follows: The railroad of the New York Central Company extended from New York City to Buffalo, and there connected with the Lake Shore Company's line from Buffalo to Chicago. Continuously since 1893 the New York Central Company had owned more than a majority of the stock of the Lake Shore Company and the Michigan Central Company. For several years the Lake Shore Company had been, and it still was, the owner of more than a majority of the stock of the Nickel Plate, the Big Four, the Lake Erie, and the Ohio Central Companies. The railroad of the Michigan Central Company and those of the several companies, a majority of whose stock was owned by the Lake Shore Company, were all parallel to and potential competitors of some part or all of the Lake Shore Company's line. All of the lines named were engaged in both intrastate and interstate commerce. The New York Central Company's interest in and control over the Lake Shore and the Michigan Central Companies had been acquired and was held with a view to suppressing competition in intrastate and interstate transportation and to restraining such commerce. In furtherance of that purpose the directors of the New York Central, the Lake Shore, and nine other companies (the nine were not named in the bill) recently had formulated and signed an agreement for the consolidation of the eleven companies into a single corporation. The agreement called for a ratification by stock-

holders' meetings. It was ratified over the plaintiff's protest at a meeting of the stockholders of the New York Central Company. The stockholders of the Lake Shore Company were intending to act on it at a meeting called

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*for an early day, and would ratify it over the plaintiff's opposition, unless prevented from doing so by an injunction. Out of 2,555,310 outstanding shares in the New York Central Company the plaintiff was the owner of 300, which it had purchased two months before the agreement for the consolidation was signed by the directors, and out of 499,961 outstanding shares in the Lake Shore Company the plaintiff was the owner of 5, which it had purchased two months after the directors signed the agreement.

The bill prayed that the New York Central Company be enjoined from voting its shares in the Lake Shore Company in favor of the consolidation agreement, or in any other way, or for any other purpose, that the Lake Shore Company be enjoined from permitting the New York Central Company to vote its shares in the former at any meeting of the stockholders, and that the Lake Shore Company be also enjoined from in any way entering into or consummating the proposed consolidation. Other incidental relief was prayed, but it need not be noticed here.

Two motions to dismiss were interposed by the Lake Shore Company and sustained by the District Court—one before and the other after the first appeal to the Circuit Court of Appeals. On that appeal the Circuit Court of Appeals upheld the ruling on the first motion as to part of the bill and reversed it as to the remainder. The second motion was directed against all that remained of the bill and advanced objections thereto which might have been, but were not, urged or considered on the first appeal. The District Court, regarding these as well taken, sustained the second motion, and on the next appeal the Circuit Court of Appeals approved that ruling. These motions gave rise to several distinct questions which we shall take up separately.

Effect of decision on first appeal.

[15] The plaintiff takes the position that the partial reversal on the first appeal

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amounted to an adjudication of the *sufficiency of so much of the bill as fell within the reversal and that the District Court could not thereafter treat its sufficiency as an open question. This position is not tenable. The reversal was put on the ground that the District Court had erred in holding in respect of that part of the bill that the New York Central Company was an indispensable party. Whether that part was rightly subject to other objections, such as afterwards were advanced in the second motion to dismiss, was neither discussed nor decided on that appeal. The opinions delivered on the two appeals make this plain. In that situation it

was quite admissible for the District Court, after the case was returned to it, to examine and pass on the objections presented in the second motion, and was likewise admissible for the Circuit Court of Appeals to consider them on the second appeal. *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, 553, 24 Sup. Ct. 538, 48 L. Ed. 788. And see *Messinger v. Anderson*, 225 U. S. 436, 444, 32 Sup. Ct. 739, 56 L. Ed. 1152.

Was the New York Central Company an indispensable party?

[16] As to so much of the bill as sought to enjoin the New York Central Company from voting its shares in the Lake Shore Company, and to enjoin the latter from permitting it to vote them, we think it is obvious that the New York Central Company was an indispensable party, and that, with it neither appearing nor reached by any effective process, no other course was open than to dismiss that part of the bill. *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 235, 246, 22 Sup. Ct. 308, 46 L. Ed. 499; *Talbot J. Taylor & Co. v. Southern Pacific Co. (C. C.)* 122 Fed. 147, 152, 154.

As to so much of the bill as sought to enjoin the Lake Shore Company from entering or consummating the proposed consolidation, the New York Central Company plainly was not an indispensable party. Its stockholding interest in the Lake Shore Company did not make its presence essential; its status in

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this regard being merely *that of the stockholders in general. Nor did its participation in the agreement for the consolidation give it any right which required that it be brought in. At best the agreement was not to be effective unless and until ratified by the stockholders of the several companies. It had not been ratified by the stockholders of the Lake Shore Company and they were under no obligation to ratify it.

Was plaintiff entitled to sue under the Sherman Anti-Trust Act and the Clayton Act, and, if so, could that right be exercised through a suit brought in a state court?

In the part of the bill assailed in the second motion to dismiss, as in the bill as a whole, the plaintiff based its right to relief by injunction primarily on the ground that the proposed consolidation would contravene the Sherman Anti-Trust Act (26 Stat. 209, c. 647), and the Clayton Act (38 Stat. 730, c. 323), and secondarily on the ground that it would be contrary to the Constitution and laws of Ohio and other states.

[17] As respects the Sherman Anti-Trust Act as it stood before it was supplemented by the Clayton Act, this court has heretofore determined that the civil remedies specially provided in the act for actual and threatened violations of its provisions were intended to be exclusive and that those remedies consisted only of (a) suits for injunctions brought by the United States in the

public interest under section 4 (Comp. St. § 8823); and (b) private actions to recover damages brought under section 7 (Comp. St. § 8829). *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 71, 24 Sup. St. 593, 48 L. Ed. 870; *Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U. S. 165, 174, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118; *Paine Lumber Co. v. Neal*, 244 U. S. 459, 471, 37 Sup. Ct. 718, 61 L. Ed. 1256; *Geddes v. Anaconda Mining Co.*, 254 U. S. 590, 593, 41 Sup. Ct. 209, 65 L. Ed. 425. The present suit for an injunction, brought by a private corporation in its own interest, was not within those remedies, and so could not be maintained under that act standing alone.

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[18] *That act was supplemented by the Clayton Act, particularly by its sixteenth section (Comp. St. § 8835o) reading as follows:

"That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damages is immediate, a preliminary injunction may issue: Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

This section undoubtedly enlarges the remedies provided in the Sherman Anti-Trust Act to the extent of enabling persons and corporations threatened with loss or damage through violations of that act to maintain suits to enjoin such violations, save in the instances specified in the proviso. This right to sue, however, is granted in terms which show that it is to be exercised only in a "court of the United States." This suit was brought in a state court, and in so far as its purpose was to enjoin a violation of the Sherman Anti-Trust Act that court could not entertain it. The situation was the same in respect of the purpose to enjoin a violation of the Clayton Act.

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[19] *When a cause is removed from a state court into a federal court, the latter takes it as it stood in the former. A want of jurisdiction in the state court is not cured by

the removal, but may be asserted after it is consummated. *Cain v. Commercial Publishing Co.*, 232 U. S. 124, 131, 34 Sup. Ct. 284, 58 L. Ed. 534 et seq.; *Cowley v. Northern Pacific R. Co.*, 159 U. S. 569, 583, 16 Sup. Ct. 127, 40 L. Ed. 263; *De Lima v. Bidwell*, 182 U. S. 1, 174, 21 Sup. Ct. 743, 45 L. Ed. 1041; *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U. S. 377, 42 Sup. Ct. 349, 66 L. Ed. 671 (April 10, 1922).

[20] It follows that so much of the bill as based the right to relief on asserted violations of the Sherman Anti-Trust Act and the Clayton Act was rightly dismissed; but the dismissal, being for want of jurisdiction, should have been without prejudice.

Did the bill show a right to relief in equity because of infractions of state Constitutions and laws?

[21] This branch of the suit was loosely set forth, and, as was observed by both courts below, there is some ground for thinking the references to state Constitutions and laws were merely makeweights. With other matters eliminated, this branch at best was left in a state of relative uncertainty. After commenting on this, the Circuit Court of Appeals said, with ample warrant (269 Fed. 239):

"We next observe that the consolidation sought to be enjoined was only a new formulation of the situation which had been existing for many years. It is expressly averred that the obnoxious control of parallel and competing lines had been accomplished, and for many years maintained, by stock ownership and control. It does not seem to be claimed that the proposed consolidation would create any restraints on competition that did not already exist. We find no definite statement that what was proposed would be obnoxious to any statute or constitutional provision which did not relate to competition between parallel lines, excepting the claim that the proposed consolidation would increase the capital stock and

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debts above *the permitted limit. It is probable, also, from the silence of the bill, that during all these years the public authorities of the various states have rested content and have not indicated any belief that public policy was being violated, and it may likewise seemingly be inferred that no public authorities are now objecting to the proposed consolidation, but that, on the contrary, they are all content.

"Further, we notice that plaintiff owns only one one-thousandth of 1 per cent. of the capital stock, that no other shareholder has accepted its invitation to join in preventing the imminent irreparable injury, and that this interest plaintiff bought after the consolidation contract was made. He seems to be a volunteer, rather than a conscript. We have, then, a case where a private suitor, with a minimum of ponderable interest, and with no disposition to beware of entrance to a quarrel, is seeking relief upon the sole ground that the public policy of the state is being violated, and where the state authorities have long acquiesced and do acquiesce in any violation there may be. Under such circumstances, the court of equity will

be strict in requiring the plaintiff to point out with precision and certainty in what respects the law is about to be violated and to show, clearly and positively, substantial and irreparable injury to its private rights. A measure of imperfection in pleading that might well be overlooked in the ordinary controversy should not be disregarded in such a case as this."

We think this branch of the suit should be tested by the rule of pleading there suggested, and that when this is done it is apparent that a right to equitable relief was not shown.

Our conclusion is that the motions to dismiss were rightly sustained. The Circuit Court of Appeals qualified the dismissal by making it without prejudice as to all parts of the bill save one. We have indicated that the qualification should have included that part.

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*The decree is accordingly modified, by making the dismissal without prejudice as to all parts of the bill, and, as thus modified, it is Affirmed.

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(260 U. S. 235)

**LIBERTY OIL CO. v. CONDON NAT.
BANK et al.**

(Argued Nov. 15 and 16, 1922. Decided
Nov. 27, 1922.)

No. 98.

1. Action ⚡36—Answer setting up equitable defense in nature of interpleader held to change proceeding from one at law to one in equity.

In an action for money had and received, where defendant by answer and cross-petition claimed to be only a stakeholder, disclaimed interest in the fund, offered to pay it into court and asked that other claimants of the fund be made parties, the proceeding was thereby changed from one at law to one in equity under Judicial Code, § 274b (Comp. St. § 1251b), permitting equitable defenses in actions at law.

2. Trial ⚡11(2)—When equitable defense interposed, court has power to order transfer to equity side of the court.

Under Judicial Code, §§ 274a, 274b (Comp. St. §§ 1251a, 1251b), where defendant in an action at law sets up an equitable defense in the nature of interpleader the court has power to order the cause transferred to the equity side of the court.

3. Action ⚡36—Failure to transfer to equity side of court does not cause loss of equitable character acquired by interposition of equitable defense.

Where defendant in an action at law filed an answer and cross-petition in the nature of a bill for interpleader, the failure to order the cause transferred to the equity side of the court did not cause the suit to lose its equitable character.

4. Jury ⚡13(18)—Trial ⚡4—Equitable defense should be first tried as in court of equity and issue of law remaining then tried to a jury.

When an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then if an issue at law remains, it is triable to a jury under Const. Amend. 7.

5. Jury ⚡12(2)—Constitutional provision read in light of practice prevailing when adopted.

Const. Amend. 7, relative to trial by jury in suits at common law, must be read in the light of the practice prevailing in the English courts of law and chancery when the Constitution and the amendment were adopted, in cases where defendant resorted to a bill in equity to enjoin a suit at law until he could make an equitable defense effective by a hearing before the chancellor.

6. Action ⚡36—Statute does not create one form, but manifests purpose to permit change with as little delay and formality as possible.

Judicial Code, §§ 274a, 274b (Comp. St. §§ 1251a, 1251b), does not create one form of civil action, but they manifest a purpose to permit change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible.

7. Jury ⚡13(18)—No right in action in which defense in nature of interpleader interposed.

In view of the established practice on bills of interpleader, where defendant files an answer and cross-petition in the nature of interpleader in an action at law, Const. Amend. 7, does not require a jury trial, and under equity rule 23 (33 Sup. Ct. xxiv), the chancellor should dispose of the controversy between the claimants, if it can readily be disposed of in the one proceeding.

8. Appeal and error ⚡846(1)—When answer in nature of interpleader filed, Circuit Court of Appeals should have considered the issue of law and fact.

In an action to recover a deposit under a contract for the purchase of oil lands, where the depository filed an answer and cross-petition in the nature of a bill of interpleader, and though the record on appeal contained a bill of exceptions, there was also a transcript of the evidence, certified as required in appeals in equity, the Circuit Court of Appeals, under Judicial Code, § 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246), and section 274b (Comp. St. § 1251b), should have considered the issue of law and fact as to marketable title, on which the decree depended, instead of limiting its review as in a suit at law on a bill of exceptions.

9. Courts ⚡383(1)—Supreme Court might consider and decide issue which Circuit Court of Appeals refused to consider, but will remand when issue not important.

In an action to recover a deposit under a contract to purchase oil lands, where the depository filed an answer and cross-petition in the nature of a bill of interpleader, and the Circuit Court of Appeals, treating the case as

one at law, refused to pass on the issue of marketable title, the Supreme Court on certiorari might consider and decide such issue; but where the writ would not have been granted on that issue alone, the case will be remanded to the Circuit Court of Appeals for consideration and decision.

Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Suit by the Liberty Oil Company against the Condon National Bank, which interpleaded certain other parties. A judgment against plaintiff was affirmed by the Circuit Court of Appeals (271 Fed. 928), and plaintiff brings certiorari. Reversed and remanded.

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*This suit was begun as an action at law in the District Court of Kansas by the Liberty Oil Company, a corporation organized under the laws of Virginia, and a citizen of that state, against the Condon National Bank, a corporation organized under the banking laws of the United States and resident and doing business in Kansas. Plaintiff by its petition averred that it had made a contract with the Atlas Petroleum Company of Oklahoma, C. M. Ball, Isadore Litman, P. G. Keith, and J. H. Keith, residents of Kansas, by which it agreed to purchase and they agreed to sell 160 acres, more or less, of oil lands in Butler county, Kansas, for \$1,150,000. By the contract, the purchaser was required to deposit \$100,000 with the Condon National Bank simultaneously with a deposit of the contract, and this sum, together with the assignments, transfers, and conveyances under the contract, was to be held by the bank and by it to be delivered in accordance with the conditions of the contract. The main conditions, and the only ones here material, were that the vendors should furnish an abstract of the title to the property contracted to be sold, showing a good and marketable title in them, that the vendee should have seven days in which to examine the abstract, and that, if its examination should show a good and marketable title, the vendee should pay the bank \$1,050,000, the remainder of the purchase money, and the bank should deliver the deeds of assignment and transfers to the vendee, and the vendor should deliver possession of the land. If the examination showed a good and marketable title, and the vendee should refuse to pay the money then due from it, the \$100,000 was to be delivered to the vendors as liquidated damages, and the contract was to become null and void. In the event that the examination should disclose that the title was not good and marketable, the vendee was to notify the vendors, and they were to have 30 days in which to perfect the title, and should they neglect in

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that time to do so the \$100,000 on *deposit was to be returned to the vendee, and the contract was to become null and void.

The petition averred that the money and the contract were deposited in the defendant bank, that the abstract of title was submitted, that an examination of the abstract submitted showed that the title of the vendors was not good and marketable, in that in the chain of title the vendors claimed under the deed of an assignee for the benefit of creditors filed in a Colorado court and taking effect by the laws of that state, but never authorized or confirmed by a court of competent jurisdiction under the laws of Kansas, as required by the law of the latter state, that this defect was not remedied by the vendors within the time required by the contract and on July 11, 1918, the plaintiff duly notified the defendant bank of this and demanded payment of the money deposited, that the defendant refused and appropriated the sum to its own use to the damage of the plaintiff in the sum of \$100,000 and interest at 6 per cent. from the date of the demand and refusal.

The defendant bank answered, admitting all the facts averred in the petition, except those as to the character of the title shown by the abstract, and alleged that the vendors in the contract of sale had also demanded that the deposit of \$100,000 be paid to them on the ground that the vendee had refused without right to accept a good and marketable title to the land sold, that the defendant bank had no interest in the deposit, and offered to pay the sum into court or to such person as the court should order. The defendant asked that the vendors be made parties and required to set up their claim to the deposit, that the court make proper order as to the disposition of the money, and that the defendant, upon compliance with the order, be discharged from all liability in connection therewith. The court granted the prayer of the answer and "ordered, adjudged, and de-

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creed" that vendors be made *parties, and set up their claim within 20 days. The vendors waived summons and filed an answer and cross-petition, in which they averred that the petition of the plaintiff did not state a cause of action, and denied as much of the petition as averred that there were defects in the abstract of title which prevented it from being good and marketable. By the cross-petition they asked for the payment of the \$100,000 deposit and also a judgment for \$1,050,000 as the purchase price for the land, title to which they had tendered, and for general relief. This cross-petition the plaintiff answered, making the same issue as that in the petition and answer. A jury was waived in writing. A bill of exceptions was taken, embodying all the evidence, which was signed by the judge, and the same evidence was included in a transcript also certified to by the judge.

The District Court on the evidence found generally for the vendors, and from its opinion it appeared that it found the title good and marketable, and that upon plaintiff's re-

fusal to accept the same the vendors became entitled to the \$100,000 as liquidated damages. Accordingly it was "considered, ordered, and adjudged" that the vendors, interveners, recover \$10,750 as interest on the \$100,000 from June 30, 1918, that the Condon Bank, defendant, be discharged from further liability, and that the interveners have judgment for the \$100,000 then in the registry of the court. There is nothing in the record to show that the defendant bank was dismissed until this final judgment, although, under some authority not made a matter of record, it had turned the money into the registry of the court.

An appeal was taken to the Circuit Court of Appeals and a supersedeas bond given. The Circuit Court of Appeals held that the action was a suit at law, that under section 4 of the Act of September 6, 1916 (39 Stat. 727 [Comp. St. § 1649a]), to amend the Judi-

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cial Code, it had the power and it was *its duty to consider the appeal taken as a writ of error, and that, as the bill of exceptions showed no special findings of fact in a cause in which a jury had been waived but only a general finding for the interveners, it was not within the power of the court in a law case to consider the sufficiency of the evidence to sustain the finding. It therefore affirmed the judgment of the District Court. A certiorari brings the case here for consideration.

Mr. F. W. Lehmann, of St. Louis, Mo., for petitioner.

Mr. John J. Jones, of Kansas City, Mo., for respondents.

Mr. Chief Justice TAFT, after stating the case, delivered the opinion of the Court.

[1, 2] We differ with the Circuit Court of Appeals in its holding that, as brought in review before it, this cause was an action at law. We think the cause was then equitable, and the proper review was by appeal. The case began as an action at law for money had and received. When the defendant bank claimed to be only a stakeholder of the deposit, disclaimed interest therein, and offered to pay it into court, and asked that the other claimants of the fund be made parties, its answer and cross-petition became an equitable defense and a prayer for affirmative equitable relief in the nature of a bill for interpleader. Section 274b of the Judicial Code, as amended by Act of March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. § 1251b), provides:

"That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or

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plea. Equitable *relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

This section applies to the case before us. The proceeding was changed by defendant's answer and cross-petition from one at law to one in equity with all the consequences flowing therefrom. The better practice would perhaps have been, on the defendant's filing its answer and cross-petition, to order the cause transferred to the equity side of the court. Under equity rule No. 22 (33 Sup. Ct. xxiv), a suit in equity which should have been brought at law must be transferred to the law side of the court. There is no corresponding provision in rule or statute which expressly directs this to be done when the action begun at law should have been by a bill on the equity side, but we think the power of the trial court to order a transfer in a case like this is implied from the broad language of section 274b, above quoted, by which the defendant who files an equitable defense is to be given the same rights as if he had set them up in a bill in equity, and from section 274a of the Judicial Code (Comp. St. § 1251a), quoted below, in which the court is directed, when a suit at law should have been brought in equity, to order amendments to the pleadings necessary to conform them to the proper practice. *Webb v. Southern Ry. Co.* (D. C.) 235 Fed. 578, 593, 594. We are aware that a different conclusion has been reached by the Circuit Court of Appeals of the Fourth Circuit in *Waldo et al. v. Wilson*, 231 Fed. 654, 145 C. C. A. 540, but for the reasons stated, and after a full examination of that case, we think the conclusion of that court upon this point was too narrow.

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[3] *Nor, by the failure to order the transfer in this case, did the suit lose the equitable character it had taken on by the answer and cross-petition of the defendant. The situation thus produced was quite like that under state Civil Codes of Procedure in which there is but one form of civil action, the formal distinction between proceedings in law and equity is abolished, and remedies at law and in equity are available to the parties in the same court and the same cause. Neither legal nor equitable remedies are abolished under such Codes.

"What was an action at law before the Code is still an action founded on legal principles; and what was a bill in equity before the Code is still a civil action founded on principles of equity." *Sutherland on Code Pleading Practice and Forms*, § 87; *De Witt v. Hays*, 2 Cal. 464,

56 Am. Dec. 352; *Smith v. Rowe*, 4 Cal. 6; *Howard v. Tiffany*, 5 N. Y. Super. Ct. 695.

Section 274b is an important step toward a consolidation of the federal courts of law and equity, and the questions presented in this union are to be solved much as they have been under the state Codes. *United States v. Richardson*, 223 Fed. 1010, 1013, 139 C. C. A. 386. The most important limitation upon a federal union of the two kinds of remedies in one form of action is the requirement of the Constitution in the Seventh Amendment that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

[4, 5] Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury. *Massie v. Stradford*, 17 Ohio St. 596; *Dodsworth v. Hopple*, 33 Ohio St. 16, 18; *Taylor v. Brick Co.*, 66 Ohio St. 360, 366, 64 N. E. 428; *Sutherland Code Pl. and Pr.* § 1157. The equitable defense

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makes the issue *equitable, and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law. The same order is preserved as under the system of separate courts. If a defendant at law had an equitable defense, he resorted to a bill in equity to enjoin the suit at law, until he could make his equitable defense effective by a hearing before the chancellor. The hearing on that bill was before the chancellor, and not before a jury, and, if the prayer of the bill was granted, the injunction against the suit at law was made perpetual, and no jury trial ensued. If the injunction was denied, the suit at law proceeded to verdict and judgment. This was the practice in the courts of law and chancery in England when our Constitution and the Seventh Amendment were adopted, and it is in the light of such practice that the Seventh Amendment is to be construed.

Congress, we think, was looking toward such a union of laws and equity actions in the enactment of section 274b quoted above, and of section 274a, which, referring to courts of the United States, provides:

"That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such

amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

[6] To be sure, these sections do not create one form of civil action as do the Codes of

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Procedure in the states, but they *manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and are long steps toward Code practice.

[7] Coming now to apply those two sections thus construed to the case before us, we find that by defendant's answer and the court's order it became a bill of interpleader in equity. Thereafter the proceedings should have been so treated, both in the trial and appellate courts. The chancellor having sustained a bill of interpleader, disposed of the controversy between the claimants by directing any method of trial which would best and expeditiously accomplish justice in the particular case. *State Insurance Co. v. Gennett*, 2 Tenn. Ch. 100, 101; *Rowe v. Hoagland's Adm'rs*, 7 N. J. Eq. 131; *Condict's Ex'rs v. King*, 13 N. J. Eq. 375, 383; *City Bank v. Bangs*, 2 Paige, Ch. (N. Y.) 570, 573; *Gibson v. Goldthwaite*, 7 Ala. 281, 290, 42 Am. Dec. 592; *Angell v. Hadden*, 16 Vesey, 202; *Kirtland v. Moore*, 40 N. J. Eq. 106, 108, 2 Atl. 269; 2 *Daniell's Ch. Practice* (6th Am. Ed.) 1568, 1569. This well-established rule takes the issue here to be tried out of that class of issues in which there must have been a jury trial under the Seventh Amendment. Where it was one which the chancellor could readily dispose of in one proceeding, it was in the interest of economy of expedition, and of justice that he should do so. This is in accord with the general rule in equity embodied in equity rule 23 (33 Sup. Ct. xxiv) that jurisdiction once assumed should be maintained to end the litigation. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 520, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *McGowan v. Parish*, 237 U. S. 285, 296, 35 Sup. Ct. 543, 59 L. Ed. 955; *Camp v. Boyd*, 229 U. S. 530, 551, 552, 33 Sup. Ct. 785, 57 L. Ed. 1317.

[8] It was therefore error by the Circuit Court of Appeals to proceed as if it were reviewing a judgment in a suit at law upon a bill of exceptions. It is true that the record contained a bill of exceptions, but there was also a transcript of the same evidence

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certified as required *in appeals in equity. The plaintiff below was evidently not certain of the proper practice and prepared for either writ of error or appeal. Under section 269 of the Judicial Code, as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181 (Comp. St. Ann. Supp. 1919, § 1246), appellate courts are enjoined to give judgment after an examination of the record

without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties; and under section 274b, whether the review is sought by writ of error or appeal, the appellate court is given full power to render such judgment upon the record as law and justice shall require. It follows that the court should have considered the issue of law and fact upon which the decree of the District Court depended; that is, whether there was a good and marketable title.

[9] On this review by certiorari, we could consider and decide the issue which the Circuit Court of Appeals erroneously refused to consider. On such an issue alone, however, we would not have granted the writ, because, except for the important question of practice, the case was not of sufficient public interest to justify it. We think it better, therefore, to reverse the judgment of the Circuit Court of Appeals, and to remand the case to that court for consideration and decision of the issues of fact and law in this case as on an appeal in equity.

(260 U. S. 340)

NEW YORK CENT & H. R. R. CO. v. KINNEY.

(Argued Nov. 21, 1922. Decided. Dec. 4, 1922.)

No. 110.

1. Master and servant § 256(1)—Pleading, warranting recovery under federal act or state laws, not contrary to statute.

A pleading in a railroad engineer's action for injuries, warranting a recovery under either the federal Employers' Liability Act (Comp. St. §§ 8657-8665) or the common law and statutes of the state, as the jury shall find, is not contrary to the statutes of the United States.

2. Limitation of actions § 127(5)—Amendment alleging engagement in interstate commerce not barred, when original complaint warranted recovery under either state law or federal statute.

Where the original complaint in a railway engineer's action for injuries set forth facts that would have given a cause of action at common law under the statutes of New York or under the federal Employers' Liability Act (Comp. St. §§ 8657-8665), as one or another law might govern, though alleging notice required by the New York statute, and to that extent pointing thereto, an amended complaint, alleging that the parties were engaged in interstate commerce, was not barred by limitations.

On Writ of Certiorari to the Supreme Court of the State of New York.

Action by John W. Kinney against the New York Central & Hudson River Railroad Company. A judgment for plaintiff was affirmed by the Appellate Division (190 App. Div. 967,

179 N. Y. Supp. 929) and Court of Appeals (231 N. Y. 578, 132 N. E. 895) of the state of New York, and defendant brings certiorari. Affirmed.

Mr. Maurice C. Spratt, of Buffalo, N. Y., for petitioner.

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*Mr. Hamilton Ward, of Buffalo, N. Y., for respondent.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit for personal injuries to the plaintiff, the respondent in this Court, caused by the collision of a train upon which he was employed by the defendant, the petitioner, as an engineer, with a train of the Michigan Central Railroad Company. After several trials and about seven years and a half after the suit was begun the plaintiff was allowed to amend his complaint by alleging that at the time of the collision the plaintiff and defendant were engaged in interstate commerce. He got the present judgment under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665), the jury having found that the parties were so engaged. The defendant contended that the amendment introduced a new cause of action and under § 6 of the Act could not be allowed after the two years' limitation had

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run. See also Act of April 5, 1910, *c. 143, 36 Stat. 291. A writ of certiorari was granted to dispose of this doubt.

[1] The original complaint set forth facts that would have given a cause of action at common law, under the statutes of New York or the Act of Congress, as one or another law might govern. It alleged a notice, required by the New York statute and to that extent pointed to that. The amended complaint, against the petitioner alone, while it introduced the allegations objected to, retained the allegation as to notice, and was treated by the trial Court, seemingly with the approval of the higher Courts of the State, as warranting a recovery under either law as the jury should find. There is nothing in the statutes of the United States to prevent this form of pleading, as is indicated incidentally in the case that we are about to cite upon the main point.

[2] In *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, the declaration was by the mother as sole heir and next of kin of an employee of the plaintiff in error, in terms referring to a statute of Kansas giving her a right of action for injuries resulting in death. An amendment was allowed, more than two years after the injury, in which the plaintiff declared both as sole beneficiary and next of kin and as administratrix and relied both on the Kansas law and

on the Act of Congress. The plaintiff got a judgment under the Act of Congress which was sustained by this Court although the original declaration by the plaintiff could not be attributed to the Employers' Liability Act, because the plaintiff sued only in her personal capacity and relied for that, as she had to, upon the Kansas law. 226 U. S. 576, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134. It is true that the fact of the injury arising in interstate commerce was pleaded by the defendant. But it was pleaded as a bar to the action as it then stood and only makes more marked the changes that the amendment introduced. We do not perceive that the effect of the amendment in

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that case distinguishes it from *this. It really is a stronger case, because, as we have said, here the declaration was consistent with a wrong under the law of the State or of the United States as the facts might turn out. The amendment "merely expanded or amplified what was alleged in support of the cause of action already asserted * * * and was not affected by the intervening lapse of time." *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 293, 36 Sup. Ct. 567, 568 (60 L. Ed. 1006). "The facts constituting the tort were the same, whichever law gave them that effect." *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352, 354, 36 Sup. Ct. 126, 60 L. Ed. 324. See also *St. Louis, San Francisco & Texas Ry. Co. v. Smith*, 243 U. S. 630, 37 Sup. Ct. 477, 61 L. Ed. 938. Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.

We shall not discuss at length other points that technically are open but that did not induce the granting of the writ, such as the sufficiency of the evidence that the parties were engaged in interstate commerce, the instruction as to assumption of risk, etc. We see no sufficient reason for disturbing the judgment and it must stand.

Judgment affirmed.

(260 U. S. 349)

DAVIS, Director General of Railroads, v. GREEN.

(Argued Nov. 28, 1922. Decided Dec. 4, 1922.)

No. 132.

I. Pleading ⚡126—Reply in words of plea held negative pregnant, and not legal denial.

In action for death, where defendant pleaded in bar that plaintiffs ought not to have their action, because the parties were engaged in in-

terstate commerce, in that they were engaged in transporting articles of commerce from and to foreign states, a reply denying that plaintiff ought not to have her action, because the parties were engaged, etc., was a negative pregnant, admitting the fact and denying only the conclusion, and in legal effect did not deny the fact.

2. Master and servant ⚡180½—Railroad company not liable for wanton and willful killing of employee by another.

Under the statutes of the United States, a railroad company is not liable for the wanton and willful act of an engineer in killing a conductor to satisfy his temper or spite, though committed while the employment was going on.

3. Courts ⚡394(15)—Erroneous assumption that liability imposed under both laws sued on held sufficient ground for reversal.

In consolidated actions under Hemingway's Code Miss. § 501, and Act Cong. April 22, 1908 (Comp. St. §§ 8657-8665), for the death of a railroad conductor, it is sufficient ground for reversing the judgment of the state Supreme Court that it based its decision in part on the erroneous assumption that defendant was liable for the act of an engineer under both laws.

4. Courts ⚡394(15)—Rights under federal law not to be denied because of state court decision that fact not adequately proved.

In an action for the death of a railroad conductor, where it appears that the case was tried on the warranted supposition that there was no serious controversy as to the parties having been engaged in interstate commerce, and it is not improbable that they were so engaged, defendant cannot be deprived of his rights under the federal law by the decision of the state Supreme Court that such fact was not adequately proved, and the United States Supreme Court must decide that question for itself.

On Writ of Certiorari to the Supreme Court of the State of Mississippi.

Action by Mrs. Maude E. Green, administratrix of Jesse Green, deceased, against James C. Davis, Director General of Railroads, and Agent under section 206 of the Transportation Act of 1920 (41 Stat. 456). A judgment for plaintiff was affirmed, with remittitur, by the Supreme Court of Mississippi (*Hines v. Green*, 125 Miss. 476, 87 South. 649), and defendant brings certiorari. Reversed.

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*Mr. T. J. Wills, of Hattiesburg, Miss., for petitioner.

Mr. J. W. Cassedy, of Brookhaven, Miss., for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

[1] This is an action made up of the consolidation of two suits, both brought to make the plaintiff in error liable for what is alleged to have been the wilful and wanton killing of Jesse Green, a conductor on the line of the Gulf & Ship Island Railroad Com-

pany, by one McLendon, an engineer. The first suit, although alleging that the Railroad was a common carrier both intra and interstate, may be taken to have been brought under the State law. It was brought by the widow of Green on her own behalf and his children by her as next friend. To this the defendant pleaded in bar among other things that the plaintiffs ought not to have their action because at the time and place the parties were engaged in interstate commerce in this that the defendant and the employees named were engaged in transporting articles of commerce from and to foreign States. The second suit was brought three months later by the widow as administratrix and was intended to state a cause of action under either the law of the State or the Act of Congress as the facts should turn out. To this also there was a plea in the words that we have quoted in abridged form. The plaintiff replied denying that she ought not to have her action because at the time and place of the said injury the defendant and the deceased were engaged in interstate commerce in this that, &c., following the words of the plea. This was a plain case of what in the old pleading was called a negative pregnant; it admitted the fact and only denied the conclusion. Very probably it was intended to deny the fact, as this mode of traversing a paragraph as a whole is very

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*common in the present careless ways, but it did not deny it in legal effect. Directly after the second suit was brought the principal plaintiff was allowed to change the first to a suit by herself as administratrix and the two suits were consolidated on her motion. As the replication that we have mentioned seems to have been filed after the consolidation, perhaps it was regarded as going to the plea in both suits. Otherwise that in the first suit does not appear to have been put in issue. At the trial the judge ruled that the parties were engaged in interstate commerce, without objection so far as the record shows, but refused, subject to exception, to direct a verdict for the defendant. The plaintiff had a verdict and judgment for \$35,000, and the case then was taken to the Supreme Court.

The Supreme Court sustained the judgment although it held that the case was governed by State law. It held that on the general principle of liability the Act of Congress (Comp. St. §§ 8657-8665) and the law of the State (Hemingway's Code, § 501) agreed. It held, however, that there were important differences between the two laws

with regard to the measure of damages and otherwise and that as the case was tried under the Act of Congress, and as on the evidence the highest amount that could have been recovered under the federal act was \$16,000, the plaintiff must remit all above that amount if she would retain her judgment, although under the State law she could have recovered more.

[2] The ground on which the Railroad Company was held was that it had negligently employed a dangerous man with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi a railroad company is

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not liable for such an act under *the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words that he did a wilful act wholly outside the scope of his employment while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies.

[3, 4] As we understand the opinion of the Supreme Court of Mississippi it based its decision in part upon the assumption that liability for the engineer's act was imposed upon the defendant by both laws and this assumption would be a sufficient ground for reversing the judgment. But we should come to the same conclusion even if our understanding were shown to be wrong. As the record stands it appears to us that the case was tried upon the warranted supposition that there was no serious controversy as to the parties having been engaged in interstate commerce and for that reason the defendant paid but slight attention to proving the fact. It seems at least not improbable that the parties were so engaged. In such circumstances the defendant is not to be deprived of its rights under the law of the United States by a decision that the fact now questioned was not adequately proved. On such matters we must judge for ourselves. If there is a new trial probably the plaintiff will be allowed to dispute the character of the employment if she is so advised. See *Bowen v. Illinois Cent. R. Co.*, 136 Fed. 306, 69 O. C. A. 444, 70 L. R. A. 915.

Judgment reversed.

260 U. S. 346)

ST. LOUIS COTTON COMPRESS CO. v. STATE OF ARKANSAS.

(Argued Nov. 23 and 24, 1922. Decided Dec. 4, 1922.)

No. 120.

1. Courts ⇨394(18)—United States Supreme Court not bound by state court's characterization of tax.

Though the United States Supreme Court is bound by the construction put on a state statute by the Supreme Court of the state, it is not bound by its characterization of a tax thereby imposed, so far as such characterization bears on the question of its constitutional effect.

2. Constitutional law ⇨283—Taxation ⇨37—Tax on insurance premiums invalid, as applied to policies obtained outside the state.

Crawford & Moses' Dig. Ark. § 9967, imposing a so-called tax on premiums paid for insurance on property in the state to companies not authorized to do business in the state, is invalid, under Const. U. S. Amend. 14, as applied to policies contracted for, delivered, and paid for outside the state, at the domicile of the owner of the property, a foreign corporation.

3. Corporations ⇨636—State cannot interfere with what foreign corporations do outside the state.

While a state may regulate the activities of foreign corporations within the state, it cannot regulate, or interfere with what they do outside.

In Error to the Supreme Court of the State of Arkansas.

Suit by the State of Arkansas against the St. Louis Cotton Compress Company. Judgment for defendant was reversed by the Supreme Court of Arkansas (147 Ark. 406, 227 S. W. 605), and judgment entered for plaintiff, and defendant brings error. Reversed.

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*Mr. Geo. B. Rose, of Little Rock, Ark., for plaintiff in error.

Messrs. Wm. T. Hammock and F. G. Lindsey, both of Little Rock, Ark., for the State of Arkansas.

Mr. Justice HOLMES delivered the opinion of the court.

This is a suit by the State of Arkansas against a corporation of Missouri authorized to do business in Arkansas. It is brought to recover five per cent. on the gross premiums paid by the defendant, the plaintiff in error, for insurance upon its property in Arkansas, to companies not authorized to do business in the State. A statute of the state purports to impose a liability for this amount as a tax. Crawford & Moses' Digest (1921) § 9967. The answer alleged that the policies were contracted for, delivered and paid for in St. Louis, Missouri, the domicile of the corporation, because the rates were less than those

charged by companies authorized to do business in Arkansas. It also alleged that long

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before the taxing act was passed the *defendant had made large investments in Arkansas in real and personal property essential to the conduct of its business, which it had held and operated ever since. The plaintiff demurred. The lower Court overruled the demurrer, but the Supreme Court sustained it, holding that the statute denied to the defendant no rights guaranteed to it by the Fourteenth Amendment. Judgment was entered for the plaintiff and the case was brought by writ of error to this Court.

[1-3] The Supreme Court justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. But this Court although bound by the construction that the Supreme Court may put upon the statute is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 362, 35 Sup. Ct. 99, 59 L. Ed. 265. The short question is whether this so-called tax is saved because of the name given to it by the statute when it has been decided in Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832, that the imposition of a round sum, called a fine, for doing the same thing, called an offence, is invalid under the Fourteenth Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the State to the imposition is not conclusive. Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 Sup. Ct. 449, 66 L. Ed. 817, May 15, 1922, Lipke v. Lederer, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. Ed. 1061, June 5, 1922. In Louisiana the detriment was \$1000. Here it is 5 per cent. upon the premiums—which is 3 per cent. more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to

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discourage insuring in companies that *do not pay tribute to the State. This case is stronger than that of Allgeyer in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside. The other limit upon the State's power due to its having permitted the plaintiff in error to establish itself as alleged, need not be considered here. Southern Ry. Co. v. Greene, 216 U. S. 400, 414, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas.

1247; *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147, 157, 38 Sup. Ct. 295, 62 L. Ed. 632; *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U. S. 132, 140, 38 Sup. Ct. 444, 62 L. Ed. 1025.

Judgment reversed.

(260 U. S. 316)

SOUTHERN RY. CO. v. CLIFT.

(Argued Nov. 21, 1922. Decided Dec. 4, 1922.)

No. 107.

1. Appeal and error ⇨84(1) — Finality of judgment not affected by right of successful party to petition for rehearing.

A law providing that, within 60 days after the termination of a case by the state Supreme Court, "either party" may petition for rehearing, does not deprive the judgment of finality, so as to preclude a writ of error from the United States Supreme Court, on the theory that the successful party, as well as the unsuccessful party, had until the expiration of such time to exercise the right to petition for rehearing.

2. Courts ⇨391(1) — Constitutional question supports writ of error, though former decision adhered to as law of the case.

Where the state Supreme Court, on a second appeal in an action, though adhering to its former decision as the law of the case, considered and decided the constitutional question involved, a writ of error lies from the United States Supreme Court.

3. Appeal and error ⇨1097(1) — Judgment ⇨634—Law of the case not res judicata.

There is a difference between adherence to a former decision as the law of the case and res judicata, as one directs discretion, while the other supersedes it and compels judgment; the question in the one case being one of power, and in the other of submission.

4. Constitutional law ⇨297 — Legislation appropriate to special characteristics and duties of railroads is due process.

As the relation of carriers and shippers is so peculiar as to render valid a classification based on it, there may be class legislation, and legislation that is considerate of, and appropriate to, the special characteristics and duties of railroads is due process of law.

5. Carriers ⇨2—Constitutional law ⇨299—Statute making carrier liable, unless it rejects claim, is constitutional.

Acts Ind. 1911, c. 183, § 3, providing that claims for loss of or damage to freight shall be paid or rejected by carriers within 90 days, and, if neither paid nor rejected in whole or in part within such time, shall stand admitted as liabilities due and payable to their full amount, but not imposing any penalty for rejection, does not violate Const. U. S. Amend. 14.

In Error to the Supreme Court of the State of Indiana.

Action by Joseph H. Clift against the Southern Railway Company. Judgment for plaintiff was affirmed by the Supreme Court

of Indiana (131 N. E. 4), and defendant brings error. Affirmed.

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*Messrs. John D. Welman, of Evansville, Ind., and Alexander Pope Humphrey, of Louisville, Ky. (Messrs. L. E. Jeffries, of Washington, D. C., Edward P. Humphrey, of Louisville, Ky., and L. C. Embree, of Princeton, Ind., of counsel), for plaintiff in error.

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*Mr. T. Morton McDonald, of Princeton, Ind., for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

The case is concerned with a statute of Indiana under which judgment was obtained against the railway company upon a claim for damage to property which it received for transportation within the state.

A motion is made by defendant in error to dismiss the writ of error; this court, it is contended, being without jurisdiction. The grounds of the motion are specified as follows: (1) The judgment, at the time the transcript was filed, had not become final. (2) It did not decide any federal question.

[1] To sustain the first ground, it is said, that under the law of the state, within 60 days after the termination of the case by the Supreme Court, "either party may file

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a "petition for a rehearing." From this it is deduced and contended that the successful as well as the unsuccessful party in the action may file a petition for rehearing, and that until the expiration of the time for the exercise of the right the judgment does not become final. The contention is curious. Legal procedure is a facility of rights, and rights achieved, its purpose is done. A successful litigant does not need the delay and provision of a rehearing. He has more efficient and enduring relief. His affliction may be solaced by not enforcing the victory which is the cause of it. The contention of defendant in error is so obviously untenable that further comment upon it would be the veriest supererogation.

[2, 3] In support of the second ground it is pointed out that the judgment to which the writ of error is directed was rendered on a second appeal and that the court decided that the decision "on the first appeal is the law of the case." It is hence asserted that it was res adjudicata and precluded dispute, and that therefore the decision rested upon an independent ground, not involving a federal question, and broad enough to maintain the judgment. For this Northern Pacific Railroad Co. v. Ellis, 144 U. S. 458, 464, 12 Sup. Ct. 724, 36 L. Ed. 504, is cited. That case does not determine this one. That case was constrained by the law of the state; such constraint does not exist in the present case. The constitutional question involved was considered and decided. The prior ruling may have been followed as the law of

the case, but there is a difference between such adherence and *res adjudicata*. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission. *Remington v. Central Pacific Railroad Co.*, 198 U. S. 95, 99, 25 Sup. Ct. 577, 49 L. Ed. 959; *Messinger v. Anderson*, 225 U. S. 436, 444, 32 Sup. Ct. 739, 56 L. Ed. 1152. The court in the present case, as we have said, considered the constitutional question

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presented and decided against it, and to *review its decision is the purpose of this writ of error. The motion to dismiss is denied.

The merits of the case are concerned with the validity of a statute of the state of Indiana passed in 1911 (Acts 1911, c. 183), providing for the presentation of claims for loss or damage to freight transported wholly within the state.

A section of the act requires the claimant to present his claim within four months, and another section (section 3) prescribes the action and the time of action of the railroad company. It is as follows:

"That every claim for loss of or damage to freight transported wholly between points within the state of Indiana may be presented to the agent of the carrier who issued the receipt or bill of lading therefor or to the freight agent or representative of such carrier at the point of destination, or to any freight agent of any carrier in whose possession such freight was when lost or damaged, and when so presented shall be paid or rejected by such carrier within ninety days therefrom, and if neither paid nor rejected in whole or in part within such time, such claim shall stand admitted as a liability due and payable to the full amount thereof against any such carrier, and may be recovered in any court having competent jurisdiction."

The assignments of error assail the quoted section as offensive to the Fourteenth Amendment of the Constitution of the United States, and in specification it is contended that the judgment of the court in sustaining the statute and in rendering judgment against the company for the full amount of the claim presented, together with interest, upon the pleadings in the case denied to the company the right to defend the case on the merits as to the amount defendant in error was damaged and whether he was damaged at all.

[4, 5] The invocation of the company is of the due process clause of the Fourteenth

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Amendment. It is admitted the *effect of the decisions of this court is that the relation of carriers and shippers is "a relation so peculiar as to render valid a classification based upon it." If there may be class assignment, there may be class legislation. In other words, under the concession and the decisions that compel it, railroads have special characteristics and duties, and the legislation that is considerate of and appropriate to

those characteristics and duties is due process of law. And this obviously. The service of a railroad is in the public interest; it is compulsory, and its purpose and duty are the transportation of persons and things promptly and safely, and the purpose and duty are fortified by responsibility for neglect of them or violation of them. And legislation may make an element of responsibility an early payment of loss or notification of controversy that responsibility may be enforced if it exist. In the legislation under review there is no impediment to investigation. Considering the facilities of the railroad company there is time for investigation and what can be discovered by it, and if controversy is resolved upon, the procedure of the law and the principles which direct the decisions of the law are available against the claim in whole or in part. Counsel is therefore in error, in the statement that the statute prohibits the railroad "from contesting the justice of the claim which has been presented to it, and from showing, even though the claim is justified to a certain amount, it is not just to the extent claimed."

The company cites cases to sustain its contention that the statute of the state is unconstitutional. We do not review them, because we consider that they are not analogous or pertinent. They were not concerned with the time of the presentation of claims simply and suit upon them as in the Indiana statute. They were concerned with elements or conditions of liability in addition to the claims. Other cases which, in candor, the company has cited oppose its contention. In

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*Seaboard Air Line Ry. v. *Seegers*, 207 U. S. 77, 28 Sup. Ct. 28, 52 L. Ed. 108, a statute of South Carolina was held valid imposing a penalty of \$50 on all common carriers for failure to adjust damage claims within 40 days from the time of demand. The statute was considered as not one of the mere refusal to pay a claim, nor was it decided to have that objection because a penalty of \$50 could be imposed in case of recovery in court. The penalty was considered a legal deterrent upon the carrier in refusing the settlement of just claims and as compensation for the trouble and expense of suit. In *Yazoo & Mississippi Valley Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 33 Sup. Ct. 40, 57 L. Ed. 193, the penalty prescribed was decided to be a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment. To the same effect is *Kansas City Railway Co. v. Anderson*, 233 U. S. 326, 34 Sup. Ct. 599, 58 L. Ed. 983, *Missouri, Kansas & Texas Railway Co. v. Cade*, 233 U. S. 642, 34 Sup. Ct. 678, 58 L. Ed. 1135, and *Chicago & Northwestern Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U. S. 35, 43 Sup. Ct. 55, 67 L. Ed. —, decided November 13, 1922.

In attempting to minimize these cases, or

exclude them from authority, it seems to be contended, certainly implied, that by the statute, in case of suit by a claimant, he is excused from establishing his claim. The contention is untenable. The statute is clear and direct in its requirements. If the claim is just there is no injustice in requiring its payment; if the claim is deemed by the company to be unjust, the statute requires a declaration of the fact by its rejection. Upon rejection, suit, of course, must be brought for it, and it must be established. No penalty is imposed for its rejection, nor increase of its amount in consequence of rejection.

Judgment affirmed.

(260 U. S. 323)

**UNITED STATES v. MASON &
HANGER CO.¹**

(Argued Nov. 24, 1922. Decided Dec. 4, 1922.)

No. 121.

United States 63—73—War Department's decision as to liability on cost plus contract binding on government.

Under cost plus contract with the government, providing for payment by the government of the cost of bonds and of losses and expenses found and certified by the contracting officer, and providing for a monthly statement of elements of costs on which, in case of disagreement, the decision of the contracting officer was to govern, and that the settlement so made and all payments thereon should be final and binding, except as provided in another article reserving final decision to the Secretary of War, where the War Department approved the contractor's claim for premium on a surety bond, and settlement and payment was made therefore, such decision, settlement, and payment was binding on the government.

Appeal from the Court of Claims.

Suit by the Mason & Hanger Company against the United States. Judgment for claimant (56 Ct. Cl. 238), and the United States appeals. Affirmed.

Mr. Alfred A. Wheat, of New York City, for the United States.

Mr. Geo. A. King, of Washington, D. C., for appellee.

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*Mr. Justice McKENNA delivered the opinion of the Court.

Appeal from a judgment of the Court of Claims which awards the appellee, plaintiff in the Court of Claims, the sum of \$12,064.52, composed of three sums, which are respectively of the amounts of \$2,500, \$450, and \$9,114.52. The last two sums the United States does not contest. The sum of \$2,500 is only, therefore, in question. The amount is charged to be due (as the other sums were) upon what are called "cost plus contracts"

for the construction of certain buildings at Camp Zachary Taylor, near Louisville, Kentucky.

It is provided in article II of the contract that "the contractor shall be reimbursed * * * for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer. * * * (h) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require, and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. * * *

The United States contends that within the meaning of article II the premium paid on a bond of \$250,000, that being the amount fixed by the War Department, was not an expenditure in the performance of the work. The Court of Claims decided the contrary and supported its decision by the action and approval of the War Department. And there was no hesitation on the part of the department. It recognized the obligation of the government under the contract to pay to the

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contractor the *amount of premium, and negotiated with the surety companies for a reduction of it in the interest of the government. The premium was approved by the contracting officer as required by article II and paid as part of the cost of the work and was not questioned for over two years. Its amount was later deducted from other sums due the contractor.

What is the import of this practical interpretation? The government does not contend that the words of the contract were dictated by statute. They are, therefore, the words of the contracting officer to express and provide for the purpose of the government in exercise of the duty with which he was charged, and used as a declaration and measure of the rights and obligations of the parties to the contract. His subsequent conduct is necessarily to be considered a definition of them. The officer in a sense is a party to the contract, not only representing but speaking for the impersonality of the government. Competent, therefore, it would seem, to declare the meaning of the contract.

We are, however, not called upon to pass upon the conflicting contentions. The contract contains other provisions that determine the liability of the government.

Article IV of the contract provides for a monthly statement of the elements of costs upon which, if there be disagreement, the decision of the contracting officer "shall gov-

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹Judgment affirmed on rehearing, 261 U. S. 610, 43 Sup. Ct. 518, 67 L. Ed. —.

ern." It is further provided that "the settlement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in article XIV hereof." Article XIV requires the contract to be interpreted as a whole, not by any special clause and takes care to reserve the determining decision to the officers concerned with the work, the final decision being that of the Secretary of War. Article IV, indeed, is the complement and elaboration of the provision of article II (quoted above),
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 which provides that the contractor is to *be reimbursed for such of its expenditures "as may be approved or ratified by the contracting officer."

We have decided that the parties to the contract can so provide and that the decision of the officer is conclusive upon the parties. *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Martinsburg & Potomac Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *United States v. Gleason*, 175 U. S. 588; 20 Sup. Ct. 228, 44 L. Ed. 284; *Ripley v. United States*, 223 U. S. 695, 32 Sup. Ct. 352, 56 L. Ed. 614. This is extending the rule between private parties to the government.

There were such decisions, and settlement, and payments, in consequence of them, as we have seen. Over the effect of these the Comptroller of the Treasury has no power. They were the acts and duty of the officer in charge in the expression of which there was no ambiguity, and were, therefore, conclusive in effect.

Judgment affirmed.

(260 U. S. 326)

UNITED STATES v. NORTHEASTERN CONST. CO.¹

(Decided Dec. 4, 1922.)

No. 122.

Appeal from the Court of Claims.

Suit by the Northeastern Construction Company against the United States. Judgment for claimant (56 Ct. Cl. 492), and the United States appeals. Affirmed.

The Attorney General, for the United States.

Mr. Justice McKENNA delivered the opinion of the Court.

Judgment in this case was rendered at the same time as that in *Mason & Hanger Co. v. United States*, 260 U. S. 323, 43 Sup. Ct. 128, 67 L. Ed. —, just decided.

The amounts only are different. In that case it was \$2,500—in this case it is \$150. In both, the amounts represented premiums on bonds and depend upon the same considerations. On the authority of the *Mason & Hanger Co.* Case the judgment of the Court of Claims in this case is

Affirmed.

(260 U. S. 309)

CITY OF BOSTON v. JACKSON, Treasurer.

(Submitted on Motion to Dismiss or Affirm Nov. 13, 1922. Decided Dec. 4, 1922.)

No. 141.

1. Courts ⇨394(25)—Overruling of objection to substitution of defendant by state court conclusive in federal Supreme Court that substitution authorized by state law.

Where the substitution of a defendant took place before the state Supreme Judicial Court considered the case on its merits, and that court noted and overruled the objection to the substitution, this settles conclusively, so far as the United States Supreme Court is concerned, that the state law authorized the substitution.

2. Courts ⇨394(25) — Decision of case by state court after payment of tax sought to be enjoined conclusive in federal Supreme Court that questions have not become moot.

In a suit to enjoin the collection of a tax to cover a deficit in the operation of a railway paid out of the treasury of the commonwealth and to enjoin further proceedings under an act providing for the operation of the railway by trustees, and for payment of deficits by taxation, where the state Supreme Judicial Court considered and decided the case after the tax sought to be enjoined had been paid, it must have found that the bill was directed, not only against the collection of the particular tax, but against future payments out of the treasury, and against the continued operation by the trustees under the statute, and such action is conclusive in the United States Supreme Court that the questions are not moot because of the payment of the tax.

3. Courts ⇨400—Case disposed of on motion to affirm, where questions wanting in substance, in view of previous decisions.

Under Supreme Court rule 6, par. 5 (32 Sup. Ct. vi), a case will be disposed of on motion to affirm, where the questions presented on such motion are so wanting in substance, in view of previous decisions, as not to need further argument.

4. Constitutional law ⇨134—Lease of subways and tunnels by city not impaired by statute providing for operation under the lease by trustees.

Where a lease by the city of Boston for a fixed rental of subways and tunnels owned by it in its private or proprietary capacity contained no restriction on the power of the lessee to assign, Sp. St. Mass. 1918, c. 159, providing for the appointment of trustees to operate the leased property under the leases because of the financial difficulties of the lessee, does not impair the obligation of the contract.

5. Street railroads ⇨49—Assignment of lease of subways and tunnels authorized by act providing for public operation of Boston Elevated Railway.

Sp. St. Mass. 1918, c. 159, providing for the appointment of trustees to operate the Boston Elevated Railway because of financial difficulties of the railway company, supplied the

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ Judgment affirmed on rehearing, 261 U. S. 610, 43 Sup. Ct. 518, 67 L. Ed. —.

railway company with corporate power to assign its lease of subways and tunnels from the city of Boston, if such power did not exist before.

6. Constitutional law ⚡137—City's lease of subways and tunnels for fixed rent not impaired by provision for payment of deficit in operation from treasury and collection by taxes.

As, under Sp. St. Mass. 1918, c. 159, providing for the operation of the Boston Elevated Railway by trustees, the payment of any deficit in operation from the treasury of the commonwealth and the assessment of the amount so paid on the cities and towns served by the railway, the taxes collected are state taxes, and the city of Boston acts in its public and political character as a mere state tax agency in collecting the tax, the act does not impair the obligations of the city's lease to the railway company for a fixed rent of subways and tunnels owned by it in its private or proprietary capacity.

7. Taxation ⚡38—Statute providing for assessment of deficit in operation of railway against cities and towns served valid under state laws.

Sp. St. Mass. 1918, c. 159, providing for the operation of the Boston Elevated Railway by trustees, for the payment of any deficit in operation from the treasury of the commonwealth, and for the assessment of the amount paid on the cities and towns in which the railway operates, is in accord with the state Constitution and statutes.

8. Constitutional law ⚡283—Street railroads ⚡66½, New, vol. 12A Key-No. Series—Statute providing for public operation of Boston Elevated Railway held not unconstitutional.

Sp. St. Mass. 1918, c. 159, providing for the operation of the Boston Elevated Railway by trustees, for the payment of any deficit from the treasury of the commonwealth, and for the assessment of the amount paid as taxes, and delegating to the trustees the power to determine the needed expenditures to comply with the obligations of a lease or the requirements of adequate public service, held not unconstitutional, as violative of Const. U. S. Amend. 14.

Error to the Supreme Judicial Court of Massachusetts.

Suit by the City of Boston against James F. Jackson, Treasurer of the Commonwealth of Massachusetts. A demurrer to the bill was sustained by the Supreme Judicial Court of Massachusetts (237 Mass. 403, 130 N. E. 390), and plaintiff brings error. Affirmed.

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*Messrs. Nathan Matthews and J. P. Lyons, both of Boston, Mass., for plaintiff in error.

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*Messrs. J. Weston Allen, Edwin H. Abbot, Jr., and Alexander Lincoln, all of Boston, Mass., for defendant in error.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a writ of error to a decree of the

Supreme Judicial Court of Massachusetts sustaining a demurrer to a bill in equity against the treasurer and receiver general of the commonwealth of Massachusetts, the Boston Elevated Railway Company, and the trustees who are operating the railway of that company under a special statute of the commonwealth (Sp. St. 1918, c. 159), and dismissing the bill for want of equity, the plaintiff not wishing to plead further. It now comes before us on a motion by the Attorney General of Massachusetts to dismiss or affirm.

The case as made by the bill is an impeachment of the validity of the special act of 1918. By acts of 1902 and 1911 (Stat. 1902, c. 534, and Stat. 1911, c. 741), the city of Boston was given power to construct and did construct subways and tunnels at a cost of \$31,000,000, and by the same authority leased these and also others built by it under earlier statute to the Boston Elevated Railway Company for a fixed rental until July 1, 1936, and the whole property and its rents and profits are by the express terms of the statute held by the city "in its private or proprietary capacity, for its own property" never to be taken by the commonwealth except upon payment of just compensation. The railway company got into financial difficulty. It served the residents of Boston and other towns of the commonwealth. The General Court in the public interest passed the special act of 1918 to relieve the situation. In

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general the act provided for the appointment of trustees who were to take the railway out of the hand of the company and operate it under the leases to the company by the city of Boston, on condition that the stockholders of the railway company accepted the provisions of the act. It is not necessary to set out what these provisions in detail are, except to say that they provide for the payment of dividends on the stock of the company, the repair and maintenance of the railway, the raising of \$3,000,000 by the company for the improvement of the property and a reserve fund, and the payment of any deficit in operation out of the treasury of the commonwealth. If the commonwealth is called upon to make payments, to meet deficits or diminution of the reserve fund, such amounts are to be assessed upon the several cities and towns in which the railway operates, as an addition to the regular state tax, in proportion to the number of persons in said cities and towns using the service of the company at the time of the payments as determined by the trustees. The trustees are to fix the fares to meet the cost of service, including taxes, rentals and interest on the indebtedness of the company, fixed dividends on the preferred stock, and 5 per cent. on the common stock for two years, 5½ per cent. for the next two years and 6 per cent.

for the remainder of public operation, which is for a period of ten years and thereafter as the commonwealth shall determine.

The company's stockholders having accepted the act, the trustees took over the possession and operation of the railway. They found the railway in bad repair and charged \$2,000,000 for depreciation and \$2,300,000 for maintenance and repair in the year 1919. This led to a deficit for that year of \$4,000,000, although in previous years the company had not expended more than \$100,000 a year on such account. The treasurer and receiver general under the act of 1918 paid the deficit out of the treasury of the commonwealth, and was about to include

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*the same in the state taxes to be collected by the city of Boston and the other towns through which the railway runs in the proportion fixed by the act. The object of the bill was to prevent this levy and collection and further proceedings under the act.

[1] The motion to dismiss is urged first on the ground that Charles L. Burrill as treasurer and receiver general was the defendant in the original bill and that the present defendant Jackson, his successor in office, has been substituted without legal sanction. The substitution took place in the Supreme Judicial Court of Massachusetts before that court considered the case on its merits and in the court's opinion the objection to the substitution was noted and overruled. This settles conclusively so far as we are concerned, that the state law authorized the substitution. The case of *Irwin v. Webb*, 258 U. S. 219, 42 Sup. Ct. 293, 66 L. Ed. 573, decided by this court March 20, 1922, has no application. That was an appeal from a federal District Court in which this court had to consider the substitution in this court of county officers newly elected for those in office when the suit was brought and the decree entered in the District Court. It was not authorized by the federal statute and we could find no state law which permitted it to be done.

[2] The second ground urged for dismissal is that the tax for 1919 sought to be enjoined, has been collected from the taxpayers of the city by the city and paid over to the treasurer of the commonwealth so that the case here becomes a moot one. But the tax had been paid before the Supreme Judicial Court took up, considered and decided the case. It must, therefore, have found, as it was entirely justified in doing, that the bill in its averments, prayer and real object was directed not only against the collection of the tax then pending but against future payments out of the treasury of the commonwealth and against the continued operation by the trustees under the statute of 1918

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with the possible incurring of future deficits to be assessed against the city for collection. The action of the state court upon such a matter relieves us from its consideration. Bi-

Metallic Co. v. State Board of Equalization, 239 U. S. 441, 444, 36 Sup. Ct. 141, 60 L. Ed. 372.

[3] Having disposed thus of the grounds presented for dismissing the writ of error, we come to the alternative prayer for affirmance. Under paragraph 5 of rule 6 of this court (32 Sup. Ct. vi), when the questions presented on such a motion are found by the court, in view of our previous decisions, to be so wanting in substance as not to need further argument, we dispose of the case. *Chicago & Rock Island R. R. v. Devine*, 239 U. S. 52, 54, 36 Sup. Ct. 27, 60 L. Ed. 140; *Missouri Pacific Railway Co. v. Castle*, 224 U. S. 541, 544, 32 Sup. Ct. 606, 56 L. Ed. 875.

The plaintiff in error comes to this court because, as it says, the statute of 1918 of the commonwealth, by which the trustees took over and are now operating the railway, impairs the obligation of the contract of lease of its property in the tunnels and subways to the railway company, and so violates the contract clause of the federal Constitution. It further contends that the imposition of a tax merely to aid a private corporation, as in the act of 1918 complained of, is not for a public purpose, and taxes collected therefor from it is taking its property without due process of law. Thirdly, it avers that vesting power in the trustees to fix the deficit in operation of the railway and to assess the city for a large part thereof is also taking its property without due process of law.

We are relieved from full or detailed consideration of these grounds urged for reversal by the satisfactory opinion of the Supreme Judicial Court in this case. *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 130 N. E. 390.

[4, 5] What the commonwealth did was to help the people of the towns which the railway served when the railway's finances threatened its collapse, by taking over the lease of the railway company for a valuable

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consideration. *There was no restriction upon the power of the railway company to assign the lease if the company had the corporate power and that, if it did not exist before, was supplied by the act itself. The law provided for keeping the property in good repair and the payment of the rentals due the city. There was nothing in the contract of assignment which in the slightest degree impaired the obligation of the company to the city under the lease. Indeed it secured the performance of those obligations.

[6, 7] But it is said the contract was impaired because the act provided that any deficit incurred in the operation of the road under the assignment was to be paid out of the treasury of the commonwealth and finally was to be collected in large part from the city of Boston, and thus that though Boston

was to receive its rental, it was required to pay a deficit in operation into which the rental must enter as an important factor. The effect, therefore, was to take away or impair its beneficial interest in the profits of the contract of lease and its property. To this the Supreme Court answered that this tax was not imposed on Boston in its proprietary capacity in which it built the subways and leased them. The taxes collected were state taxes to achieve a state purpose and Boston in its public and political character was a mere state tax agency for the collection. The taxpayers were to be called upon to bear the burden of the public purpose of the state in furnishing this important service of transportation in and between the communities in which they lived. If this was in accord with the state constitution and statutes, as we must and do find it to be from the well-reasoned opinion of the Supreme Judicial Court, we can not see that in any respect the levy of the tax for deficits impairs Boston's contract with the railway company.

[8] In disposing of this objection we have in effect disposed of those objections to the

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act of 1918 based on the Fourteenth Amendment. If the Constitution and laws of Massachusetts authorize the commonwealth to operate a railway company for the public benefit, there is nothing in the Fourteenth Amendment to prevent. Nor is there anything in it preventing the state from using the trustees as agents to operate the railway and in such operation to determine the needed expenditures to comply with the obligations of the lease or the requirements of adequate public service. This is delegating to proper agents the decision of a proper administrative policy in the management of a state enterprise and the ascertainment of facts peculiarly within their field of authorized action.

In this conclusion, we assume as did the Supreme Judicial Court, that the state may confer on one of its subdivisions like a city or town the private proprietary capacity by which it may acquire contract or property rights protected by the federal Constitution against subsequent impairment by its creator the state. *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515. We do not wish to be understood as accepting such assumption as an established rule. *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 1054. All we now decide is that even if the city of Boston may invoke the contract clause of the federal Constitution to protect its rights under the lease as against infringing legislation by the commonwealth, the act of 1918 does not infringe.

Decree affirmed.

McKELVEY et al. v. UNITED STATES.

(Argued Nov. 21, 1922. Decided Dec. 4, 1922.)

No. 106.

1. Indictment and information — In indictment for obstructing passage over public lands need not negative exception in proviso.

An indictment for preventing or obstructing free passage over public lands, in violation of Act Feb. 25, 1885, § 3 (Comp. St. § 4999), need not negative the exception contained in the proviso in favor of persons who have gone on, improved, or occupied such lands, claiming title thereto in good faith.

2. Indictment and information — Need not negative exception made by proviso or distinct clause.

An indictment or other pleading, founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception, made by a proviso or other distinct clause, whether in the same section or elsewhere; but the one relying thereon must set it up and establish it.

3. Public lands — Statute as to obstructing "free passage" includes transient obstruction by intimidation.

Act Feb. 25, 1883, § 3 (Comp. St. § 4999), providing that no person by force, threats, intimidation, fencing or inclosing, or other unlawful means, shall prevent or obstruct free passage over public lands, is not limited to a continuing obstacle, but includes a transient obstacle to passage by particular persons on a particular occasion, such as by intimidation and threats of violence, especially as passage or transit is not "free," when withheld by some persons from others, whether permanently or temporarily.

4. Public lands — Statute as to obstructing passage not limited to persons acting as owners or agents.

Act Feb. 25, 1885, § 4 (Comp. St. § 5000), providing for the punishment of any person violating any of the provisions of that act, whether as owner, part owner, or agent, applies to persons other than owners, part owners, or agents obstructing free passage over the public lands, in violation of section 3 (Comp. St. § 4999).

5. Public lands — Statute as to obstructing passage over public lands not invalid, as encroaching on state's police power.

Act Feb. 25, 1885, §§ 3, 4 (Comp. St. §§ 4999, 5000), construed as penalizing the transient obstruction of passage over public lands by particular persons, by violence or intimidation, on the part of persons not acting as owners, or agents, is not invalid as encroaching on the police power of the states, as it does not deal with personal violence as such, or affect the power of the state to deal therewith.

6. Public lands — Congress may sanction uses and forbid interference therewith.

Congress may prescribe rules respecting the use of the public lands, and sanction some uses

and prohibit others, and forbid interference with such as are sanctioned.

7. Public lands ¶7—State may prescribe police regulations, not arbitrary or inconsistent with congressional enactments.

The states may prescribe police regulations applicable to public land areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Charles McKelvey and others were convicted of obstructing free passage over public lands, and the judgment was affirmed by the Circuit Court of Appeals (273 Fed. 410), and they bring certiorari. Affirmed.

Mr. Solon B. Clark, of Mackay, Idaho, for petitioners.

H. L. Underwood, of Washington, D. C., for the United States.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

The five petitioners were indicted, tried, and convicted in the District Court of the

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United States for the District *of Idaho upon a charge of unlawfully preventing and obstructing, by means of force, threats, and intimidation, free passage over and through certain unoccupied public lands of the United States by designated persons—they being the three employes hereinafter mentioned. The Circuit Court of Appeals affirmed the judgment. 273 Fed. 410. A writ of certiorari brings the case here.

The record purports to contain the substance of the evidence in chief presented by the United States, but not the evidence produced by the defendants, nor that of the United States in rebuttal. That which it does contain tends strongly to establish the following case:

In August, 1919, the owners of a band of sheep then about 30 miles northwest of Mackay, Idaho, committed to three employes the task of driving the sheep to a range on the other side of Mackay. A part of the route lay over unoccupied public lands of the United States in relative proximity to a stream, called Lost river. In that vicinity there were two well-known trails. One, recently established,¹ passed on the east side of the river, and the other, theretofore used by the owners of the sheep, passed on the west side. The employes took the latter trail, and, while following it in the usual way of driving sheep, were met by some of the defendants, who insisted that the lands thereabouts were used as a cattle range and demanded that the sheep be not driven along

that trail, but taken to the trail on the other side of the river, 4 or 5 miles away. This occurred about 11 o'clock in the forenoon of August 25th, when it was very warm. One of the employes answered that the sheep should be permitted to rest until it became cooler, and that they could not be taken across the river without an order from one of the owners. Such of the defendants as were present then pointed out a place where

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the sheep could be held *In the shade and went away. About 4 o'clock in the afternoon some of the defendants returned and demanded that the sheep be moved to the other side of the river right away. To this the answer was made that instructions had been received, presumably by telephone, from one of the owners to await his coming, which would be later in the day. One of the defendants then requested his comrades to line up with their rifles, which they did, whereupon he proceeded to make a hostile demonstration against one of the employes and to chase him about, obviously as a matter of intimidation. These defendants then went away. That evening one of the owners arrived and directed that the driving be continued along the trail on which the employes were proceeding; it being "the trail we always used" and "about 3 miles wide." Early the next morning, before the employes started the sheep again, one of the defendants returned and inquired what was going to be done, and, on learning what the owner had directed, said: "You can't go through there." "Something will happen to you this morning." "Are you willing to take the consequences?" This defendant then rode away, and a little later others of them rode up on a gallop, ordered the employes to put up their hands, which was done, and then began shooting. They shot and seriously injured one of the employes, threatened to finish him, and did other things calculated to put all three in terror. The defendants then moved two of the employes and the sheep to the other side of the river and took the wounded employe to a hospital. While some of the defendants were present at one time, and some at another, the circumstances were such that what was done was the act of all. The lands through which this trail extended and over which the employes intended to drive the sheep were unoccupied public lands of the United States. The pur-

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pose of the defendants in all that they *did was to prevent the employes from proceeding with the sheep over those lands. The lands were comprised in two townships, each 6 miles square, and within these townships were several small tracts—a minor part of the whole—which were claimed and held by individuals under the public land laws; but the trail did not pass over these small tracts, nor were the employes driving or intending to drive the sheep over them.

¹ Presumably under section 10 of the Act of December 29, 1916, c. 9, 39 Stat. 862 (Comp. St. § 4587j).

The indictment was founded on sections 3 and 4 of the Act of February 25, 1885, c. 149, 23 Stat. 321 (Comp. St. §§ 4999, 5000) which read as follows:

"Sec. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: Provided, this section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

"Sec. 4. That any person violating any of the provisions hereof, whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, for each offense."

The indictment was challenged on several grounds by a demurrer and a motion in arrest of judgment, both of which were overruled; and error is assigned on these rulings.

[1, 2] One ground of objection is that the indictment contains no showing that the ac-

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cused were not within the excep^tion made in the proviso to section 3. This is not a valid ground. By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it. *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 10, 27 Sup. Ct. 407, 51 L. Ed. 681; *Javierre v. Central Altagracia*, 217 U. S. 502, 508, 30 Sup. Ct. 598, 54 L. Ed. 859, and cases cited.

[3] Another ground is that the words of section 3, "or shall prevent or obstruct free passage or transit over or through the public lands," refer to a continuing obstacle to passage or transit in general, such as a fence or the maintenance of an armed patrol, and not to a transient obstacle to passage or transit by particular persons on a particular occasion, such as is charged here. We think this ground is not tenable. The words "by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means" are as comprehensive of transient means of obstruction as of continuing or relatively permanent means. Besides, it is "free" passage or transit that is to be unobstructed. Pas-

sage or transit is free in the sense intended when it is open to all. When some withhold it from others, whether permanently or temporarily, it is not free.

[4] A third ground is that under section 4 the only punishable offenses are those where-in the offender acts as owner, part owner or agent, and that this indictment does not show that any of the defendants were so acting. This ground is without merit. While section 4 is not happily worded, there is no difficulty in getting at its meaning. It is the penal section and broadly fixes the punishment for the several acts made unlawful by

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the other sections. *Some of the proscribed acts involve an assertion of a groundless right to the exclusive use and occupancy of public lands, a right which the offender might be asserting in his own behalf, or in behalf of himself and another, or in behalf of others whom he serves as agent. But in several of the proscribed acts there is no such element. The offense charged here is of the latter class. With this understanding of the acts made unlawful by the other sections, it is apparent that the words "whether as owner, part owner, agent" in section 4 are intended merely to make sure that offenders acting as owners, part owners or agents are brought within the penal provision, and not to exclude other offenders therefrom or to absolve them from punishment.

[5] It also is contended that section 3, when construed as we construe it, transcends the power of Congress and encroaches on the police power of the states. This contention proceeds on the assumption that the section, so construed, deals with acts of personal violence which do not affect the public lands or the rights of the United States in them. But this is a mistaken assumption. The section in terms, and as we construe it, deals with the obstruction by unlawful means of free passage over the public lands. It makes no attempt at dealing with acts of personal violence as such. Only when and as they are made the means—resorted to for the purpose—of effecting the prohibited obstruction does it take any account of them. The power of the state to deal with and punish them is not affected. Such acts may be an ingredient of an offense against the United States and also in themselves as an offense against the state. The following excerpt from *Moore v. Illinois*, 14 How. 13, 20 (14 L. Ed. 306) is pertinent:

"The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process,

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is a high offense against the United States, *for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if

they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable."

[6] It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned. *Camfield v. United States*, 167 U. S. 518, 525, 17 Sup. Ct. 864, 42 L. Ed. 260; *United States v. Grimaud*, 220 U. S. 506, 521, 31 Sup. Ct. 480, 55 L. Ed. 563; *Light v. United States*, 220 U. S. 523, 536, 31 Sup. Ct. 485, 55 L. Ed. 570; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404, 405, 37 Sup. Ct. 387, 61 L. Ed. 791. The provision now before us is but an exertion of that power. It does no more than to sanction free passage over the public lands and to make the obstruction thereof by unlawful means a punishable offense.

[7] It also is settled that the states may prescribe police regulations applicable to public land areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments. Among the regulations to which the state power extends are quarantine rules and measures to prevent breaches of the peace and unseemly clashes between persons privileged to go upon or use such areas.

Two regulations of the latter type by the state of Idaho have been sustained by this court—one making it unlawful to herd sheep or permit them to graze within two miles of the dwelling house of another having a possessory claim to the land whereon the house stands (*Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499), and the other making it unlawful to herd sheep or permit

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them to graze on a range which *by prior usage has come to be a cattle range (*Omaechevarria v. Idaho*, 246 U. S. 343, 38 Sup. Ct. 323, 62 L. Ed. 763). As construed by the Supreme Court of the state, these regulations are not intended to cover the driving of sheep from one range to another, nor such occasional grazing as is done by the sheep while being driven or during temporary stops for needed rest or similar purposes. In view of the instructions to the jury in this case the verdict must be taken as finding that there was no herding or grazing here which was forbidden by these regulations.

Complaint is made of several rulings on the trial, but we think all were right. As to some the complaint is disposed of by what has been said, and as to the others it is so wanting in substance that it does not call for special notice.

Judgment affirmed.

(260 U. S. 327)

PORTSMOUTH HARBOR LAND & HOTEL CO. et al. v. UNITED STATES.

(Argued Nov. 15, 1922. Decided Dec. 4, 1922.)

No. 97.

1. Courts ⚡463—Question on demurrer to petition in Court of Claims is whether facts, if proved, would require or warrant finding for claimant.

On demurrer to petition in Court of Claims setting up claim against the United States, the question is not what inferences should be drawn from the facts that may be proved, but whether the allegations, if proved, would require, or at least warrant, a finding for the claimant.

2. Eminent domain ⚡2(1)—Installing battery with intent to fire guns across land at any time is appropriation of property.

If the government installed a coast defense battery, not simply as a means of defense in war, but with the purpose and effect of subordinating a strip of land between it and the sea to the right and privilege of the government to fire projectiles directly across it for practice or otherwise whenever it saw fit in time of peace, with the result of depriving the owner of its profitable use, the imposition of such servitude would constitute an appropriation of the property for which compensation should be made.

3. Courts ⚡464(2)—Discharge of guns across land after filing of petition in Court of Claims may be considered in determining intent in establishing fire control.

The discharge of coast defense guns across claimant's land, though occurring after petition was filed in the Court of Claims, may be considered as bearing on the intent of the government in establishing a fire control station on claimant's land before the filing of the petition.

4. Courts ⚡464(5)—Discharge of guns in sufficient number and for sufficient time may show intent to appropriate property.

A continuance of the discharge of coast defense guns across land in sufficient number and for a sufficient time may prove an intent on the part of the government to fire across the land at will, and every successive trespass adds to the force of the evidence.

5. Courts ⚡470—That evidence in prior suit in Court of Claims insufficient to show intent to appropriate land not conclusive that it is still insufficient.

That the evidence was insufficient in 1905, at a prior suit by the claimant, to show an abiding purpose on the part of the government to discharge coast defense guns across claimant's land at will, does not show that it may not be sufficient in 1922.

6. Courts ⚡463—Pleading ⚡8(3)—Petition held to allege sufficient specific facts to show appropriation of land; allegation that United States had taken land was conclusion of fact.

Petition alleging that the government set up heavy coast defense guns with intention of firing them over claimant's land, and without in-

tant or ability to fire them, except over such land and established on claimant's land a fire control station and service, and discharged all of such guns over the land, as it had done some years before, and that it had thereby taken the land, set forth sufficient specific facts to warrant a finding that a servitude had been imposed, and was not demurrable; the allegation that the United States had taken the land being a conclusion of fact rather than law.

7. Courts ⇨463—Acts alleged to be those of the government not declared acts of unauthorized persons on demurrer.

Where petition alleges acts of setting up heavy coast defense guns with intention of firing them over claimant's land, and without intent or ability to fire them, except over his land, and establishing a fire control station and service on the land, and discharging the guns thereover, were the acts of the government, it cannot be declared on demurrer that they were the acts of unauthorized persons.

8. Courts ⇨449(1)—If acts amount to taking of property, contract will be implied, whether thought of or not.

If the acts of the government in setting up heavy coast defense guns that could only be fired over claimant's land, and in establishing a fire control station thereon, and discharging the guns over the land, amount to a taking without assertion of an adverse right, a contract will be implied whether it was thought of or not.

9. Courts ⇨463—Whether repeated acts show abiding purpose to fire guns over land at will, or are only trespasses, held to be decided on evidence, and not on demurrer.

Whether the repetition through many years of the acts of firing coast defense guns across claimant's land and the establishment of a fire control thereon show an abiding purpose to fire the guns whenever the United States sees fit, or constitute only occasional torts, is for the Court of Claims to determine on evidence, and not on demurrer.

Mr. Justice Brandeis and Mr. Justice Sutherland, dissenting.

Appeal from the Court of Claims.

Suit by the Portsmouth Harbor Land & Hotel Company and others against the United States. Judgment sustaining a demurrer to the petition (56 Ct. Cl. 494), and the claimant appeals. Reversed.

Mr. Chauncey Hackett, of Washington, D. C., for appellants.

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*Mr. Solicitor General Beck, of Washington, D. C., for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a claim in respect of land which, or an interest in which, is alleged to have been taken by the United States Government. Similar claims in respect of the same land based upon earlier acts of the Government have been made before and have been denied. *Peabody v. United States*, 231 U. S. 530, 34

Sup. Ct. 159, 58 L. Ed. 351; *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U. S. 1, 39 Sup. Ct. 399, 63 L. Ed. 809. But it is urged that the cumulative effect of later acts added to those that have been held not enough to establish a taking leads to a different result. The land is on Gerrish Island, lying east of the entrance to Portsmouth Harbor, and borders on the ocean. Its main value is for use as a summer resort. Adjoining it to the north and west lies land of the United States upon which the Government has erected a fort, the guns of which have a range over the whole sea front of the claimants' property. In the first case it was decided that the mere erection of the fort and the fact that guns were fired over the claimants' land upon two occasions about two years and a half before the suit was brought, coupled with the apprehension that the firing would be repeated, but with no proof of intent to repeat it other than the facts stated, did not require the finding of an appropriation and a promise to pay by the United States. The second case was like the first except for "some occasional subsequent acts of gun fire," 250 U. S. 2, 39 Sup. Ct. 399, 63 L. Ed. 809, and finding of the Court of Claims for the United States again was sustained.

[1, 2] The present case was decided upon demurrer. The question therefore is not what inferences should be drawn from the facts that may be proved but whether the

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allegations it proved would require or at least warrant a different finding from those previously reached. There is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that—

"If the Government had installed its battery, not simply as a means of defence in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." 231 U. S. 538, 34 Sup. Ct. 160, 58 L. Ed. 351.

That proposition we regard as clearly sound. The question is whether the petition before us presents the case supposed.

[3-6] It is alleged that after dismounting the old guns for the purpose of sending them to France during the late war, the United States has set up heavy coast defence guns with the intention of firing them over the

claimants' land and without the intent or ability to fire them except over that land. It also, according to the petition, has established upon that land a fire control station and service, and in December, 1920, it again discharged all of the guns over and across the same land. The last fact, although occurring after this petition was filed, may be considered as bearing on the intent in establishing the fire control. If the United States, with the admitted intent to fire across the claimants' land at will should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in suf-

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ficient number and for a sufficient *time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an abiding purpose. The fact that the evidence was not sufficient in 1905 does not show that it may not be sufficient in 1922. As we have said the intent and the overt acts are alleged as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific facts set forth would warrant a finding that a servitude has been imposed.

[7-9] It very well may be that the claimants will be unable to establish authority on the part of those who did the acts to bind the Government by taking the land, *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935. But as the allegation is that the United States did the acts in question, we are not prepared to pronounce it impossible upon demurrer. As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen. If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not. The repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire when the United States sees fit, even if not frequently, or they may be explained as still only occasional torts. That is for the Court of Claims when the evidence is heard.

Judgment reversed.

Mr. Justice BRANDEIS dissenting, with whom Mr. Justice SUTHERLAND concurs.

I agree that, in time of peace, the United States has not the unlimited right to shoot

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from a battery over adjoining *private property, even if no physical damage is done to it

thereby; that a single shot so fired may, in connection with other conceivable facts, justify a court in finding that the government took, by eminent domain, the land or an easement therein; and that such taking, if made under circumstances which give rise to a contract implied in fact to pay compensation, will entitle the owner to sue in the Court of Claims. But the question here is not whether the facts set forth in the petition would alone, or in connection with other evidence, justify the court in finding such a taking and the implied contract. The case was heard on demurrer to the petition; the facts therein set forth must, therefore, be taken as the ultimate facts; and they must be treated as are the findings of fact made by the Court of Claims. These are treated like a special verdict and not as evidence from which inferences may be drawn. Rule 1 of this court, relating to appeals from the Court of Claims; *Crocker v. United States*, 240 U. S. 74, 78, 36 Sup. Ct. 245, 60 L. Ed. 533; *Brothers v. United States*, 250 U. S. 88, 93, 39 Sup. Ct. 426, 63 L. Ed. 859. Unless, therefore, the petition sets forth facts well pleaded, which, if found by the lower court would as matter of law entitle the claimants to a judgment, the lower court was, in my opinion, right in dismissing the petition.

Appropriation by the United States of private property for public use, without instituting condemnation proceedings, does not entitle the owner to sue under the Tucker Act (Judicial Code, § 24, par. 20 [Comp. St. § 991]), unless the taking was made under such circumstances as to give rise to a contract express or implied in fact to pay compensation. *Hill v. United States*, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862; *Schilling v. United States*, 155 U. S. 163, 168-171, 15 Sup. Ct. 85, 39 L. Ed. 108; *Belknap v. Schild*, 161 U. S. 10, 17, 16 Sup. Ct. 443, 40 L. Ed. 599; *John Horstmann Co. v. United States*, 257 U. S. 138, 146, 42 Sup. Ct. 58, 66 L. Ed. 80. Hence this action must rest on a contract, express or implied in fact. *Harley v. United States*, 198 U. S. 229, 25 Sup. Ct. 634, 49 L. Ed. 1029; *United States v. Buffalo Pitts Co.*, 234 U. S. 228, 232, 34 Sup. Ct. 840, 58 L. Ed. 1290; *William Cramp & Sons*

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v. Curtis Turbine Co., 246 U. S. 28, 40, 41, 38 Sup. Ct. 271, 62 L. Ed. 560. There is no suggestion of an express promise; and there is not to be found in the petition, or in the exhibits incorporated by reference, a single allegation, however general, of an implied contract. This omission would not be fatal, if the petition set forth the facts essential to the existence of the cause of action. But it does not. An appropriation of private property will not entitle the owner to recover if made by mistake or if made under a claim of right, although the claim is later shown to be unfounded. *Tempel v. United States*, 248 U. S. 121, 130, 131, 39 Sup. Ct. 56, 63

L. Ed. 162. And, if the appropriation was made by an officer without authority, the claimant is likewise without this remedy against the government. *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 333, 40 Sup. Ct. 518, 64 L. Ed. 935. The essentials of a recovery are a taking on behalf of the United States, made by officials duly authorized, and under such conditions that a contract will be implied in fact. The petition fails to set out such facts. Indeed, the facts which are set out make it clear that what was done did not constitute a taking; that the officers of the Government in doing what they did, had no intention of subjecting it to any liability; that they were not authorized to take the land or an easement therein; and that they consistently denied that claimants were entitled to compensation. Implied contracts in fact do not arise from denials and contentions of parties, but from their common understanding whereby mutual intent to contract without formal words therefor is shown. *Farnham v. United States*, 240 U. S. 537, 36 Sup. Ct. 427, 60 L. Ed. 786; *E. W. Bliss Co. v. United States*, 253 U. S. 187, 190, 191, 40 Sup. Ct. 455, 64 L. Ed. 852; *Knapp v. United States*, 46 Ct. Cl. 601, 643.

The petition sets forth the proceedings in the two earlier cases, *Peabody v. United States*, 231 U. S. 530, 34 Sup. Ct. 159, 58 L. Ed. 351; *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U. S. 1, 39 Sup. Ct. 399, 63 L. Ed. 809. Those judgments make *res judicata*, not only the fact that there was no appropriation prior to 1918,

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but *also the facts specifically found in the second suit concerning the erection and maintenance of the battery, the policy and practice of the military authorities, and their intentions when the guns were discharged prior to that date. Among other things, as the petition states, the court found that the shots were fired for the purpose of testing certain modifications of the gun carriages made shortly prior thereto; that in so firing the guns the officers and agents of the United States especially desired, intended, and took precautions so to fire them, and believed they were so firing them, as to avoid firing any of them over any part of claimants' land; that such firing as was done over said land was due to a misunderstanding on the part of said officers and agents as to the boundaries of said land; that the fort was not constructed for the purpose of firing any of its guns over and across any of claimants' lands in time of peace, or of so firing them at all, except over the government's own premises occasionally for testing purposes; that the fort was never garrisoned; that no target or practice firing was ever done there; that until 1917, when its guns were dismounted for removal and use elsewhere, its batteries had been continuously kept in serviceable condi-

tion for defensive use by a small detail from Fort Constitution, across the harbor; and that it was the policy and practice of the military authorities not to maintain garrisons and train gun crews at all of its coast fortifications, but to maintain garrisons and do such training at fortifications where the facilities for training are best and where there was, or naturally would be, less objection and complaint by nearby residents on account of the noise and concussion.¹

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The only later occurrences, *material to the issue, which are set forth in this suit, in the petition as amended, are the reinstallation of the guns at the battery after the Armistice, the erection of a fire control station on claimants' land in connection therewith, and firing the guns on December 8, 1920.

This suit was begun in February, 1920. The original petition set forth the facts found

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in the earlier cases, and *substantially nothing more, except the intention to reinstall the guns. It was devoted largely to pointing out errors in the earlier findings, for which it sought relief through the equity powers of the court. The only new fact then alleged,

¹ The facts concerning the establishment and earlier use of the battery found in the first suit, were:

By Act of February 21, 1873, c. 175, 17 Stat. 468, 469, Congress appropriated \$50,000 for batteries in Portsmouth Harbor on Gerrish Island and Jerry Point, and by Act of February 10, 1875, c. 39, 18 Stat. 313, added to the appropriation for the Gerrish Island battery, \$20,000. Under the authority thus conferred a tract of 70 acres abutting claimants' land was purchased in 1873, and construction was begun. After \$50,000 had been expended in substantially completing the breast-high walls of the fortification, the work was suspended for lack of appropriations in 1876, and it was not resumed until funds were allotted out of the general appropriation made by the Act of May 7, 1898, c. 248, 30 Stat. 400, for fortifications and like purposes. Then, on the site of the old, uncompleted battery, there was constructed the battery now known as Ft. Foster, and in December, 1901, it was transferred to the Artillery. In June, 1902, the government fired two of the guns, and in September, 1902 another, for the purpose of testing guns and carriages off the coast, and in so doing it fired across complainants' land. Between that time and 1911 no gun was fired from the fort. This battery is located within 200 feet of a corner of claimants' land. No part of the fort encroaches upon it; but the guns there installed had a range of fire over all its sea front, and whether the guns then installed could have been fired for practice or other necessary purpose in time of peace without shooting over claimants' land depends upon a question of law concerning ownership of a narrow strip of land over which the guns had a range of fire—a question as to which the parties were, and so far as appears are still, in dispute. It was not so far as then appeared, the intention of the government to fire in time of peace any gun already installed, or which might thereafter be installed, over and across the claimants' land, so as to deprive them of the use of the same or to injure them, except as such intention can be drawn from the fact that the guns then installed were so fixed as to make it possible so to do and the fact that they had been fired as stated. On these facts found by the Court of Claims (46 Ct. Cl. 39) that court and this held that there was no basis for the claim that the government had appropriated the land and impliedly agreed to pay for it. *Peabody v. United States*, 231 U. S. 530, 34 Sup. Ct. 159, 58 L. Ed. 351.

which may be deemed material, was "establishing [on claimants' land] a fire control station and service for use of the fort." The reinstallation of guns, and the firing in December, 1920, were first set up by an amendment filed in 1921. And it is by this reinstallation after the commencement of this suit, that the United States is alleged to have established the fort as a part of the permanent coast defense.² If there was no taking until the guns were installed and the shots fired in December, 1920, then there was no cause of action when this suit was brought, and the demurrer was properly sustained on that ground. See *Court of Marion County v. United States*, 53 Ct. Cl. 120, 150. And there is this further obstacle to the maintenance of the suit. We take judicial notice of the fact that on December 8, 1920, the United States was still at war with Germany and Austria-Hungry. Joint Resolution of March 3, 1921, c. 136, 41 Stat. 1359. That the government has in time of war the right to shoot

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over private land was assumed in *Peabody v. United States*, supra, and is not disputed. See, also, *Peabody v. United States*, 43 Ct. Cl. 5, 18. The Armistice, signed November 11, 1918, left the United States possessed in December, 1920, of the same power to fire over claimants' land as if war had then been flagrant. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 158-160, 40 Sup. Ct. 106, 64 L. Ed. 194. Reinstallation of the guns and testing them by firing was an appropriate precautionary measure, in view of a possible renewal of the conflict. Thus the only overt acts upon claimants' land which are alleged to have occurred after the date of the findings in the earlier cases, and which are relied upon as establishing a taking after entry of the judgment in 250 U. S. 1, 39 Sup. Ct. 399, 63 L. Ed. 809, appear to have been acts done in the exercise of a right already possessed without a taking.

It is said that the petition alleges, in general terms, a taking and intention to take by the United States; that this allegation alone, although general, is an allegation of all the facts necessary to give a cause of action; and that the specification in detail of the facts relied upon may be treated as surplusage.

² The amendment alleges:

"And in so doing the United States have established the said fort and battery with the said guns as a part of the permanent establishment of the coast defense fortifications maintained by [it] * * * without intending to fire, or being able to fire, the said guns to sea except over and across the said land. And the United States have used the said land of the said claimants for the establishment of a fire control station and service for the use of said fort. The United States have, since setting up the said guns as aforesaid, at frequent intervals in the use of said fort, raised the said guns and pointed them as aforesaid, over and across the said land, and have further, in the use of the said fort discharged all of the said guns as aforesaid, on or about the 8th day of December, 1920, over and across the said land."

To this contention there are several answers. The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain concise statement of the facts relied upon. See rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met. *Schierling v. United States*, 23 Ct. Cl. 361; *Atlantic Works v. United States*, 46 Ct. Cl. 57, 61; *New Jersey Foundry & Machine Co. v. United States*, 49 Ct. Cl. 235; *United States v. Stratton*, 88 Fed. 54, 59, 31 C. C. A. 384. If the suit had rested upon a statute which provides that the owner of property appropriated shall receive compensation, a fairly general statement that the property had been taken might be sufficient; for, in such a case, the obligation to pay would follow as a conclusion of

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law. But here there *is no such statute. The mere fact of appropriation would not raise a promise implied in law; hence claimants were obliged to set forth additional facts to show that the government intended to pay the claimants compensation. Moreover, the general allegation of taking was not left to stand alone. Claimants set forth, in great detail, the facts upon which they rely as constituting a legal taking. They have done it in such a way that the allegation of taking reads now, not as an allegation of fact, but as a statement by the pleader of a conclusion of law, and consequently is not admitted by the demurrer. *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498, 500, 39 Sup. Ct. 172, 63 L. Ed. 381. And for a further reason the facts set forth in detail may not be disregarded as surplusage. They negative the existence of a cause of action. *Randall v. Howard*, 2 Black, 585, 17 L. Ed. 269; *McClure v. Township of Oxford*, 94 U. S. 429, 24 L. Ed. 129; *Speidel v. Henrich*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718. The facts stated show, as indicated above, not only an absence of taking and of intention to take the claimants' property, but also an absence of authority to do so in those who did the acts relied upon.

The petition alleges in terms authority in the Secretary of War to take the land. But in setting forth the facts relied upon the pleader has disclosed the absence of authority from the Secretary of War to the officers by whom the taking, if any, must have been made. Claimants seek in their suit to recover \$820,000. They assert that the land is worth \$700,000. For the 15 years preceding the commencement of this suit, there had been active litigation, in which claimants had strenuously asserted that there was a taking, and the United States had throughout denied that it had taken, or intended to take, any property of claimants. Unless the Secretary of War conferred upon his subordinates, who made this alleged taking, author-

ity to take this land or an easement therein, the government can, in no event, be made liable. *United States v. North American*

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Transportation & Trading Co., 253 U. S. 330, 333, 334, 40 Sup. Ct. 518, 64 L. Ed. 935. See *Ball Engineering Co. v. J. G. White & Co.*, 250 U. S. 46, 54-57, 39 Sup. Ct. 393, 63 L. Ed. 835. If the present case had proceeded to a trial on the facts, claimants could not have proved authority in the subordinate officers to acquire this land or an interest therein, by showing merely that they were authorized to reinstall the guns and to test them after installation. That is exactly what they had done before, and which the courts found did not constitute a taking. An authority to take land by purchase or by eminent domain is not conferred by the Secretary of War merely because he has authorized, directly or indirectly, certain discharges of guns for testing or other purposes. We must take judicial notice that to acquire land for fortifications is not, and was not, within the powers ordinarily conferred upon the Ordnance or upon the Artillery. We know that by Act of July 2, 1917, c. 35, 40 Stat. 241 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6911a), provision was made for speedy acquisition by the Secretary of War, by means of condemnation or purchase, of any land, temporary use thereof, or interest therein, needed for the site, location, construction, or prosecution of works for fortification or coast defenses; that, upon filing a petition for condemnation, the immediate possession thereof to the extent of the interest to be acquired could be obtained; and that by passage of this act the occasions for taking interests in land without first instituting condemnation proceedings had been largely removed. We know that by Act of June 30, 1906, c. 3914, 34 Stat. 764 (Comp. St. § 6763) a contract involving payment of money may not be made in excess of appropriations. 30 Op. Attys. Gen. 147, 149. We know that Act of March 3, 1919, c. 99, § 6, 40 Stat. 1305, 1309 (Comp. St. Ann. Supp. 1919, § 6702a), required that estimates of appropriation for fortifications and other defense works for the year beginning July 1, 1920, be submitted to Congress in the book of estimates. And we may take judicial notice of the fact that in submitting estimates of the amount needed for

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the year beginning *July 1, 1920, "for pro-

curement or reclamation of land, or rights pertaining thereto, needed for site, location, construction, or prosecution of work for fortifications and coast defenses," the Secretary of War asked for only \$15,000 for the whole country for all these purposes, and that no part of that amount was allocated in the estimates to the "purchase of land and interest in land." Estimates of Appropriations, 66th Congress, 2d Session, Doc. 411, pp. 531, 532. The facts alleged, and of which we take judicial notice, show not only an absence of intention to take, but the absence of power and authority to take.

The principle on which, under certain conditions, compensation may be recovered in the Court of Claims for private property appropriated for public purposes without condemnation proceedings, leaves unimpaired the long-established rules that the United States is not liable for its torts, nor for unauthorized acts of its officers and agents, although performed in the ordinary course of their business and for the benefit of the United States. The Tucker Act merely gives a remedy where the essential elements of contractual liability exist. It does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law, as in case of unjust enrichment (*Sutton v. United States*, 256 U. S. 575, 581, 41 Sup. Ct. 563, 65 L. Ed. 1099, 19 A. L. R. 403), or when a plaintiff waives a tort and sues in contract (*Hijo v. United States*, 194 U. S. 315, 323, 24 Sup. Ct. 727, 48 L. Ed. 994; *Hooe v. United States*, 218 U. S. 322, 31 Sup. Ct. 85, 54 L. Ed. 1055). The fact alleged in the petition that at some time in 1919 the War Department offered to purchase part of this land for the fire control station—perhaps only a few square feet, or a rood, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative, authorization to make the taking asserted in this suit. That the offer was not accepted,

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*and that the government did not institute condemnation proceedings, may tend to show that officers of the United States committed a tort on its behalf; but, if a tort was committed, the remedy lies with Congress, not with the courts.

(260 U. S. 377)

UNITED STATES v. LANZA et al.

(Argued Nov. 23, 1922. Decided Dec. 11, 1922.)

No. 39.

1. Intoxicating liquors $\S$ 13—Under Eighteenth Amendment, either state or federal governments may enact prohibitory legislation within their territories.

The effect of Const. U. S. Amend. 18, § 2, was to give Congress power to enact legislative measures to make prohibition effective within the territorial limits of the United States, and at the same time to preserve the like power of the several states within their territories.

2. Intoxicating liquors $\S$ 6, 13 — State prohibition law does not derive its authority from Eighteenth Amendment.

Const. U. S. Amend. 18, is not the source of the power of the states to adopt and enforce prohibition measures, since they had such power, save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, and state prohibitory laws, whether enacted before or since the amendment, derive their force from the power originally belonging to the states, and preserved to them by Amendment 10, and now relieved from the restrictions theretofore imposed by the federal Constitution.

3. Criminal law $\S$ 201 — Prosecution under National Prohibition Act after conviction under state statute does not violate double jeopardy provision.

An act which was made an offense both by the state prohibition law and by the National Prohibition Act is an offense against each sovereignty, and may be punished by each, without violating Const. U. S. Amend. 5, prohibiting double jeopardy, which applies only to proceedings by the federal government, and forbids only a second prosecution under the authority of the federal government after a first trial for the same offense under the same authority.

4. Criminal law $\S$ 100(3)—Comity does not prevent federal prosecution after state has exhausted its jurisdiction against defendant.

The principle that the state or federal jurisdiction which first acquires jurisdiction over a prisoner may exhaust its jurisdiction to the exclusion of the other does not prevent a prosecution under the National Prohibition Act after the state had exhausted its jurisdiction against defendants by imposing a fine on them for the same act.

5. Constitutional law $\S$ 70(3)—Courts need not discuss wisdom of legislation.

It is not for the courts to discuss the wisdom of legislation.

In Error to the District Court of the United States for the Western District of Washington.

Vito Lanza and others were indicted for violating the National Prohibition Act. The District Court dismissed the five counts of the indictment (United States v. Peterson,

268 Fed. 864), and the United States brings error. Reversed, with directions.

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*Mr. Solicitor General Beck, of Washington, D. C., for the United States.

Mr. John F. Dore, of Seattle, Wash., for defendants in error.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a writ of error by the United States under the Criminal Appeals Act (34 Stat. c. 2564, p. 1246 [U. S. Comp. St. § 1704]), to reverse an order of the District Court for the Western District of Washington dismissing five counts of an indictment presented against the defendants in error April 28, 1920. The first of these charged the defendants with manufacturing intoxicating liquor, the second with transporting it, the third with possessing it, and the fourth and fifth with having a still and material designed for

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its manufacture *about April 12, 1920, in violation of the National Prohibition Act (chapter 85, 41 Stat. 305). The defendants filed a special plea in bar setting out that on April 16, 1920, an information was filed in the superior court of Whatcom county, Wash., charging the same defendants with manufacturing, transporting and having in possession the same liquor, and that on the same day a judgment was entered against each defendant for \$250 for manufacturing, \$250 for transporting, and \$250 for having in possession such liquor. The information was filed under a statute of Washington in force before the going into effect of the Eighteenth Amendment and passage of the National Prohibition Act. Remington's Code, § 6262—1 et seq., as amended by Sess. Laws 1917, p. 46. The government demurred to the plea. The District Court sustained the plea and dismissed the five counts. United States v. Peterson, 268 Fed. 864. No point is made by the government in the assignments of error that counts 4 and 5, for having a still and material in possession, were not covered by the information and judgment by the state court.

The Eighteenth Amendment is as follows:

"Section 1. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The defendants insist that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under the Fifth Amendment; and in support

of this position it is argued that both laws

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derive their force from the same *authority—the second section of the amendment—and therefore that in principle it is as if both punishments were in prosecutions by the United States in its courts.

Consideration of this argument requires an analysis of the reason and purpose of the second section of the amendment. We dealt with both sections in the National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946. The conclusions of the court, relevant here, are Nos. 6, 7, 8, and 9.

"6. The first section of the amendment, the one embodying the prohibition, is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state Legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

"7. The second section of the amendment, the one declaring 'the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation,' does not enable Congress or the several states to defeat or to thwart the prohibition, but only to enforce it by appropriate means.

"8. The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

"9. The power confided to Congress by that section, while not exclusive, is territorially co-extensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

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[1] *The amendment was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several states within their territorial limits shall not cease to exist. Each state, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a state become laws of that state. They may vary in many particulars, including the penalties prescribed, but this is an inseparable

incident of independent legislative action in distinct jurisdictions.

[2] To regard the amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do

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all new ones consistent with *it, not from this amendment, but from power originally belonging to the states, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the federal Constitution. This is the ratio decidendi of our decision in *Vigliotti v. Pennsylvania*, 258 U. S. 403, 42 Sup. Ct. 330, 66 L. Ed. 686 (April 10, 1922).

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

[3] It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government (*Barron v. City of Baltimore*, 7 Pet. 243, 8 L. Ed. 672), and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority. Here the same act was an offense against the state of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different

offense against the United States, and so is not double jeopardy.

This view of the Fifth Amendment is supported by a long line of decisions by this court. In *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213, 410, a judgment of the Supreme Court of Ohio was under review. It affirmed a

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conviction under a state law *punishing the uttering of a false United States silver dollar. The law was attacked as beyond the power of the state. One ground urged was that, as the coinage of the dollar was intrusted by the Constitution to Congress, it had authority to protect it against false coins by prohibiting not only the act of making them, but also the act of uttering them. It was contended that if the state could denounce the uttering, there would be concurrent jurisdiction in the United States and the state, a conviction in the state court would be a bar to prosecution in a federal court, and thus a state might confuse or embarrass the federal government in the exercise of its power to protect its lawful coinage. Answering this argument, Mr. Justice Daniel for the court said (5 How. 434, 12 L. Ed. 213):

"It is almost certain that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration."

This conclusion was affirmed in *United States v. Marigold*, 9 How. 560, 569 (13 L. Ed. 257), where the same justice said that—

"The same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."

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*The principle was reaffirmed in *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306, in *United States v. Cruikshank*, 92 U. S. 542, 550, 551, 23 L. Ed. 588, in *Ex parte Siebold*, 100 U. S. 371, 389, 390, 391, 25 L. Ed. 717, in *Cross v. North Carolina*, 132 U. S. 131, 139, 10 Sup. Ct. 47, 33 L. Ed. 287, in *Pettibone v. United States*, 148 U. S. 197, 209, 13 Sup. Ct. 542, 37 L. Ed. 419, in *Crossley v. California*, 163 U. S. 640, 641, 18 Sup. Ct. 242, 42 L. Ed. 610, in *Southern Ry. Co. v. R. R. Com. Indiana*, 236 U. S. 439, 35 Sup. Ct. 304, 59 L. Ed. 661, in *Gilbert v. Minnesota*, 254 U. S. 325, 330, 41 Sup. Ct. 125, 65 L. Ed. 287, and, finally, in

McKelvey v. United States, 260 U. S. 353, 43 Sup. Ct. 132, 67 L. Ed. —, decided December 4, 1922.

In *Southern Ry. Co. v. R. R. Com. Indiana*, supra, Mr. Justice Lamar used this language:

"In support of this position numerous cases are cited, which, like *Cross v. North Carolina*, 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respectively within the sphere of state and federal regulation and thus violates the laws of both, or where there is this double effect in a matter of which one can exercise control, but an authoritative declaration that the paramount jurisdiction of one shall not exclude that of the other."

These last words are peculiarly appropriate to the case presented by the two sections of the Eighteenth Amendment. The court below is the only District Court which has held conviction in a state court a bar to prosecution for the same act under the Volstead Law. *United States v. Holt* (D. C.) 270 Fed. 639; *United States v. Bostow* (D. C.) 273 Fed. 535; *United States v. Regan* (D. C.) 273 Fed. 727; *United States v. Ratagczak* (D. C.) 275 Fed. 558.

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[4] *Counsel for defendants in error invoke the principle that as between federal and state jurisdictions over the same prisoner, the one which first gets jurisdiction may first exhaust its jurisdiction to the exclusion of the other. *Ponzi v. Fessenden et al.*, 258 U. S. 254, 42 Sup. Ct. 309, 66 L. Ed. 607, decided March 27, 1922. This is beside the point and has no application. The effect of the ruling of the court below was to exclude the United States from jurisdiction to punish the defendants after the state court had exhausted its jurisdiction, and when there was no conflict of jurisdiction.

[5] If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so. If a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. But it is not for us to discuss the wisdom of legislation; it is enough for us to hold that in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling

intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts.

Judgment reversed, with direction to sustain the demurrer to the special plea in bar of the defendants and for further proceedings in conformity with this opinion.

(260 U. S. 423)

KIRBY et al. v. UNITED STATES, for and on behalf of the CROW TRIBE OF INDIANS.

(Argued Nov. 27, 1922. Decided Dec. 11, 1922.)

No. 126.

1. Indians ⚡16(7)—Provision in lease to be read with other provisions, the lessees' proposal, and the conditions prompting it.

A provision in a lease of Indian lands by the government, limiting the number of cattle to be grazed thereon, and providing for an additional payment for any excess, must be read with the other provisions of the lease, the written proposal of the lessees whereby the lease was obtained, and in the light of the conditions which naturally prompted some provision on the subject, in determining its meaning.

2. Indians ⚡16(7)—Lease held to treat each year as distinct period as respected rental for excess cattle grazed.

A lease of Indian lands by the government, providing that the number of cattle to be grazed should be limited to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head, and that any excess above such maximum number should be paid for at the rate of \$4.50 per head, held to evidence an intent to deal with each year of the term of the lease as a distinct period.

3. Indians ⚡16(7)—Lease construed with respect to payment for excess of cattle grazed.

Under a lease of Indian lands for grazing for a minimum rental, which provided that the number of cattle to be grazed should be limited to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head, and that any excess above such maximum number should be paid for at the rate of \$4.50 for each head of such excess number, it was the excess over an average of 9,000 head, and not the excess over 11,500 at any one time for which the additional charge was to be made.

4. Damages ⚡78(6)—Provision for additional payment under lease held not penalty or liquidated damages.

A provision in a lease of Indian lands providing for a minimum rental, that the number of cattle to be grazed thereon should be limited to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head, and that any excess should be paid for at the rate of \$4.50 a head, was not a provision for a penalty or liquidated damages within a state statute condemning such provisions.

5. Indians ⚡16(7)—Act of lessee held binding on other lessees.

Under a lease of Indian lands for cattle grazing, providing for an additional payment per head for cattle grazed in excess of a specified average number, the acts of one of the lessees, who had special charge of the operations under the lease, in permitting additional cattle to be grazed, were the acts of both.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Action by the United States, for and on behalf of the Crow Tribe of Indians, against George B. Kirby and others. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (273 Fed. 391), and defendants bring error. Affirmed.

Messrs. Milton S. Gunn, of Helena, Mont., and Edgar Allen Poe, of Baltimore, Md., for plaintiffs in error.

Mr. Assistant Attorney General Seymour, for the United States.

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*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

With the approval of the Secretary of the Interior certain lands of the Crow Tribe of Indians in Montana were leased to George B. Kirby and Charles McDaniels for the grazing of cattle for two years beginning February 1, 1916. A bond, in which the United States Fidelity & Guaranty Company joined as surety, was given by the lessees for the faithful performance of their obligations. The lease required them to pay a minimum rental of \$31,950 per year and to abide by the following provision:

"And it is further agreed that the number of cattle to be grazed on the territory described above shall be limited to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head, and that any excess over and above such maximum number shall be paid for at the rate of \$4.50 per head for each and every head of such excess number in addition to the rental herein named."

The lessees paid the rental of \$31,950 for each of the two years, but failed to pay an additional sum claimed under that provision for cattle grazed in excess of the prescribed average.

On behalf of the tribe the United States sued the lessees and the surety company to recover the additional sum so claimed, and the defendants answered denying that there had been any excess grazing. The issues were tried to the court, a jury being waived by written stipulation. The court found that there was no excess grazing during the first year, but that the cattle grazed during the second year exceeded "the contract maximum average of 9,000 head for the year" by what was "equivalent to 6,968 head for one year." For this excess a recovery

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was allowed at the rate of \$4.50 per head,

which was affirmed by the Circuit Court of Appeals. 273 Fed. 391. The defendants prosecute the present writ of error.

The chief controversy is over the meaning and effect of the provision we have quoted from the lease. Pointing to it, the defendants contend (a) that any grazing in excess of an average of 9,000 head was prohibited, and therefore was a trespass for which no recovery could be had in a suit on either the lease or the bond; (b) that the additional payment at the rate of \$4.50 per head was to be made only for any excess over 11,500 head grazed at any one time; and (c) that the intended average of 9,000 head was for the full two-year period and not for either year taken separately. Both courts below rejected these contentions.

[1-3] The provision relied on was loosely framed and, if read alone, might well be regarded as of uncertain meaning. But it is to be read with other provisions of the lease, with the written proposal of the lessees whereby the lease was obtained, and in the light of the conditions which naturally prompted some provision on the subject. When it is examined in this way, the explanation for it and its meaning are shown to be as follows: The parties recognized that pasturage being an annual crop, is lost if not utilized before the next growing season, and they evidently intended to deal with each year as a distinct period. A minimum rental of \$31,950 was to be paid to the lessors for each year. Payment of that sum was to give the lessees the right to graze 9,000 cattle on the leased area for the particular year. But it was not practicable to have a definite number grazing throughout the year, for marketing some and bringing in others would cause the number to vary materially. So, an average of 9,000 head was agreed on. This would permit a shortage in one part of the year to be made up by a corresponding increase in another part. But to prevent this privilege from being carried to extreme lengths, the provision for an aver-

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age *was qualified by saying "the maximum number at any one time not to exceed 11,500 head." The purpose of that provision, as thus qualified, was to define the grazing which might be done for the minimum rental of \$31,950—in other words, to show that the grazing which might be done without further payment was limited to an average of 9,000 cattle. But the parties recognized the propriety of making some provision respecting the possible grazing of a larger number and the charge to be paid for it. Accordingly, they said in a succeeding clause that "any excess over and above such maximum number shall be paid for at the rate of \$4.50

per head." The maximum number there intended was evidently the number which might be grazed for the minimum rental—that is to say, an average of 9,000 head; for, of course, the point to which that rental extended must have been the one at which the charge for additional grazing was to begin. It was not intended that any grazing should be free, but, on the contrary, that all that was not covered by the minimum rental should be paid for at the rate of \$4.50 per head. The District Court aptly said:

"The language of the lease, that this \$4.50 per head is payable for 'any excess over and above such maximum number,' does not necessarily import only cattle over and above 11,500 head, the last antecedent and maximum *eo nomine*, but consistent with the writing and construction can be and is taken to import cattle over and above 9,000 head, the first antecedent, and also a maximum, although not in terms so characterized. Nine thousand head are the maximum for the year as a whole, the principal thing, and the 11,500 are the maximum at any time (and for such time as will serve to accomplish the 9,000 maximum), an incidental thing. * * * Defendants' argument that by the terms of the lease they are to pay only for excess over 11,500 head, and that for all between 9,000 head and 11,500 head they

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would be amenable only to the *relevant criminal law applicable to trespassers, is untenable."

The Circuit Court of Appeals construed the lease in the same way, and we think that construction is the correct one. As the three contentions before stated all depend on a contrary construction they must fail.

[4] The \$4.50 rate is assailed as being a penalty or liquidated damages, and therefore condemned by a statute of the state. We think it is neither a penalty nor liquidated damages. It was not to be paid for any breach of contract, but as compensation for particular grazing contemplated in the lease and not covered by the rental otherwise fixed. Whether the state statute could affect a contract made by the United States on behalf of Indian wards need not be considered.

[5] At the trial it appeared that the additional cattle were admitted to and grazed on the leased area by one of the lessees, who had special charge of the operations under the lease; and there was a conflict in the evidence as to whether the other lessee consented to or acquiesced in those acts. The District Court ruled that the conflict was immaterial and that the acts of the lessee in charge were the acts of both. Complaint is made of this, but it obviously was right. *Kendall v. Carland*, 5 Cush. (Mass.) 74; *Goshorn v. Steward*, 15 W. Va. 657, 664.

Judgment affirmed.

(260 U. S. 366)

CHAMPLAIN REALTY CO. v. TOWN OF BRATTLEBORO.

(Argued Nov. 27 and 28, 1922. Decided Dec. 11, 1922.)

No. 128.

1. Commerce §72—Taxation §101—Holding of logs in boom for purposes of safety held not to break continuity of interstate journey.

Where logs were placed in a tributary of the Connecticut river with intent to drive them to a mill in another state, but part of the drive was held for a few days in a boom at the mouth of such tributary, because the Connecticut was frozen, or because its waters were so high as to render it unsafe to continue the drive, and not for any beneficial purpose of the owner, except to facilitate the safe delivery of the logs at the mill, the continuity of the interstate journey was not broken, so as to permit state taxation of the logs.

2. Commerce §72—Movable property not exempt from local taxation, unless in actual continuous transit.

The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation, which is not discriminative, unless it is in actual continuous transit in interstate commerce.

3. Commerce §72—Interruption of journey to promote safe or convenient transit does not break continuity of trip.

If interruptions of an interstate journey are only to promote safe or convenient transit, the continuity of the interstate trip is not broken.

4. Commerce §72—Continuity of interstate transit to be determined by consideration of various factors.

The continuity of interstate transit in case of interruptions is to be determined by consideration of various factors, first among which are the owner's intention, the control he retains to change the destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which a tax is sought to be levied.

On Writ of Certiorari to the Supreme Court of Vermont.

Suit by the Champlain Realty Company against the town of Brattleboro. A judgment for plaintiff was reversed by the Supreme Court of Vermont (95 Vt. 216, 113 Atl. 806), and plaintiff brings certiorari. Reversed and remanded.

This was a suit in assumpsit by the petitioner, the Champlain Realty Company, to recover \$484.50 and interest from the town of Brattleboro, Vt., being the amount of taxes levied on logs of pulpwood of the petitioner floating in the West river in that town on April 1, 1919, and paid by the petitioner under protest as illegally collected,

because the logs were then in transit in interstate commerce to Hinsdale, N. H. The

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suit *was brought in the county court, and, the defendant having failed to set the cause for jury trial within the time fixed by statute, it was heard by the court, which made findings of fact that under the state practice are conclusive on review by the Supreme Court. The county court gave judgment for the Realty Company. The town took the case on exceptions to the Supreme Court.

The Supreme Court (95 Vt. 216, 113 Atl. 806) summarized the findings of fact by the county court as follows:

"During the winter of 1918-19 the plaintiff cut pulpwood, in all about 10,000 cords, in the towns of Jamaica, Stratton, Londonderry and Winhall in this state. The plaintiff maintains a mill at Hinsdale, in the state of New Hampshire, about three miles below Brattleboro, where its pulpwood is rossed and bolted. The wood, cut four feet long, was placed upon the banks of West river and its tributaries to be floated down into the Connecticut and thence to its destination at the mill in Hinsdale. The waters of the West river are wholly in this state and empty in the town of Brattleboro into the Connecticut. West river and its tributaries had been used for driving pulpwood to the mill at Hinsdale in the years 1917 and 1918. A single log boom is provided at the mill to receive the wood floated down the river, but is incapable of holding it all when the water in the Connecticut is high and the current swift, and the wood is liable to be carried over and drawn under the boom and lost. A pond of considerable size is formed near the mouth of West river in the town of Brattleboro by water set back from the Connecticut by the dam at Vernon. Plaintiff maintains a boom at this point to hold and control the logs driven down West river until the water in the Connecticut has receded sufficiently to permit of their being held in the boom at Hinsdale.

"On March 25, 1919, the plaintiff began putting the pulpwood into the West river and its

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tributaries the *water in these streams then being high, intending to drive it down the river and thence into the Connecticut and down that river to its mill in Hinsdale. In anticipation of the probable high water in the Connecticut, plaintiff had previously placed its boom across West river near its mouth to hold the wood there until the water in the Connecticut had receded enough to allow it to be held at the mill at Hinsdale. The wood floated down West river on the high water and the head of the drive reached the boom at the mouth of West river on March 27, 1919. At that time the Connecticut was so high and its current so swift that it was not thought safe to let the wood into that river, as it could not be held at the Hinsdale boom. For this reason and no other the plaintiff held its wood in the boom at Brattleboro. The Connecticut was not suitable for driving pulpwood from the time the drive began until April 3d, on which date the plaintiff's servants cut the boom at the mouth of West river so that the wood could pass into the Connecticut. Prior to April 3d only about

4,000 cords of the wood had reached and been held at the West river boom. The balance arriving later went through to Hinsdale without stopping. On March 28, 1919, when there was by estimation about 4,000 cords of wood in the West river boom, it broke, allowing some of the wood to escape into the Connecticut, and onto the Retreat meadow in Brattleboro, near the mouth of West river. The boom was repaired on March 29, 1919. At this time the part of West river where the wood lay back of the boom, called the holding ground, was frozen, so the wood, if not boomed, could not have continued on its journey into the Connecticut at that time. On April 1, 1919, about 1,500 cords of the pulpwood was being held in plaintiff's boom at the mouth of West river. Some wood that was lodged on an island and the wood on the Retreat meadow remained after the boom was cut. The latter remained

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on the meadow about two weeks and had *to be taken out by a process called 'booming' or 'warping.' None of this 1,500 cords was cut in the town of Brattleboro. All of it had been carried down West river and was destined for the plaintiff's mill at Hinsdale, N. H., by way of the Connecticut. The drive of pulpwood down West river to the Connecticut and thence to the rossing plant at Hinsdale was in continuous operation from March 25th until it was completed on May 9th, and was conducted properly to make an uninterrupted passage, so far as possible."

On these findings the Supreme Court held that the interstate transit did not begin until the wood left the Brattleboro boom. Everything before that was merely preparations. The floating of the logs from the West river towns to Hinsdale was interrupted, and the interruption, although only long enough to secure safety in the drive, was for the benefit of the owner, and in law postponed the initial step in the interstate transit until the wood was released from the Brattleboro boom. The court, therefore, held the wood taxable at Brattleboro and reversed the county court.

Messrs. Wm. C. Cannon, of New York City, and M. P. Maurice, of Brattleboro, Vt., for petitioner.

Messrs. Arthur P. Carpenter and Ernest W. Gibson, both of Brattleboro, Vt., for respondent.

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*Mr. Chief JUSTICE TAFT, after stating the case, delivered the opinion of the Court.

The Vermont Supreme Court depended for its conclusions chiefly upon *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, which is the leading case on this subject. There logs had been cut on Wentworth's Location in New Hampshire during the winter, and had been drawn down to Errol in the same state, and placed in Clear stream and on the banks thereof on lands of John Akers and part on land of George C. Demeritt in said town, to be from thence floated down the Androscoggin river to the state of Maine. 116 U. S. 518, 6 Sup. Ct. 475, 29 L. Ed. 715.

It is not clear how long they had lain

there, but certainly for part of one winter season. This court, speaking by Mr. Justice

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Bradley, sought to fix the time when *such logs, in the course of their being taken from New Hampshire to Maine, ceased to be part of the mass of property of New Hampshire and passed into the immunity from state taxation as things actually in interstate commerce. The learned Justice states the rule to be:

"That such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey." 116 U. S. 527, 6 Sup. Ct. 478, 29 L. Ed. 715.

Again, on page 528 of 116 U. S., on page 479 of 6 Sup. Ct. (29 L. Ed. 715), Justice Bradley said:

"The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in the course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri and not at all a fixed and certain thing.

"The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the state of

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*Maine. They had only been drawn down from Wentworth's Location to Errol, the place from which they were to be transported to Lewiston in the state of Maine. There they were to remain until it should be convenient to send them to their destination."

[1] The question here then is: Where did the interstate shipment begin? When the wood was placed in the waters of the West river in the towns of Jamaica, Stratton, Londonderry and Winhall, or at the boom in Brattleboro? The whole drive was 10,000 cords. Six thousand cords of that, shipped from these towns after the 3d of April, went through directly to Hinsdale, N. H., without stopping. Certainly that was a continuous passage, and the wood when floating in the West river was as much in interstate

commerce as when on the Connecticut. Why was it any more in interstate commerce than that which had been shipped before April 3d from the same towns for the same destination by the same natural carrying agency, to wit, the flowing water of the West and Connecticut rivers? Did the fact that before April 3d the waters of the Connecticut were frozen, or so high as to prevent the logs reaching Hinsdale, requiring a temporary halting at the mouth of the West river, break the real continuity of the interstate journey? We think not. The preparation for the interstate journey had all been completed at the towns on the West river where the wood had been put in the stream. The boom at the mouth of the West river did not constitute an entrepôt or depot for the gathering of logs preparatory for the final journey. It was only a safety appliance in the course of the journey. It was a harbor of refuge from danger to a shipment on its way. It was not used by the owner for any beneficial purpose of his own except to facilitate the safe delivery of the wood at Hinsdale on their final journey already begun. The logs were not detained to be classi-

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fied, measured, counted, *or in any way dealt with by the owner for his benefit, except to save them from destruction in the course of their journey that, but for natural causes, over which he could exercise no control, would have been actually continuous. This was not the case in *Coe v. Errol*. It is evident from the statement of that case, and Mr. Justice Bradley's language that the logs were partly drawn and partly floated to Errol, and deposited some in the stream and some on the banks, where "they were to remain until it should be convenient to send them to their destination," and they were being gathered there for the whole previous winter season. It was an entrepôt or depot, as the Justice several times describes it. The mere fact that the owner intended to send them out of the state under such circumstances did not put them into transit in interstate commerce. But here we have the intention put into accomplishment by launching, and manifested by an actually continuous journey of more than half the drive, with a halting of less than half of it in the course of the interstate journey to save it from loss, and only for that purpose.

The case at bar is easily distinguishable from the other cases cited by the Vermont Supreme Court. In *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615, Bacon had bought shipments of grain in transitu from Western States to New York in the contract for which the carriers had given the shipper the right to remove it "for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination." On ar-

rival of the grain in Chicago, Bacon removed the grain from the cars to his private elevator. This removal was for the purpose of inspecting, weighing, grading, mixing, etc., but not to change its ownership, consignee, or destination. It was held that, whatever his intention, the grain was at rest, within his complete power of disposition, and held

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for his *own benefit and was taxable. His storing of the grain was not to facilitate interstate shipment of the grain, or save it from the danger of the journey. It was to enable him to treat the grain, so as to enable him more conveniently to dispose of it. He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought the grain within the taxable jurisdiction of the state.

So, in *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754, the Oil Company had its principal place of business in Memphis, Tenn., for the manufacture and sale of illuminating oils in interstate commerce. It imported oil from other states and put it into a tank, appropriately marked for distribution in smaller vessels to fill orders for oil already sold in Arkansas, Louisiana, and Mississippi. The court held that the first shipment had ended, that its storage at Memphis for division and distribution to various points was for the business purposes and profit of the company. The court continued:

"It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation." 209 U. S. 231, 28 Sup. Ct. 482, 52 L. Ed. 754.

The tank at Memphis thus became a depot in its oil business for preparing the oil for another interstate journey. So far as it bears upon this case, *American Steel and Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538, presented a similar state of facts and ruling.

In *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. Ed. 394, the company cut 180,000,000 feet of timber for the purpose of saving the same from fire, and to protect and preserve it, put it into the Ontonagon river, Mich. It was drawn down to the mouth of the river into the township of Ontonagon, Mich., to the sorting ground and pier jams of the company and there it was taxed. The logs remained there and

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were *shipped as they were needed to Green Bay, Wis., to the mills of the company. Not more than 40,000,000 feet a season were needed. Palpably the company's sorting grounds and pier jams were a depot for the keeping of the logs for the business purposes of the company, and there was no interstate com-

merce until the final shipment to Green Bay began.

In the cases of *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257, and *Pittsburg Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538, the coal in barges in the Mississippi river which was the subject of taxation had come to rest in Louisiana, after a trip from Pittsburg, and was being held for sale to any one who might wish to buy.

[2-4] The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. *State v. Engle, Receiver*, 34 N. J. Law, 425, 435; *State v. Carrigan*, 39 N. J. Law, 36. This was the case in *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359, in which sheep driven 500 miles from Utah to Nebraska which traveled 9 miles a day were held immune from taxation in Wyoming where they stopped and grazed on their way. Another instance is as to that part of the logs in *Coe v. Errol*, which were not before this court because the Supreme Court of New Hampshire had found them nontaxable in New Hampshire. They were cut in Maine and were floated down the Androscoggin on their way to Lewiston, Me., but were delayed for

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a season at Errol, *N. H., because of low water. In the cases just cited the transit had begun in one state and was continued through another on the way to a third. This circumstance strengthened the inference that the interruption in the intermediate state did not destroy interstate continuity of the trip. But this was not always so, as *Bacon v. Illinois* and *General Oil Co. v. Crain* show. In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied.

Of all the cases in this court where such movable property has been held taxable, none is nearer in its facts than *Coe v. Errol* to the case at bar. We have pointed out the

distinction between the two, which requires a different conclusion here.

Reversed and remanded for further proceedings not inconsistent with this opinion.

(260 U. S. 360)

AMERICAN MILLS CO. v. AMERICAN SURETY CO. OF NEW YORK.

(Argued November 24, 1922. Decided December 11, 1922.)

No. 118.

1. Equity ⇨46—Defense at law to action on guaranty procured by fraud is adequate.

A guarantor whose guaranty was procured by fraud has an adequate remedy at law by setting up the fraud as a defense in an action at law on the guaranty.

2. Equity ⇨53(1)—Objection that remedy at law is adequate can be waived.

The objection to a suit in equity on the ground that there was an adequate remedy at law can be waived.

3. Courts ⇨347—Requirement of federal equity rule that counterclaim arising in same transaction be stated lies only to equitable claims.

The requirement of equity rule 30 (33 Sup. Ct. xxvi) that the answer must state any counterclaim arising out of the transaction which is the subject-matter of the suit applies only to counterclaims of an equitable nature, since otherwise the holder of a legal claim would be compelled to waive his right to jury trial guaranteed by Const. Amend. 7.

4. Equity ⇨53(1)—Pleading legal counterclaim waives objection that remedy at law was adequate.

Since a defendant is not required to state, in an answer in a suit in equity, a legal counterclaim, though it arose from the same transaction, the pleading of such counterclaim in an answer, filed after the objection that complainant's remedy at law was adequate had been overruled without prejudice to renewal, waived the objection.

Appeal from the Circuit Court of Appeals of the Second Circuit.

Suit by the American Surety Company of New York against the American Mills Company. Decree for complainant after removal of the cause from the state court to the United States District Court (262 Fed. 691) was affirmed by the Circuit Court of Appeals (273 Fed. 67) and defendant appeals. Affirmed.

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*Mr. Henry Uttal, of New York City, for petitioner.

Mr. Wm. Marshall Bullett, of Louisville, Ky., for respondent.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This case involves a question of procedure and turns on the construction of equity rule 30 (33 Sup. Ct. xxvi). An understanding of the point at issue requires a statement of the facts and the course of the litigation.

In September, 1918, the Hartenfeld Bag Company, which was in a failing condition, owed the American Mills Company, the petitioner, about \$22,000, which it was unable to pay. The Mills Company and the Bag Company made a contract, the performance of which by the Bag Company the American Surety Company guaranteed. The contract recited that the Mills Company had paid in advance to the Bag Company \$22,100 for which the Bag Company was to deliver certain merchandise within 75 days, and in default of this delivery, the money was to be returned. The Bag Company delivered only \$1,500 worth of goods and then went into bankruptcy. The fact was that the Mills Company had never made the advance payment of \$22,000 recited in the contract, but instead of that, some days after the execution of the contract, the Mills Company and the Bag Company exchanged checks for a little less than this amount in order to create the appearance of a genuine transaction. The effect of what was done was that the Mills Company received a guaranty from the Surety Company of a bad debt, while the latter company thought it was insuring the performance of a bona fide contract of sale and delivery of goods by the Bag Company for which that company had received the full purchase price in advance. In December, 1918,

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after demand for payment *and refusal, the Mills Company, a corporation of Georgia, sued the Surety Company, a corporation of New York, on its guaranty in a state court in Georgia and in a state court in Illinois. In March, 1919, the Surety Company, before appearing in the Georgia or Illinois courts, filed the suit at bar in a state court in New York against the Mills Company seeking to cancel the guaranty on the ground of fraud and to enjoin its enforcement. The Mills Company removed the cause to the equity side of the District Court below, and then filed an answer and counterclaim in which it denied the alleged fraud and pleaded as a separate and distinct defense that the Surety Company had an adequate remedy at law by setting up the alleged fraud as an answer to the suits in Georgia and Illinois, and second, "as a separate and distinct counterclaim to the cause of action alleged in the complaint," set up the execution of the guaranty, the default thereunder, notice to the Surety Company, demand for payment, refusal thereof, and a prayer "for judgment against the plaintiff on defendant's counterclaim for the sum of \$21,050 with interest." Thereafter the Mills Company twice moved to dismiss the action on the ground that the plaintiff had an adequate remedy at law and

these motions were denied without prejudice to such action as the trial court might deem advisable. When the cause came on for hearing the Surety Company introduced proof of the fraud. The Mills Company introduced no evidence on the issue of fraud, but made proof of the execution of the guaranty and the facts subsequent thereto to show the liability of the Surety Company and put the contract of guaranty in evidence. The court directed that it be delivered to the clerk and impounded. After both sides had rested in the case, the court called for an argument on the law of the case, announcing with emphasis that the fraud had been clearly shown. The court entered a decree cancel-

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ing the guaranty, holding *that the defendant had waived his defense that there was an adequate remedy at law and had thereby given the court of equity jurisdiction to grant the relief prayed for by cancellation of the guaranty. *American Surety Co. v. American Mills Co.*, 262 Fed. 691. On appeal, the decree was affirmed by the Circuit Court of Appeals, 273 Fed. 68.

[1, 2] It is conceded by the respondent that its bill in equity in the District Court should have been dismissed because it had an adequate remedy at law. The cases of *Insurance Co. v. Bailey*, 13 Wall. 616, 622, 20 L. Ed. 501, and *Cable v. U. S. Life Insurance Co.*, 191 U. S. 288, 306, 307, 24 Sup. Ct. 74, 48 L. Ed. 188, settle that. Respondent therefore relies solely on the waiver of this defect by the Mills Company in doing what it did in the District Court. A defendant in a bill of equity may waive such a defect. *McGowan v. Parish*, 237 U. S. 285, 295, 35 Sup. Ct. 543, 59 L. Ed. 955; *Metropolitan Railway Receivership*, 208 U. S. 90, 109, 110, 28 Sup. Ct. 219, 52 L. Ed. 403; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 380, 14 Sup. Ct. 127, 37 L. Ed. 1113; *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. Ed. 934; 1 *Daniell's Ch. Pr.* (4th Am. Ed.) 555.

Did petitioner waive it? It made the objection seasonably both by answer and by motions to dismiss. The motions were denied without prejudice to their renewal when the cause should come on for hearing before the trial court. The defendant, instead of renewing its motion to dismiss or insisting on the sufficiency of the first defense of its answer, introduced proof of its right to an affirmative judgment for the full amount of the guaranty, putting the written instrument in evidence. This certainly constituted a waiver unless the contention of the defendant, the petitioner here, that equity rule 30 required it to put in proof of its claim on penalty of being barred from prosecuting it at law, is sound.

[3] The relevant part of rule 30 is as follows:

"The answer *must* state in short and simple form any counterclaim arising out of the trans-

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action which is the *subject-matter of the suit, and *may*, without cross-bill, set out any set-off or counterclaim against the plaintiffs which might be the subject of an independent suit in equity against him, and such set-off or counterclaim so set up shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims." (Italics mine.)

The petitioner argues that *must* and *may* are here set over against one another for the purpose of enforcing the intention and effect of the rule to require the defendant in an action in equity to set out any counterclaim arising out of the subject-matter of the bill, but to leave it to the option of the defendant whether a counterclaim or set-off not arising out of the same transaction shall be interposed or shall be prosecuted by independent bill. The respondent contends that, while this may be correct, the counterclaim growing out of the same transaction must be an equitable claim, and not a legal one, as here. We concur in this view.

The new equity rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence and by uniting in one action as many issues as could conveniently be disposed of. But they normally deal with subjects-matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the federal statutes, practice and decisions when the rules were promulgated. By the construction which petitioner would put upon rule 30, it is an attempt to compel one who has a cause of action at law to bring it into a court of equity and then try it without a jury whenever the defendant in that cause can find some head of equity jurisdiction under which he can apply for equitable relief in respect of the subject-matter. The order of procedure as between the law

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and equity *sides in such cases always has been that the equity issue is first disposed of by the chancellor and then, unless that ends the litigation, the original plaintiff may have his action at law and his trial by jury secured him by the Seventh Amendment of the Constitution. *Liberty Oil Co. v. Condon National Bank*, 260 U. S. 235, 43 Sup. Ct. 118, 67 L. Ed. —, decided November 26, 1922.

Petitioner's construction of rule No. 30 would deny the successful defendant in the equity action this right. Petitioner seeks to avoid the dilemma by the suggestion that the rule would be satisfied by merely pleading the action at law without proving it, but this would be futile. The counterclaim referred to in the first part of the paragraph must therefore be an equitable counterclaim, one which like the set-off or counterclaim referred to in the next clause could be made the subject of an independent bill in equity. The counterclaim and the set-off and counterclaim in the two clauses are in *pari materia* except that the first grows out of the subject-matter of the bill and the other does not. That which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation. That which does not may be set up if the defendant wishes in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding, even though they are not related. *Buffalo Specialty Co. v. Vancleef* (D. C.) 217 Fed. 91. The formality of cross-bills is not required, and the rule goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants. The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counterclaims to those which are equitable is imperative. Equity rule 30 was evidently suggested by order XIX, rule 3, of the English Practice, but, as the division between equity and law jurisdictions does not now obtain in the English courts, the England rule applies to all ac-

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tions either at law or in *equity (*Hopkins' Federal Equity Rules* [3d Ed.] p. 195), and consideration of it does not aid us in the question we are discussing.

[4] The result is that the petitioner as defendant was not obliged to set up and prove its action at law under rule 30, and when it did so, by its affirmative action, it waived its previous objection to the equitable jurisdiction and also its right of trial by jury. An analogous effect of such affirmative action in pressing a counterclaim is seen in *Merchants Heat & Light Co. v. J. B. Clow & Sons*, 204 U. S. 286, 289, 290, 27 Sup. Ct. 285, 51 L. Ed. 488, where a nonresident corporation, having saved its right to object to the service of summons, lost it, not by answer, but by a counterclaim.

Decree affirmed.

(260 U. S. 386)

REGAL DRUG CORPORATION v. WARDELL, Collector of Internal Revenue.

(Submitted Nov. 28, 1922. Decided Dec. 11, 1922.)

No. 108.

Constitutional law **§318**—Internal Revenue **§45**—Jury **§19(15)**—Tax or penalty cannot be imposed for illegal sale of liquor without notice or hearing, and its collection may be enjoined.

In view of the constitutional guaranties of due process of law and trial by jury, so-called taxes or penalties imposed for alleged sales of intoxicating liquors in violation of law cannot be imposed by the Commissioner of Internal Revenue without notice or hearing, whether imposed under National Prohibition Act, tit. 2, § 35, or under the tax laws antedating such act, and the collection of such a tax may be enjoined, notwithstanding Rev. St. § 3224 (Comp. St. § 5947).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the Regal Drug Corporation against Justus S. Wardell, as Collector of Internal Revenue for the First District of California. A decree dismissing the suit was affirmed by the Circuit Court of Appeals (273 Fed. 182), and plaintiff brings certiorari. Reversed and remanded.

Mr. John W. Preston, of San Francisco, Cal., for petitioner.

Mr. Solicitor General Beck, Mrs. Assistant Attorney General Willebrandt, and Mr. Robert P. Reeder, all of Washington, D. C., for respondent.

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*Mr. Justice McKENNA delivered the opinion of the Court.

The case involves the legality of taxes, assessments or penalties under the revenue law or the National Prohibition Act (41 Stat. 305), upon certain distilled spirits and liquors of the Regal Drug Corporation (herein called complainant), and the dstraint of its store and the property contained therein.

The remedy sought is by injunction against respondent Wardell, as collector of internal revenue, from taking or continuing in

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possession of the store and its property, *or from conducting any action or proceeding to enforce the collection of the taxes, assessments or penalties.

Complainant presented the grounds of its prayer in a bill of complaint filed in the Southern Division of the United States District Court for the Northern District of California.

The United States demurred to the bill on the ground, among others, that complainant had a "plain, speedy, adequate and com-

plete remedy at law." The District Court sustained the demurrer and decreed the dismissal of the suit. The ruling and decree were affirmed upon appeal of complainant by the Circuit Court of Appeals for the Ninth Circuit.

The bill of complaint is an amended one. A summary of its allegations is all that is necessary and the facts alleged may be assumed to be true. They are as follows: The complainant is a corporation under the laws of California and the defendant (respondent here) is the United States collector of internal revenue for the First district of California. On the 28th day of October, 1919, complainant was the holder of a permit duly issued to it to sell intoxicating liquor and distilled spirits for nonbeverage purposes, and continued to be the holder thereof until some time in June, 1920, during which time it was in force.

During that time complainant purchased and withdrew from the bonded warehouses distilled spirits and intoxicating liquors to the amount of 17,900 gallons, and also 450 gallons of sweet wines containing not over 21 per cent. of alcohol, and purchased about 20 gallons of dry wines containing not over 14 per cent. of alcohol. All taxes and assessments against the spirits and liquors that were levied or could be levied were paid by the complainant in advance, and during the time the permit was in force complainant sold and disposed of the spirits and liquors under the permit, "and under and in accordance with the provisions of the National Prohibition Act." Complainant also

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complied *with the law in regard to filing a bond in the sum of \$100,000.

Complainant had in its drug store during the time mentioned, a stock of drugs, medicines and sundries of the value of about \$15,000.

That in or about the month of June, 1920, the Commissioner of Internal Revenue levied against complainant a so-called assessment or tax at the rate of \$6.40 per gallon, amounting in the aggregate to \$115,092.50 upon all distilled liquors that had been withdrawn by complainant from the bonded warehouses between October 28, 1919, and the time when complainant's permit to sell and dispose of the spirits was revoked, to wit, in the month of June, 1920.

The Commissioner also levied arbitrarily a so-called tax or assessment against complainant at the rate of 40 cents a gallon on the sweet wines purchased and disposed of by complainant, and 16 cents a gallon on the dry wines.

None of the levies were either taxes or assessments but were fines and penalties imposed on complainant without notice or a hearing.

Complainant had already paid taxes on

all of the articles amounting to the sum of \$39,656.89. The Commissioner of Internal Revenue claimed and claims there is due the further sum of \$75,592.61.

The Commissioner also levied against complainant a penalty of \$500 for selling spirits in violation of law, and a penalty of \$93.75 for conducting the business of a rectifier, in violation of law, and a penalty of \$1,000 a month for having manufactured distilled spirits or intoxicating liquors in violation of law.

The levies of the taxes and assessments were without notice or hearing, or that the same were proposed, and complainant was therefore, without knowledge or information of the proposed action or the basis or grounds of it. No evidence was taken or received by the Commissioner in regard thereto prior to the attempted levy.

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On the 19th day of July, 1920, the Commissioner took possession of complainant's drug store and of the entire stock of drugs and goods therein, excluding complainant therefrom, and is proceeding to and threatening to sell the same in order to satisfy the so-called assessments or taxes and penalties, and that the damage done to complainant will be irreparable.

The District Court, comparing the inconvenience and loss to the parties from a preliminary injunction, said it would grant one but for section 3224¹ of the Revised Statutes of the United States (Comp. St. § 5947), which the court considered applied, and forbade relief by injunction. The court also expressed a doubt of the validity of the tax, but was of the view that the fact did not preclude the application of the statute. For this conclusion the court cited *Snyder v. Marks*, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901; *Dodge v. Osborn*, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557, and other cases.

The court decreed the dismissal of the suit. The Circuit Court of Appeals affirmed the decree, citing the same cases, and expressed the view that they conclusively determined against relief by injunction, even if the tax could be considered "in the nature of a penalty."

Since the decision of the Circuit Court of Appeals we have decided a case which is a necessary factor to be considered. In *Lipke v. Lederer, Collector*, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. Ed. 1061, decided June 5, 1922, the power of a collector of internal revenue under circumstances such as are presented by this record was passed upon, the limitations upon it, and the rights of one against whom it is attempted to be exercised.

The case originated in the District Court of the Eastern District of Pennsylvania, and

was brought, as the case at bar is, to restrain the enforcement of a tax on the ground that it was the imposition of a penalty, not a tax, and was not preceded by a

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hearing. The bill was dismissed by the District Court upon the authority of *Ketterer v. Lederer*, 269 Fed. 153, that case deciding that an injunction could not be issued to restrain the collection of a tax.

The facts of the case were these: Lipke paid all revenue taxes required by the laws for the year ending June 30, 1920. He held a retail liquor license under the laws of the state. On December 29, 1920, he was arrested for selling liquor under the National Prohibition Act, and gave bail to appear and answer in the United States District Court.

On March 18, 1921, he was notified that there was assessed against him a tax (its amount was stated), and, if not paid within 10 days, a penalty would be added to the tax. On March 31st, he received a second demand, and was advised that, if the tax and penalty were not paid within 10 days, collection of the same with accrued interest and costs would "be made by seizure and sale of all property."

To restrain the execution of the threat, the suit was brought; Lipke alleging that he was "wholly without adequate remedy at law to prevent such seizure of his property."

Passing on section 3224 of the Revised Statutes, which was urged against the suit, it was decided that the section had no application, and that section 35 of title 2 of the Prohibition Act did not confer the power the collector threatened to exercise. Describing the power, we said that the collector was undertaking to punish Lipke "by fine and penalty for an alleged criminal offense without hearing, information, indictment or trial by jury, contrary to the federal constitution." And we said further that if the "section has the meaning ascribed to it by the defendant [the collector], it is unconstitutional.

The distinction between a tax and a penalty was emphasized. The function of a tax,

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it was said, "is to provide for the support of the government"; the function of a penalty clearly involves the "idea of punishment for infringement of the law," and that a condition of its imposition is notice and hearing. *O'Sullivan v. Felix*, 233 U. S. 318, 324, 34 Sup. Ct. 596, 58 L. Ed. 980. And even if the imposition may be considered a tax, if it have punitive purpose, it must be preceded by opportunity to contest its validity. *Central of Georgia Railway v. Wright*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463.

We took pains to say that "evidence of crime (section 29, tit. 2) is essential to assessment under section 35," and that we could not "concede, in the absence of language admitting of no other construction,

¹ Sec. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guaranties of due process of law and trial by jury are not to be forgotten or disregarded. See *Fontenot v. Accardo* (C. C. A.) 278 Fed. 871. A preliminary injunction should have been granted."

The comment and decision are applicable here, and decisive. The government concedes that the case is conclusive against the "penalties and double taxes," but contends that under tax laws which antedated the National Prohibition Act, only inconsistent laws are repealed, and that taxes in this case were levied under a law not inconsistent. For this section 35 is adduced. *Lipke v. Lederer* manifestly precludes the contention.

The contention encounters, besides, the averments of the bill. They assert that all taxes that were or could be levied were paid by complainant, and that those against which the bill is directed were imposed without notice or hearing as penalties for criminal violations of the law. The facts are not denied. They impel the application of *Lipke v. Lederer* and the reversal of the action of the District Court and that of the Circuit Court of Appeals.

Reversed and remanded to the District Court for further proceedings in accordance with this opinion.

(260 U. S. 427)

COX v. HART.

(Argued Nov. 16, 1922. Decided Dec. 11, 1922.)

No. 71.

1. Public lands ⚡41—Plaintiff held to have taken possession and commenced reclaiming desert land.

One who caused a furrow to be plowed around a tract of 320 acres of desert land, posted a notice thereon, claiming it, caused about 80 acres to be leveled, cleared, and seeded with barley, and irrigation ditches to be constructed, and irrigated the barley, fenced the land on which it was grown, and seeded another small tract with barley, constructed a head ditch along the east line and did some work in preparation for irrigation of the south half, and put up stakes on that half to mark the lines, was in actual possession of the entire tract and had in good faith commenced the work of reclaiming it within Act March 28, 1908, § 1 (Comp. St. § 4681), giving preference right of entry to any person who, prior to survey, takes possession and reclaims or in good faith commences the work of reclaiming desert land.

2. Statutes ⚡263 — Operate prospectively only, unless contrary plainly apparent.

Unless the contrary plainly appears, a statute operates prospectively only.

3. Public lands ⚡37 — Statutory preference right as to one taking possession before survey applies to one taking possession before statute passed.

Under Act March 28, 1908, § 1 (Comp. St. § 4681), limiting the right to make entry of desert lands to surveyed lands, but providing that one who has prior to survey taken possession of a tract of desert land, not exceeding in area 320 acres, and has reclaimed or in good faith commenced to reclaim it, shall have the preference right to make entry thereof, the proviso applies to one who had done the things enumerated prior to its enactment; this not giving the proviso a retroactive operation or impairing vested rights.

4. Statutes ⚡228—Office of proviso stated.

Though sometimes misused to introduce independent pieces of legislation, the office of a proviso is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached.

5. Statutes ⚡263—Not retroactive, because operating on antecedent facts.

A statute is not made retroactive merely because it draws on antecedent facts for its operation.

6. Public lands ⚡25—Survey creates and does not ascertain boundaries.

A survey of public lands does not ascertain boundaries, but creates them.

7. Public lands ⚡27—Regarded as unsurveyed until filing and approval of survey.

The running of lines in the field, and the laying out and platting of townships, sections, and legal subdivisions, are not alone sufficient to constitute a survey, and until all conditions as to filing in the proper land office, and all requirements as to approval have been complied with, the lands are to be regarded as unsurveyed, and not subject to disposal as surveyed lands.

8. Public lands ⚡28 — Survey annulled or abandoned by act directing resurvey.

A purpose to annul or abandon a survey of public lands may be disclosed by an act of Congress directing a resurvey, based on the fact of obliteration of the lines and marks.

9. Public lands ⚡37—Lands ordered resurveyed held unsurveyed as to preference right to enter.

Where the lines and marks of the original survey, made in 1854 to 1856, of lands ordered resurveyed by Act July 1, 1902, were obliterated, and for all practical purposes had ceased to exist, the lands were unsurveyed lands within the proviso of Act March 28, 1908 (Comp. St. § 4681), giving a preference right to enter desert lands to one taking possession thereof prior to survey, and reclaiming or in good faith commencing the work of reclaiming them.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by Ethel Hart against Joseph W. Cox. A decree for plaintiff was affirmed by the

Circuit Court of Appeals (270 Fed. 51), and defendant appeals. Affirmed.

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*Mr. Charles R. Pierce, of Washington, D. C., for appellant.

Messrs. Eugene W. Britt and William J. Hunsaker, both of Los Angeles, Cal., for appellee.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

This case involves conflicting claims to a tract of 160 acres of land in Imperial county (formerly San Diego county), state of California. The facts, so far as necessary to be stated, are as follows:

About the years 1854-56 the body of public lands, which includes the tract in controversy, was surveyed under the authority of the United States. No settlements upon these lands of any consequence were made until the year 1900. In the interval the marks of the survey had so far disappeared as to render it practically impossible to locate the lines which the survey had established. None of the section or township corners originally placed upon or in the vicinity of the land here involved was in place, and it was impossible to determine by reference to that survey in what section it was located.

On July 1, 1902, Congress provided for a resurvey of this body of public lands, by an act (32 Stat. 728) as follows:

"That the Secretary of the Interior be, and he is hereby, authorized to cause to be made a resurvey of the lands in San Diego county, in the state of California, embraced in and consisting of the tier of townships thirteen, fourteen, fifteen, and sixteen south, of ranges eleven, twelve, thirteen, fourteen, fifteen, and sixteen east, and the fractional township seventeen south, of ranges fifteen and sixteen east, all of San Bernardino base and meridian; and all rules and regulations of the Interior Department requiring petitions from all settlers of said townships asking for resurvey and agreement to abide by the result of the same so far as these lands are concerned are hereby abrogated: Provided, that nothing herein contained shall be so construed as to impair the present bona fide claim of any actual occupant of any of said lands to the lands so occupied."

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*The resurvey thus authorized was made and the approved plats filed in 1909.

On March 28, 1908, Congress passed an act to limit and restrict the right of entry and assignment under the desert land law and to authorize an extension of the time within which to make final proof. 35 Stat. 52. Section 1 of that act is as follows:

"That from and after the passage of this act the right to make entry of desert lands under the provisions of the act approved March third, eighteen hundred and seventy-seven, entitled 'An act to provide for the sale of desert lands in certain states and territories,' as amended by the act approved March third, eighteen hundred and ninety-one, entitled 'An act to repeal

timber-culture laws, and for other purposes,' shall be restricted to surveyed public lands of the character contemplated by said acts, and no such entries of unsurveyed lands shall be allowed or made of record: Provided, however, that any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office." Comp. St. § 4681.

The appellee (plaintiff below), during the year 1906, being then of age and qualified, began the work of reclaiming a tract of 320 acres, including the lands here in controversy. Previously, and shortly before she was of age, her father, acting in her behalf, had caused a furrow to be plowed around the entire 320-acre tract, and had posted a notice claiming it for the appellee. During the year 1906 appellee caused about 80 acres of that

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portion of *the tract lying east of the lands in controversy to be leveled, cleared and seeded to barley, and ditches for irrigating the same to be constructed. All the lands at that time were unoccupied desert lands, within the meaning of the land laws of the United States. The barley was irrigated several times during the year. After the crop had matured and during the year 1906 the appellee fenced the land upon which it had been grown, and also during the year seeded to barley about 5 acres of the 160 acres in controversy. This crop, however, did not mature. Early in November, 1906, the appellee constructed a head ditch along the east line of the specific tract in controversy and did some work in preparation for the irrigation of the south half thereof, and also put up stakes upon the south half to mark the lines. She also caused borders to be made along the east line in preparation for the construction of a head ditch. This was the state of things on November 8, 1906, when the appellant put up a tent house upon the land, established a residence and claimed the 160-acre tract. Appellant saw the plowed furrows along the east and south sides of the land and was notified by appellee's father that that 160-acre tract was included within appellee's 320-acre claim. Appellant remained on the tract until he was ejected, in March, 1909, as the result of a judgment obtained by appellee against him in a state court. Hart v. Cox, 171 Cal. 364, 153 Pac. 391. Appellant during his occupancy constructed a ditch one-half mile in length and did some other work on the land.

Appellant, in July, 1907, filed an application for the land in the local land office, but his application was rejected for the reason that the description was defective. Later in

the same month appellee filed an application for the entire 320-acre tract, but her application was rejected.

In March, 1909, after the resurvey had been completed, appellant filed a new appli-

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cation and shortly thereafter *and within 90 days after the filing of the survey plat, appellee also filed a new application, both applications describing the lands with reference to the resurvey. Decision was rendered in the local land office in favor of appellant. The Commissioner of the General Land Office reversed this decision, but the Secretary of the Interior reversed the Commissioner and affirmed the local land office in favor of appellant. Subsequently, on October 24, 1918, a patent was issued to the appellant for the land in controversy.

Appellee thereupon brought suit against the appellant in the United States District Court for the Southern District of California, and prayed a decree declaring that appellant held the land in trust and requiring appellant to convey the legal title to her. That court rendered a decree in favor of appellee, and the case was carried by appeal to the Circuit Court of Appeals for the Ninth Circuit, where, after hearing, the decree of the District Court was affirmed. 270 Fed. 51. The case is here upon appeal from the Circuit Court of Appeals.

The rights of the parties turn upon the meaning and effect of the proviso to section 1 of the Act of March 28, 1908, heretofore quoted. That proviso is, in substance, that where a qualified entryman has *prior to survey taken possession* of a tract not exceeding 320 acres of *unsurveyed* desert land and has reclaimed or in good faith commenced the work of reclaiming the same he shall have the preference right to make entry of such tract within 90 days after the filing of the plat of survey in the local land office. Two questions are, therefore, presented for solution:

(1) Did appellee take possession of the lands and reclaim or in good faith commence the work of reclaiming the same prior to the attempted appropriation by appellant?

(2) Were the lands at the time *unsurveyed* desert lands, to which upon the facts the

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statutory preference *right to make entry attached? Appellant denies that the lands were unsurveyed and contends, moreover, that in any event, appellee is not within the terms of the proviso since whatever she did was prior to the passage of the act which is not to be given retrospective operation.

[1] 1. Prior to appellant's occupation on November 8, 1906, appellee had entered upon and exercised and was then exercising the acts of dominion herein set forth over the 320-acre tract under a claim of right. When appellant entered upon the land all these evidences of appellee's claim and possession were open and visible and in addition appel-

lant was specifically notified that the claim included the land in controversy.

What will constitute possession of land largely depends upon its character, condition and the use to which it is adapted. Here appellee went upon the land for the purpose of reclaiming it from its desert character. The whole of it obviously could not be reclaimed at once. The building of ditches, the securing of a water supply, the plowing and preparation of the land and the planting of crops were all steps requiring time. Residence upon the land was not required as a prerequisite to securing title under the Desert Land Laws. Having in view all the conditions we are of opinion that the facts sufficiently establish appellee's actual possession of the entire tract at the time appellant sought to make his appropriation. *Ellicott v. Pearl*, 10 Pet. 412, 442, 9 L. Ed. 475; *Ewing v. Burnet*, 11 Pet. 41, 53, 9 L. Ed. 624; *Hart v. Cox*, 171 Cal. 364, 153 Pac. 391; *Booth & Graham v. Small & Small*, 25 Iowa, 177, 181; *Illinois Steel Co. v. Bilot and Wife*, 109 Wis. 418, 443, 446, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905. It is not necessary to constitute actual possession that there should be an inclosure or any physical or visible occupancy of every part of the land. As well said by the Supreme Court of Iowa in *Booth v. Small*, supra:

"Possession of land is the holding of and exclusive exercise of dominion over it. It is

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evident that this is not, *and cannot be, uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of ownership. The owner cannot occupy literally the whole tract; he cannot have an actual *pedis possessio* of all, nor hold it in the grasp of his hands. His possession must be indicated by other acts. The usual one is that of inclosure. But this cannot always be done, yet he may hold the possession in fact of uninclosed land, by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable, and acquire the profits it yields in its present condition; such acts, being continued and uninterrupted, will amount to actual possession, and, if under color of title, or claim of right, will be adverse."

That appellee, in addition to taking possession of the entire 320 acres before appellant's occupancy, had in good faith commenced the work of reclaiming the same, does not admit of doubt. Indeed she had actually reclaimed more than one-fourth of the entire area, which included 5 acres of the tract in controversy.

[2] 2. It remains to determine whether the lands at the time appellee took possession of them were *unsurveyed* lands and whether appellee was entitled to the preference right granted by the proviso heretofore quoted.

We first dispose of the contention that, even if the lands were unsurveyed, it cannot be held that appellee was within the terms of the proviso because that would be to give

the proviso a retroactive effect and there is nothing to show that Congress so intended. The rule is, of course, well settled that unless the contrary plainly appear a statute operates prospectively only. Does the application of the proviso here proposed contravene this rule?

[3-5] Prior to the Act of March 28, 1908 (35 Stat. 52), unsurveyed lands, as well as surveyed lands, came within the purview of the Desert Land Laws (19 Stat. 377). That act, however, from and after its passage restricted "the right to make entry of desert

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lands * * * to surveyed *public lands" and expressly declared that "no such entries of *unsurveyed* lands shall be allowed or made of record." Then follows the proviso now being considered. The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. *Minis v. United States*, 15 Pet. 423, 10 L. Ed. 791. Although it is sometimes misused to introduce independent pieces of legislation. *Georgia Railway & Banking Co. v. Smith*, 128 U. S. 174, 181, 9 Sup. Ct. 47, 32 L. Ed. 377; *White v. United States*, 191 U. S. 545, 551, 24 Sup. Ct. 171, 48 L. Ed. 295. Here, however, the proviso is plainly employed in its primary character. The effect of the substantive enactment was to forbid the entry of unsurveyed lands. But the law theretofore had been otherwise, and one purpose of the proviso evidently was to exclude from the operative effect of the new rule cases which might have arisen under the prior law; that is cases of persons who had taken possession of and undertaken to reclaim unsurveyed lands at a time when the law conferred the right to do so. Any such person, no less than one who acted subsequently, is within the words of the proviso. He is literally "a person who has, prior to survey, taken possession," etc. The proviso so construed impairs no vested right and brings into existence no new obligation which affects any private interest. No reason is perceived why the words employed should not be given their natural application and so applied the case of appellee is included. Indeed, this does not give the proviso a retroactive operation. The language in terms applies to one who at the time of the enactment occupied a particular status, viz. the status of a person who *has done* the things enumerated. A statute is not made retroactive merely because it draws upon antecedent facts for its operation. *Reg. v. Inhabitants of St. Mary, Whitechapel*, 12 Queen's Bench Reports, 120, 127; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007.

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[6-8] *Passing this point, however, it is contended that the lands in question were in fact surveyed. It is true the lands had been surveyed in 1854-56, but the lines of that

survey by the year 1900 had disappeared to such a degree that for practical purposes they had become nonexistent. A survey of public lands does not *ascertain* boundaries; it *creates* them. *Robinson v. Forrest*, 29 Cal. 317, 325; *Sawyer v. Gray* (D. C.) 205 Fed. 160, 163. Hence the running of lines in the field and the laying out and platting of townships, sections and legal subdivisions are not alone sufficient to constitute a survey. Until all conditions as to filing in the proper land office and all requirements as to approval have been complied with, the lands are to be regarded as unsurveyed and not subject to disposal as surveyed lands. *United States v. Morrison*, 240 U. S. 192, 210, 36 Sup. Ct. 326, 60 L. Ed. 599; *United States v. Curtner* (C. C.) 38 Fed. 1, 10. It follows that, although the survey may have been physically made, if it be disapproved by the duly authorized administrative officers the lands which are the subject of the survey are still to be classified as unsurveyed. In other words, to justify the application of the term "surveyed" to a body of public land something is required beyond the completion of the field work and the consequent laying out of the boundaries, and that something is the filing of the plat and the approval of the work of the surveyor. If, pending such approval, or, still more, if after disapproval of the survey, the lands in contemplation of law are unsurveyed, it is difficult to see why the same result may not follow when the survey originally approved and platted is subsequently annulled or abandoned, because the lines and marks established have become obliterated. A purpose to annul or abandon such survey we think may be disclosed by an act of Congress directing a resurvey plainly based upon the fact of such obliteration.

[9] Turning now to the record in the case under consideration it appears that the lines

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and marks of the original *survey of 1854-56 had for all practical purposes ceased to be. This is apparent not only from a consideration of the record but is in accord with repeated declarations of the land department. See *In re Peterson et al.*, 40 Land Dec. 562, 566, 570, where it is said not only that all the corners which had been established north of the fourth standard parallel were missing, but that the survey itself was "grossly inaccurate"; that in making the resurvey an attempt to retrace the old original survey, had failed, "and it is now a physical impossibility to identify" the corners of sections 16 and 36 "according to the original survey. * * * All vestiges of that survey have been wiped away." See, also, *Stephenson v. Pashgian*, 42 Land Dec. 113, 114. In the land office contest between the parties hereto for the land in controversy the Secretary of the Interior, although ruling in favor of appellant, stated that the description of the land by reference to the lines of the old sur-

vey "was an impossible condition." Hart v. Cox, 42 Land Dec. 592, 594. Both courts below reached the same conclusion.

The District Court said:

"The evidence of the survey of 1856 upon the ground in that vast area covered by said act had become useless, by reason of the fact that the lines of the survey were obliterated, and all that was left were some prominent monuments. This act [the resurvey act] recognized that the survey of 1856 was of no practical use and that the lands were, for all practical purposes, unsurveyed lands. It was impracticable to dispose of these lands by congressional subdivision according to the survey of 1856."

The Circuit Court of Appeals, after referring to the original survey and the fact that no settlement was made until nearly 50 years later, said:

"It was then found that the marks of the survey had so far been obliterated that it was practically impossible to locate the lines thereof." Cox v. Hart, 270 Fed. 51.

From the foregoing it results, and we hold, that the Resurvey Act of 1902 was in

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effect and intent a legislative *declaration that the lands therein described were, when the act was passed and for all purposes of settlement and sale, unsurveyed lands. With the disappearance of the physical evidences the old survey survived only as an historical event. As a tangible, present fact it ceased to exist, and a new survey became necessary to re-establish the status of the area over which it had extended as surveyed lands of the United States.

The decree below is
Affirmed.

(260 U. S. 393)

PENNSYLVANIA COAL CO. v. MAHON
et al.

(Argued Nov. 14, 1922. Decided Dec. 11, 1922.)

No. 549.

1. Constitutional law §118, 280—Eminent domain §2(1)—Values incident to property may be diminished without compensation under police power, but power not unlimited, in view of contract and due process clauses.

While some values incident to property are enjoyed under an implied limitation, and the government may to some extent diminish such values without compensation, the implied limitation is subject to limits, in view of the contract and due process clauses.

2. Eminent domain §2(1)—Extent of diminution of value of property under police power is to be considered.

In determining the limits within which values incident to property may be diminished under the police power without compensation, the extent of the diminution is a fact for consideration.

3. Eminent domain §67—Judgment of Legislature of great weight in determining extent to which values may be diminished, but not conclusive.

In determining whether there has been such a diminution in values incident to property under the police power as to require an exercise of eminent domain and the payment of compensation, the greatest weight is given to the judgment of the Legislature, but it always is open to interested parties to contend that the Legislature has gone beyond its jurisdictional power.

4. Nuisance §71—Damage to single house not a public nuisance.

A source of damage to a single private house is not a public nuisance, even if similar damage is inflicted on others in different places; the damage not being common or public.

5. Mines and minerals §92—Statute prohibiting mining, so as to cause subsidence of dwelling, not justified as protection of personal safety.

The destruction of valuable property and contract rights by Act Pa. May 27, 1921 (P. L. 1198), forbidding the mining of anthracite coal in such way as to cause the subsidence of any dwelling house, etc., is not justified as a protection of personal safety, as this could be provided for by notice.

6. Mines and minerals §92—Destruction of property and contract rights by statute against causing subsidence not valid as applied to dwelling owned by one whose deed reserved right to remove coal.

The destruction of valuable property and contract rights by Act Pa. May 27, 1921 (P. L. 1198), forbidding the mining of anthracite coal so as to cause the subsidence of any dwelling house, and other structures and places, is not valid as applied to mining causing the sinking of a single dwelling house owned by one whose deed reserved the right to remove the coal, and who thereby waived all claim for damages therefrom.

7. Mines and minerals §92—Destruction of rights by statute regulating mining not valid as to places where right to mine reserved.

The destruction of property and contract rights by Act Pa. May 27, 1921 (P. L. 1198), forbidding the mining of anthracite coal so as to cause the subsidence of certain buildings and places, cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.

8. Eminent domain §318—When right to support for street not acquired, it cannot be supplied later without compensation.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for, and if its representatives have acquired only surface rights, without the right of support, the right of support cannot be supplied later without compensation, in view of Const. Amends. 5, 14.

9. Eminent domain $\Rightarrow$ 2(1)—Regulation of property constitutes a taking, if it goes too far.

While property may be regulated to a certain extent, if regulation goes too far, it constitutes a taking.

Mr. Justice Brandeis dissenting.

In Error to the Supreme Court of the State of Pennsylvania.

Suit by H. J. Mahon and another against the Pennsylvania Coal Company. A judgment for defendant was reversed by the Supreme Court of Pennsylvania (274 Pa. 489, 118 Atl. 491), and decree directed for plaintiffs, and defendant brings error. Reversed.

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*Messrs. John W. Davis, of New York City, and H. S. Drinker, Jr., of Philadelphia, Pa., for plaintiff in error.

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*Mr. W. L. Pace, of Pittston, Pa., for defendants in error.

Mr. Geo. Ross Hull, of Harrisburg, Pa., for State of Pennsylvania, as amicus curiæ.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921 (P. L. 1198), commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsi-

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dence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than

one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

[1-3] Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

[4-6] This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 96, 103, 90 Am. Dec. 181. The ex-

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tent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should

be discussed. The Attorney General of the State, the City of Scranton and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

[7] It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth v. Clearview Coal Co.*, 256 Pa. 328, 331, 100 Atl. 820, L. R. A. 1917E, 672. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This *we think that we are warranted in assuming that the statute does.

It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. Ed. 713, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that with the pillar on the other side of the line would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

[8] The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

[9] The general rule at least is that while

property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and

if they go beyond the general rule, *whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & Boston Ry. Co.*, 172 Mass. 488, 489, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act. *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877; *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595, March 20, 1922.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

Mr. Justice BRANDEIS dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent "as to cause the * * *

*subsidence of * * * any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." Act Pa. May 27, 1921, § 1 (P. L. 1198). Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threat-

en the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious—as it may because of further change in local or social conditions—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some

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private *persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. *Welch v. Swasey*, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923. Compare *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 Sup. Ct. 118, 65 L. Ed. 276. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargine cases settled that. *Mugler v. Kansas*, 123 U. S. 623, 663, 669, 8 Sup. Ct. 273, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 682, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253. See also *Hadacheck v. Los Angeles*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381.

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Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the state need not resort to that power. Compare *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515; *Missouri Pacific Railway Co. v. Omaha*, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. 157. If by mining anthracite coal the owner would necessarily unloose poisonous gases, I suppose no one would doubt the power of the state to prevent the mining, without buying his coal fields. And why may not the state, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the sur-

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face, as to expose the community to *like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value, and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending ab orco usque ad cælum. But I suppose no one would contend that by selling his interest above 100 feet from the surface he could prevent the state from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the state's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied. See *Powell v. Pennsylvania*, 127 U. S. 678, 681, 684, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Murphy v. California*, 225 U. S. 623, 629, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153. But even if the particu-

lar facts are to govern, the statute should, in my opinion be upheld in this case. For the defendant has failed to adduce any evidence

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from which *it appears that to restrict its mining operations was an unreasonable exercise of the police power. Compare *Reinman v. Little Rock*, 237 U. S. 171, 177, 180, 35 Sup. Ct. 511, 59 L. Ed. 900; *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498, 500, 39 Sup. Ct. 172, 63 L. Ed. 381. Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the Legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

It is said that this is a case of a single dwelling house, that the restriction upon mining abolishes a valuable estate hitherto secured by a contract with the plaintiffs, and that the restriction upon mining cannot be justified as a protection of personal safety, since that could be provided for by notice. The propriety of deferring a good deal to tribunals on the spot has been repeatedly recognized. *Welch v. Swasey*, 214 U. S. 91, 106, 29 Sup. Ct. 567, 53 L. Ed. 923; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365, 30 Sup. Ct. 301, 54 L. Ed. 515; *Patson v. Pennsylvania*, 232 U. S. 138, 144, 34 Sup. Ct. 281, 58 L. Ed. 539. May we say that notice would afford adequate protection of the public safety where the Legislature and the highest court of the state, with greater knowledge of local conditions, have declared, in effect, that it would not? If the public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Atlantic Coast Line R. R. Co. v. North Carolina*, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269, 39 Sup. Ct. 274, 63 L. Ed. 599. The rule that the state's power to take appropriate measures to guard the safety of all who may be within its jurisdiction may not be bargained away was applied to compel carriers to establish grade crossings at their own expense, despite contracts to the contrary (*Chicago, Burlington & Quincy R. R. Co. v. Nebraska*, 170 U. S.

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57, 18 Sup. Ct. 513, 42 L. Ed. 948); *and, likewise, to supersede, by an Employers' Liability Act, the provision of a charter exempting a railroad from liability for death of employees, since the civil liability was deemed a matter of public concern, and not a mere private right. *Texas & New Orleans R. R. Co. v. Miller*, 221 U. S. 408, 31 Sup. Ct. 534,

55 L. Ed. 789. Compare *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; *Douglas v. Kentucky*, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553; *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 23, 38 Sup. Ct. 35, 62 L. Ed. 124. Nor can existing contracts between private individuals preclude exercise of the police power. "One whose rights, such as they are, are subject to state restriction cannot remove them from the power of the state by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U. S. 349, 357, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 438, 23 Sup. Ct. 531, 47 L. Ed. 887; *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. The fact that this suit is brought by a private person is, of course, immaterial. To protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a state to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not limited to, churches, schools, hospitals, theaters, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

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(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Law, section 1.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be "an average reciprocity of advantage" as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity

of advantage is an important consideration, and may even be an essential, where the state's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects (*Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369); or upon adjoining owners, as by party wall provisions (*Jackman v. Rosenbaum Co.*, 260 U. S. 22, 43 Sup. Ct. 9, 67 L. Ed. —, decided October 23, 1922). But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381; his brickyard, in 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; his livery stable, in 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900; his billiard hall, in 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153; his oleomargarine factory, in 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; his brewery, in 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1922

(260 U. S. 703)

No. —, original. *Benjamin GITLOW*, plaintiff in error, v. *The PEOPLE OF THE STATE OF NEW YORK*. Nov. 27, 1922. For opinion below, see 234 N. Y. 132, 136 N. E. 317. Petition for a writ of error in this cause, submitted to the whole court, granted.

(260 U. S. 703)

No. 185. *Michael HEITLER*, plaintiff in error, v. *The UNITED STATES of America*;

No. 186. *Nathaniel PERLMAN*, plaintiff in error, v. *The UNITED STATES of America*;

No. 187. *Mandel GREENBERG*, plaintiff in error, v. *The UNITED STATES of America*;

No. 188. *Frank McCANN*, plaintiff in error, v. *The UNITED STATES of America*; and

No. 189. *George F. QUINN*, plaintiff in error, v. *The UNITED STATES of America*. Nov. 27, 1922. In error to the District Court of the United States for the Northern District of Illinois. For opinion below, see 274 Fed. 401. *Mr. Weymouth Kirkland*, of Chicago, Ill., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction, upon the authority of (1) *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550; *Piedmont Power & Light Co. v. Town of Graham*, 253 U. S. 193, 195, 40 Sup. Ct. 453, 64 L. Ed. 855; (2) *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364; *Blair v. United States*, 250 U. S. 273, 279, 39 Sup. Ct. 468, 63 L. Ed. 979; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289, 42 Sup. Ct. 106, 66 L. Ed. 239; (3) *The Nation Prohibition Cases*, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946.

(260 U. S. 756)

No. 289. *Elbert R. ROBINSON*, plaintiff in error, v. *The PEOPLE OF THE STATE OF ILLINOIS*. Nov. 27, 1922. In error to the

Supreme Court of the State of Illinois. For opinion below, see 299 Ill. 617, 132 N. E. 803. Messrs. *Andrew Jackson*, of Chicago, Ill., and *L. T. Michener*, of Washington, D. C., for plaintiff in error. Dismissed with costs and mandate granted, on motion of *Mr. L. T. Michener* in behalf of counsel for the plaintiff in error.

(260 U. S. 756)

No. 378. *The UNITED STATES of America ex rel. the WESTERN UNION TELEGRAPH COMPANY*, plaintiff in error, v. *INTERSTATE COMMERCE COMMISSION*. Nov. 27, 1922. In error to the Court of Appeals of the District of Columbia. For opinion below, see 51 App. D. C. 334, 279 Fed. 316. *Mr. Rush Taggart*, of New York City, for plaintiff in error. Dismissed per stipulation.

(260 U. S. 742)

No. 578. *The UNITED STATES*, petitioner, v. *LIPPMANN, SPIER & HAHN*. Nov. 27, 1922. Application for reconsideration of order (260 U. S. 739, 43 Sup. Ct. 95, 67 L. Ed. —) denying petition for writ of certiorari. The Attorney General, for the United States.

PER CURIAM. The application is denied for the reason that the provision of section 195 of the Judicial Code, as amended by the act of August 22, 1914, c. 267, 38 Stat. 703 (Comp. St. § 1186), which prescribes the time within which application may be made to this court for a writ of certiorari, has been amended and limited by section 6 of the act of September 6, 1916, c. 448, 39 Stat. 726, 727 (Comp. St. § 1228a).

(260 U. S. 702)

No. 593. *Charles L. HARRIS*, as Trustee of the *Davis Transit Company*, etc., plaintiff in error, v. *MORELAND TRUCK COMPANY* et al. Nov. 27, 1922. In error to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 279 Fed. 543.

Mr. Fabius M. Clarke, of San Francisco, Cal., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction. Section 3, act of September 6, 1916, c. 448, 39 Stat. 726, 727 (Comp. St. § 1120a); Central Trust Co. v. Lueders, 239 U. S. 11, 36 Sup. Ct. 1, 60 L. Ed. 119; Staats Co. v. Security Trust & Savings Bank, 243 U. S. 121, 124, 37 Sup. Ct. 336, 61 L. Ed. 632.

(260 U. S. 743)

No. 630. Robert ABELES et al., petitioners, v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY et al. Nov. 27, 1922. For opinion below, see 280 Fed. 38. Mr. Clifford B. Allen, of St. Louis, Mo., for petitioners. Mr. Paul D. Cravath, of New York City (Messrs. Carl A. De Gersdorff and Robert H. Neilson, both of New York City, of counsel), for respondents Holmes & Neilson and Missouri Pac. R. Co., Mr. Perry D. Traf-ford, of New York City, for Union Trust Co. of New York and Benjamin F. Edwards, as trustees. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 743)

No. 632. The P. R. WALSH TIE & TIM-BER COMPANY et al., petitioners, v. The MISSOURI PACIFIC RAILWAY COMPANY et al. Nov. 27, 1922. For opinion below, see 280 Fed. 38. Mr. Clifford B. Allen, of St. Louis, Mo., for petitioners. Messrs. Stetson, Jennings & Russell, of New York City, and Nagel & Kirby, of St. Louis, Mo. (Messrs. Edwin S. S. Sunderland, of New York City, and Allen C. Orrick, of St. Louis, Mo., of counsel), for respondents Guaranty Trust Co. of New York and Benjamin F. Edwards, as trustee. Mr. Paul D. Cravath, of New York City (Carl A. De Gersdorff and Robert H. Neilson, both of New York City, of counsel), for respondents Holmes & Neilson and Missouri Pac. R. Co. Messrs. Jesse W. Barrett, Atty. Gen., and Lee B. Ewing, of Nevada, Mo., special counsel, for State of Missouri, amicus curiæ. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 743)

No. 658. Fred WOLF et al., petitioners, v. The UNITED STATES of America. Nov. 27, 1922. For opinion below, see 283 Fed. 885. Mr. James M. Johnson, of Kansas City, Mo. (Mr. Donald W. Johnson, of Kansas City, Mo., of counsel), for petitioners. Mr. James M. Beck, Sol. Gen., John W. H. Crim, Asst. Atty. Gen., and Franklin G. Wixson, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 719)

No. 692. James C. DAVIS, Director General of Railroads, etc., petitioner, v. Samuel WECHSLER. Nov. 27, 1922. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri granted.

(260 U. S. 744)

No. 695. ARMOUR & COMPANY, petitioner, v. LOUISVILLE PROVISION COMPANY. Nov. 27, 1922. For opinion below, see 283 Fed. 42. Messrs. Geo. P. Fisher, of Chicago, Ill., and Helm Bruce, of Louisville, Ky., for petitioner. Mr. Edward P. Humphrey, of Louis-ville, Ky. (Messrs. Alexander P. Humphrey, and William W. Crawford, both of Louisville, Ky., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(260 U. S. 705)

No. 674. Edward N. MITTLE, plaintiff in error, v. The STATE OF SOUTH CAROLINA. Dec. 4, 1922. In error to the Supreme Court of the State of South Carolina. For opinion below, see 113 S. E. 335. See, also, 260 U. S. 744, 43 Sup. Ct. 164, 67 L. Ed. —. Messrs. Chas. A. Douglas and Hugh H. Obeare, both of Washington, D. C. (Wolfe & Berry, of Orangeburg, S. C., Cole L. Blease, of Columbia, S. C., and T. M. Rayson and E. C. Mann, both of Orangeburg, S. C., of counsel), for plaintiff in error. Messrs. Samuel M. Wolfe, Atty. Gen., A. J. Hydrick, Sol., of Orangeburg, S. C., M. L. Smith, of Camden, S. C., and J. Leroy Dukes and Sims & Sims, all of Orangeburg, S. C., for the State of South Carolina.

PER CURIAM. Dismissed for want of jur-is-diction. Section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726 (Comp. St. § 1214); Jett Bros. Distilling Co. v. City of Carrollton, 252 U. S. 1, 5-6, 40 Sup. Ct. 255, 64 L. Ed. 421.

(260 U. S. 744)

No. 674. Edward N. MITTLE, plaintiff in error, v. The STATE OF SOUTH CAROLINA. Dec. 4, 1922. For opinion below, see 113 S. E. 335. See, also, 260 U. S. 705, 43 Sup. Ct. 164, 67 L. Ed. —. Messrs. Wolfe & Berry, of Orangeburg, S. C., Cole L. Blease, of Columbia, S. C., T. M. Rayson and E. C. Mann, both of Orangeburg, S. C., and Chas. A. Douglas and Hugh H. Obeare, both of Washington, D. C., for petitioner. Messrs. Samuel M. Wolfe, Atty. Gen., A. J. Hydrick, Sol., of Orangeburg, S. C., M. L. Smith, of Camden, S. C., and J. Leroy Dukes and Sims & Sims, all of Orangeburg, S. C., for the state of South Carolina. Petition for a writ of certiorari herein denied.

(260 U. S. 704)

No. 701. BOARD OF TRADE OF THE CITY OF CHICAGO et al., appellants, v. Charles F. CLYNE, U. S. District Attorney for the Northern District of Illinois et al. Dec. 4, 1922.

Order.—It is ordered by this court, the de-fendants not objecting, that the status quo be preserved while this cause is pending in this court and for 20 days thereafter by restraining and enjoining the appellee, Charles F. Clyne, as United States District Attorney for the Northern District of Illinois, from attempting to enforce the act of Congress entitled the "Grain Futures Act" during the pendency of this cause in this court and for 20 days there-after, and also from at any time prosecuting criminally, or otherwise, under said act any member of the Board of Trade of the city of

Chicago, or any customer of any such member, for, or by reason of, any violation by him or them of any provision of said act committed during the pendency of this cause in this court or 20 days thereafter, and that appellee, Arthur C. Lueder, as postmaster of the city of Chicago, be also restrained and enjoined from interfering with any of the mail passing between members of said board of trade and customers of said members during the pendency of this cause in this court and 20 days thereafter: Provided, however, that nothing herein shall relieve the members of said board of trade from severally keeping and preserving, as required by the Grain Futures Act, their records of their contracts for future delivery during the pendency of this stay.

(260 U. S. 756)

No. 72. *I. W. GEER et al. v. The UNITED STATES of America*. Dec. 11, 1922. On a certificate from the United States Circuit Court of Appeals for the Third Circuit. For opinion below, see 268 Fed. 385. James M. Beck, Sol. Gen., of Washington, D. C., for the United States. Mr. W. S. Dalzell, of Pittsburgh, Pa., for appellant. Certificate dismissed, on motion of Mr. Solicitor General Beck for The United States.

(260 U. S. 706)

No. 94. *John SIMON, appellant, v. AMERICAN EXCHANGE NATIONAL BANK et al.* Dec. 11, 1922. Appeal from the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see American Exch. Nat. Bank v. Garvan, 273 Fed. 43. Mr. Henry A. Wise, of New York City, for appellant.

PER CURIAM. Affirmed upon the authority of Central Union Trust Co. v. Garvan, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. 403; Stoehr v. Wallace, 255 U. S. 239, 41 Sup. Ct. 293, 65 L. Ed. 604.

(260 U. S. 707)

No. 123. *SOUTHERN EXPRESS COMPANY, plaintiff in error, v. TERRY PACKING COMPANY*. Dec. 11, 1922. In error to the Supreme Court of the State of South Carolina. For opinion below, see 118 S. E. 628. Mr. Douglas McKay, of Columbia, S. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Norfolk Turnpike Co. v. Virginia, 225 U. S. 264, 268, 32 Sup. Ct. 828, 56 L. Ed. 1082; Louisiana Navigation Co. v. Oyster Commission, 226 U. S. 99, 101, 33 Sup. Ct. 78, 57 L. Ed. 138; Schlosser v. Hemphill, 198 U. S. 173, 25 Sup. Ct. 654, 49 L. Ed. 1000; Missouri, etc., Ry. Co. v. Olathe, 222 U. S. 185, 186, 32 Sup. Ct. 46, 56 L. Ed. 155.

(260 U. S. 706)

No. 139. *The UNITED STATES of America ex rel. Aaron SUHONEN, appellant, v. Frederick A. WALLIS, Commissioner of Immigration, et al.* Dec. 11, 1922. In error to the District Court of the United States for the Southern District of New York. Mr. Charles Recht, of New York City, for appellant.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; *Consolidated Turnpike Company v. Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U. S. 20, 24, 38 Sup. Ct. 35, 62 L. Ed. 124; (2) *Fong Yue Ting v. The United States*, 149 U. S. 698, 707, 728, 730, 13 Sup. Ct. 1016, 37 L. Ed. 906; *Zakonaite v. Wolf*, 226 U. S. 272, 275, 33 Sup. Ct. 31, 57 L. Ed. 218; *Bugajewitz v. Adams*, 228 U. S. 585, 591, 33 Sup. Ct. 607, 57 L. Ed. 978; *Lewis v. Frick*, 233 U. S. 291, 302, 34 Sup. Ct. 488, 58 L. Ed. 967; *Ng Fung Ho v. White*, 259 U. S. 276, 42 Sup. Ct. 492, 66 L. Ed. 938.

(260 U. S. 706)

No. 151. *The UNITED STATES, appellant, v. Arthur John BANCROFT*. Dec. 11, 1922. Appeal from the Court of Claims. For opinion below, see 56 Ct. Cl. 218. The Attorney General, for the United States.

PER CURIAM. Affirmed upon the authority of *Glavey v. The United States*, 182 U. S. 595, 21 Sup. Ct. 891, 45 L. Ed. 1247; *United States v. Andrews*, 240 U. S. 90, 94, 36 Sup. Ct. 349, 60 L. Ed. 541; *McMath v. The United States*, 248 U. S. 151, 152, 39 Sup. Ct. 31, 63 L. Ed. 177.

(260 U. S. 705)

No. 153. *John Barton PAYNE, Director General of Railroads, etc., plaintiff in error, v. A. E. STEVENS et al.* Dec. 11, 1922. In error to the Supreme Court of the State of Mississippi. For opinion below, see 125 Miss. 582, 88 South. 165. See also, 257 U. S. 642, 42 Sup. Ct. 52, 66 L. Ed. 412. Mr. Gregory L. Smith, of Mobile, Ala., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction. Act of February 8, 1899, c. 121, 30 Stat. 822 (Comp. St. § 1594); *Le Crone v. McAdoo*, 253 U. S. 217, 219, 40 Sup. Ct. 510, 64 L. Ed. 869.

(260 U. S. 744)

No. 682. *WAGNER ELECTRIC MANUFACTURING COMPANY, petitioner, v. WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY*. Dec. 11, 1922. For opinion below, see 281 Fed. 453. Messrs. Melville Church, of Washington, D. C., and Edwin E. Huffman, of St. Louis, Mo., for petitioner. Messrs. Paul Bakewell, of St. Louis, Mo., and John C. Kerr, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 744)

No. 708. *TOM REED GOLD MINES COMPANY, petitioner, v. UNITED EASTERN MINING COMPANY*. Dec. 11, 1922. For opinion below, see 209 Pac. 283. Mr. Wm. E. Colby, of San Francisco, Cal., for petitioner. Messrs. John P. Gray, of Cœur D'Alene, Idaho, R. L. Alderman, of Los Angeles, Cal., and

C. W. Herndon, of Kingman, Ariz., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Arizona denied.

(260 U. S. 744)

No. 709. UNION TRUST & SAVINGS BANK, as Trustee, etc., et al., petitioners, v. The SOUTHERN TRACTION COMPANY OF ILLINOIS et al. Dec. 11, 1922. For opinion below, see 283 Fed. 50. Messrs. Hiram T. Gilbert, John C. Slade, and Walter Bachrach, all of Chicago, Ill., for petitioners. Messrs. William Beye, Kemper K. Knapp, and Francis M. Lowes, all of Chicago, Ill., for Lorimer & Gallagher Co. Messrs. Dan McGlynn, of East St. Louis, Ill., and John R. Cochran, of Chicago, Ill., for Robert R. Thomas, Trustee. Messrs. Edward C. Kramer, Rudolph J. Kramer, and Bruce A. Campbell, all of East St. Louis, Ill., and George B. Logan, of St. Louis, Mo., for Angerer for use of Abeles. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 760)

No. 329. COCA COLA COMPANY v. CITY OF ATLANTA;

No. 336. Thomas K. GLENN v. CITY OF ATLANTA; and

No. 340. EMPIRE COTTON OIL COMPANY v. CITY OF ATLANTA. Aug. 26, 1922. In error to the Supreme Court of the State of Georgia. For opinions below, see 152 Ga. 558, 110 S. E. 730, 23 A. L. R. 1339; 152 Ga. 575, 111 S. E. 189. See, also, 259 U. S. 581, 42 Sup. Ct. 585, 66 L. Ed. 1074. Messrs. L. Z. Rosser, Clifford L. Anderson, L. C. Hopkins, Harold Hirsch, W. D. Thomson, Jack J. Spalding, and Hughes Spalding, all of Atlanta, Ga., for plaintiffs in error. Messrs. George M. Napier and Jesse M. Wood, both of Atlanta, Ga., for defendant in error. Dismissed pursuant to the 28th Rule.

(260 U. S. 752)

No. 28. ROYAL BAKING POWDER COMPANY v. George W. EMERSON, Prosecuting Attorney, etc. Oct. 6, 1922. Appeal from the Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 270 Fed. 429. Messrs. Samuel W. Fordyce, Jr., and Bennett C. Clark, both of St. Louis, Mo., and Archibald Cox, of New York City, for appellant. Mr. James L. Hopkins, of St. Louis, Mo., for appellee. Dismissed with costs, on motion of counsel for appellant.

(260 U. S. 703)

No. 157, October Term, 1921. John S. KENDALL, Administrator, etc., et al. v. Paul A. EWERT. Nov. 27, 1922. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Motion by appellee to withdraw original papers, submitted November 22, 1922. See, also, 259 U. S. 129, 42 Sup. Ct. 442, 66 L. Ed. 858, 259 U. S. 139, 42 Sup. Ct. 444, 66 L. Ed. 862, 42 Sup. Ct. 587. Mr. Arthur S. Thompson, of Miami, Okl., for appellants. Messrs. William R. Andrews and Henry C. Lewis, both of Washington, D. C., and Paul A. Ewert, of Joplin, Mo., for appellee. Motion as to (1)

withdrawal of original paper of notice of dismissal of counsel, dated December 31, 1921, denied. Motion as to (2) original deed of July 5, 1918, from George Redeagle to Paul A. Ewert and as to (3) original deeds of November 19, November 21, and December 21, 1921, from the heirs of George Redeagle to Paul A. Ewert, granted, the copies of said deeds on file to remain with the Clerk.

(260 U. S. 705)

No. 18, Original. STATE OF OKLAHOMA v. STATE OF TEXAS. Dec. 11, 1922. See, also, 262 U. S. 724, 43 Sup. Ct. 704, 67 L. Ed. —. Order entered authorizing payments to counsel and to the receiver, and to charge the same as expenses of the receivership.

(260 U. S. 708)

No. 196. GORHAM MANUFACTURING COMPANY v. James A. WENDELL, Individually, etc., et al. Jan. 2, 1923. Appeal from the District Court of the United States for the Southern District of New York. See, also, 261 U. S. 1, 43 Sup. Ct. 313, 67 L. Ed. —, 274 Fed. 975. Messrs. George Carlton Comstock and Robert C. Beatty, both of New York City, for appellant. Mr. Claude T. Dawes, of Albany, N. Y., for appellees. Motion for substitution submitted December 11, 1922. Order: On consideration of the motion to substitute parties appellees, It is ordered that a rule to show cause why the case as to the Comptroller should not be dismissed, in view of Irwin v. Wright, 258 U. S. 219, 42 Sup. Ct. 293, 66 L. Ed. 573, and United States v. Butterworth, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. Ed. 873, shall issue.

(260 U. S. 710)

No. 260. Charles KELLER et al. v. POTOMAC ELECTRIC POWER COMPANY. Jan. 24, 1923. Appeal from the Court of Appeals of the District of Columbia. See, also, 276 Fed. 327, 51 App. D. C. 77, 261 U. S. 428, 43 Sup. Ct. 445, 67 L. Ed. —. Messrs. Conrad H. Syme, F. H. Stephens, and George P. Barse, all of Washington, D. C., for appellants. Messrs. S. R. Bowen, of Washington, D. C., John A. Garver, of New York City, and John S. Barbour, of Washington, D. C., for appellee. Argument commenced by Mr. Conrad H. Syme for appellants. Ordered: This case is passed for the purpose of having presented and argued to the Court three questions: First, whether Congress can vest in this Court under the restrictions upon its appellate jurisdiction under the Constitution the character of review of the proceedings of the Public Utilities Commission contemplated by the act creating it; and, second, whether an appeal can be taken to this Court until a final judgment has been pronounced in the District Court of Appeals; and, third, whether such judgment is final.

These questions will be set for argument on February 19 next, after the cases specially set for that day, and will be considered and decided by this Court before proceeding to hear the case on its merits in the event that the Court finds it has jurisdiction to do so.

(260 U. S. 501)

**CHARLES A. RAMSAY CO. v. ASSOCIATED
BILL POSTERS OF UNITED STATES
AND CANADA et al.****WM. H. RANKIN CO. v. SAME.**(Submitted Nov. 5, 1922. Decided Jan. 2,
1923.)

Nos. 100, 101.

**Monopolies ¶12(2)—Combination of bill post-
ers held a violation of Anti-Trust Act.**

The combination of the bill posters of the United States and Canada into an association which fixed the prices for the services of its members, each of whom posted in its own locality bills transmitted in interstate commerce, and which agreement was designed and was probably adequate materially to interfere with the free flow of commerce among the states and with Canada, by restricting the business of soliciting bill posting to licensed solicitors and interfering with the printing and distribution of bills which were not to be posted on the boards of its members, was a violation of the Sherman Anti-Trust Act (Comp. St. § 8820 et seq.).

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Separate actions by the Charles A. Ramsay Company and by the Wm. H. Rankin Company against the Associated Bill Posters of the United States and Canada and others. A judgment dismissing both complaints on demurrer was affirmed by the Circuit Court of Appeals (271 Fed. 140), and plaintiff in each action brings error. Reversed.

Messrs. John A. Hartpence and Thomas S. Haight, both of Jersey City, N. J., for plaintiffs in error.

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*Mr. Richard T. Greene, of New York City, for defendants in error.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

These are separate actions for treble damages under the Sherman Act (Comp. St. § 8820 et seq.). The plaintiffs are distinct corporations and demand different sums; otherwise their complaints are identical. Holding no cause of action was stated, the trial court dismissed both complaints upon demurrer, and the Circuit Court of Appeals affirmed this action. 271 Fed. 140. It will suffice to state the substance of the pertinent allegations.

Plaintiffs were solicitors of advertising for customers in many States. They prepared, designed, purchased and sold posters and caused them to be displayed by local operators in many cities and towns throughout the United States and Canada. They contracted with their customers and received pay for the entire service of preparing, designing, purchasing and posting the adver-

tisements and were engaged in interstate commerce.

Defendants are a New York corporation and its officers and directors, together with certain favored solicitors.

Advertising by posters has become common, and in most of the larger cities and towns throughout this country and Canada one or more local concerns follow the business of displaying them. Usually advertisers contract with a lithographer directly or through agents (solicitors), such as plaintiffs, for the manufacture or purchase of posters, and with the local billposter for displaying them. Often the lithographer does business in a different state from the advertiser and both operate in different states from those where most of the billboards are located. Some posters are prepared for the exclusive use of an advertiser and some ("stock" or "sample" ones) for general use. Nearly all are put out by six or eight lithographers.

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*In 1891 many billposters throughout the United States and Canada, theretofore in competition, entered into a combination and conspiracy to monopolize the business in their respective localities and to dominate and control all trade and commerce in posters within such limits. To that end they organized a voluntary association—afterwards incorporated—whose membership is now very large.

The following were among the means adopted for carrying out the purposes of the combination and conspiracy: (a) Membership has been restricted to one employing billposter in each town or city and members have been prohibited from competing with each other. (b) Funds have been furnished to members for buying out competitors. (c) Rules prevent members accepting certain work from an advertiser who has given business to a nonmember. (d) A schedule of prices has been fixed and members have been prohibited from accepting certain kinds of work from any one except solicitors (twelve in all) arbitrarily selected and licensed, who are forbidden to patronize a nonmember in any place where any member does business. (e) By threats of withdrawal of patronage, manufacturers have been prevented from furnishing posters to independent billposters or to advertisers desiring to do business with independents except upon prohibitive terms.

The association's membership has become large, its powers and influence great, while the number of independent billposters has greatly declined, and it is now practically impossible for an advertiser to utilize posters except by employing members of the association and upon terms arbitrarily fixed. Advertisers are not permitted to purchase "stock" posters, unless willing to have them

displayed upon boards of members, and independent billposters cannot purchase such matter at all.

Plaintiffs had developed a lucrative and profitable business when in July, 1911, the

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association canceled their *licenses and refused to renew the same. Now, as a result of the defendants' unlawful acts, they are disabled from competing in the markets and their business is restricted and unprofitable.

The court below held:

"The business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that, after the posters have arrived at destination, the posting of them by the bill posters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578."

We cannot accept this view. The alleged combination is nation-wide; members of the association are bound by agreement to pursue a certain course of business designed and probably adequate materially to interfere with the free flow of commerce among the states and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, is not applicable. There the holding was that the rules, regulations and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding noncompetitive prices. The allegations clearly show the result has been as designed, that the statute has been violated and plaintiff's business has suffered.

This court has heretofore laid down and adequately discussed the applicable principles. *Montague v. Lowry*, 193 U. S. 38, 45, 46, 24 Sup. Ct. 307, 48 L. Ed. 608; *Swift &*

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Co. v. United States, *196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518; *Loewe v. Lawlor*, 208 U. S. 274, 293, et seq., 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 438, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 609, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. See

also *United States v. Associated Bill Posters* (D. C.) 235 Fed. 540. The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade. The alleged actions of defendants are directly opposed to this beneficent purpose and are denounced by the statute.

We find no adequate support for the claim that plaintiffs were parties to the combination of which they now complain.

Reversed.

(260 U. S. 473)

GALVESTON WHARF CO. et al. v. CITY OF GALVESTON et al.

(Argued Dec. 7, 1922. Decided Jan. 2, 1923.)

No. 19.

1. Injunction ☞118(3)—Bill held not to show threat to do more than exercise power of eminent domain.

A bill for an injunction, alleging that a city owning property jointly with plaintiff would attempt to partition the property or condemn it, or both, if sufficiently alleging any threat and intent by the city, did not show that the city would go beyond an exercise of the right of eminent domain.

2. Eminent domain ☞171 — City's contract held not to prevent exercise of power.

A contract under which a city became the owner of stock in a wharf company and a joint owner of the wharf company's property in trust for the inhabitants of the city, and agreed that it should be inalienable except by a four-fifths vote of all qualified voters, did not prevent the exercise of the power of eminent domain by the city.

Appeal from the District Court of the United States for the Southern District of Texas.

Suit by the Galveston Wharf Company and others against the City of Galveston and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

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*Mr. J. W. Terry, of Galveston, Tex., for appellants.

Mr. Frank S. Anderson, of Galveston, Tex., for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an appeal from a decree of the District Court dismissing a bill in equity for want of jurisdiction, on the ground that the bill states no federal question. The ground appears by the decree and also by the certificate of the Judge. Act of March 3, 1911, c. 231 (the Judicial Code) § 238, 36 Stat. 1087, 1157, amended by Act of January 28, 1915, c. 22, § 2, 38 Stat. 803, 804 (Comp. St. § 1215).

The bill alleges a contract embodied by consent in a decree of April 1, 1869, that compromised a suit brought by the city against the present plaintiff, the Galveston Wharf Company, plaintiff in error, concerning flats in Galveston Bay. It is enough to state the general features of the arrangement. The title of the Wharf Company to certain lands was established, but it was provided that the City should become owner of one-third of the Wharf Company's stock, which was to be increased to that end, and of an undivided one-third of the Wharf Company's property, in trust for the present and future inhabitants of Galveston—all to be inalienable except by a four-fifths vote of all the qualified voters. This was confirmed by the Legislature in 1870. There was a later contract of March 9, 1905, not now material except that it again confirmed the decree of 1869, and has been performed up to the date of the bill.

But in May, 1920, the City, which is self-governing, amended its charter by giving

itself power to purchase, *condemn and operate the various means and instrumentalities of public service such as gas and electric lighting plants, dock and wharf railway terminals, docks, wharves, and other things named, including the property jointly owned by the Galveston Wharf Company and the City, for the purpose of owning and operating any such public service and distributing it, with provision as to the mode of exercising eminent domain. By another amendment details were arranged in case the City should acquire the joint property by purchase or condemnation and by still another the City was authorized to compel a partition of the same property when authorized by a majority of its qualified voters, and to that end to prosecute a suit. It is alleged that the purpose of a partition would be a sale of one-third of the property upon a majority vote of the citizens, whereas the contract required a vote of four-fifths; and that a condemnation equally would impair the obligation of contracts and would deprive the plaintiff of its property without due process of law, contrary to the Constitution of the United States. The plaintiff further shows large expenditures to improve the property at its own cost and points out other property that it says can be taken more fairly if the City wishes to start municipal wharves.

Without going into greater detail we will assume that the alleged contract was made and bound the City, and that its terms will be departed from if the City should exercise the new power. The bill alleges that the proper officers will declare the amendments adopted, and that unless restrained the City "will attempt to partition said property or condemn the same, or both," and prays for an injunction against attempting to enforce

the amendments in any manner so far as the above mentioned property is concerned. The case was heard upon the pleadings and documentary evidence but it is unnecessary to state them further since the decree went

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upon the ground *that the bill did not state a case within the jurisdiction of the Court.

[1, 2] We are of opinion that the decree was right. If the bill can be taken to allege sufficiently any threat and intent of the defendant it does not show that the City will go beyond an exercise of the right of eminent domain. The allegation is, will attempt to partition or condemn. If questions can be raised about the constitutionality of the ordinance authorizing partition, the City may confine itself to condemnation, and will, so far as appears. But there is nothing to prevent the exercise of eminent domain by the legislative power. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 38 Sup. Ct. 35, 62 L. Ed. 124. These cases not only dispose of the objection based upon the contract but also show the difference between an attempt to transfer property from one private person to another and the taking it for public administration by a public body. 166 U. S. 694, 17 Sup. Ct. 718, 41 L. Ed. 1165. There is no question about the principle and therefore there is no substantial federal question raised by the bill. This seems to us so plain that we have not thought it necessary to consider whether the suit was prematurely brought.

Decree affirmed.

(260 U. S. 565)

BALTIMORE & O. R. CO. v. UNITED STATES.

(Submitted Nov. 16, 1922. Decided Jan. 2, 1923.)

No. 99.

Internal revenue — § 38 — Request for ruling as to necessity of stamps held not claim for abatement of stamp tax.

A request to the Commissioner of Internal Revenue for an informal ruling as to whether stamps were required on conveyances made without consideration was not a claim for abatement or refund, within Act May 12, 1900, as amended by Act June 30, 1902 (Comp. St. § 6346), requiring claim for redemption of, or allowance for, stamps to be made within two years after purchase, and therefore a subsequent claim for refund, made more than two years after the purchase, was insufficient to sustain an action against the United States on a claim for the stamps affixed to such deeds, in view of Rev. St. § 3226 (Comp. St. § 5949), making an appeal to the Commissioner a pre-

requisite to suit for the recovery of any internal revenue tax.

Appeal from the Court of Claims.

Claim by the Baltimore & Ohio Railroad Company against the United States. Judgment for defendant on sustaining demurrer to the petition (56 Ct. Cl. 279), and claimant appeals. Affirmed.

Messrs. Geo. E. Hamilton and John F. McCarron, both of Washington, D. C., and R. Marsden Smith, of Baltimore, Md., for appellant.

Messrs. Solicitor General Beck, of Washington, D. C., and Alfred A. Wheat, of New York City, for the United States.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

The appellant brought an action in the Court of Claims against the United States to recover the sum of \$55,158.00, alleged to have been illegally exacted as stamp taxes upon 13 deeds of conveyance made and delivered to appellant by its subsidiary companies. The deeds were without valuable consideration, and were executed for the sole purpose of transferring legal title, to enable appellant to mortgage the property conveyed. On February 11, 1915, before the delivery of these deeds, appellant exhibited three of them to the Commissioner of Internal Revenue and asked for a ruling, thereby making what it alleges was a claim in abatement. The Commissioner held that the Stamp Tax Act (38 Stat. 745) applied, and the appellant, without protest, affixed to the thirteen deeds the requisite amount of stamps.

Four years later the Commissioner, in construing a similar act of 1918 (40 Stat. 1057), held that "where no valuable consideration passed stamps were not required on conveyances."

Appellant thereupon filed with the commissioner a claim for refund of the taxes paid, which was rejected, because barred by the statute of limitations.

Appellant now alleges that its claim for a refund constitutes an amendment of its original so-called claim in abatement. The Court of Claims sustained a demurrer to appellant's petition alleging the foregoing, upon the ground that the original request to the Commissioner for a ruling was not a claim either for abatement or refund, but that the claim for a refund was in effect first made in 1919, and, therefore, that the Commissioner's ruling was right.

The Act of May 12, 1900, c. 393, 31 Stat. 177, as amended by the Act of June 30, 1902, c. 1327, 32 Stat. 506 (Comp. St. § 6346), provides in part:

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"That the Commissioner of Internal Revenue, subject to regulations prescribed by the

Secretary of the Treasury, may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps, issued under authority of law, to denote the payment of any internal revenue tax, as may have been spoiled * * * or in any manner wrongfully collected: * * * Provided further, that no claim for the redemption of or allowance for stamps shall be allowed unless presented within two years after the purchase of said stamps from the government."

By section 3226, Revised Statutes (Comp. St. § 5949), no suit can be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally collected until appeal has been made to the Commissioner of Internal Revenue, as provided by law, and the decision of the Commissioner thereon has been had.

The preliminary request to the Commissioner for an informal ruling was in no sense a claim for abatement or refund. Appellant affixed the stamps to the deeds without protest and after that no effort was made to secure redemption of or allowance for the stamps until long after the two-year period had expired.

On the facts alleged in the petition the Court of Claims could not have done otherwise than sustain the demurrer. *Rock Island, Arkansas & Louisiana Railway Co. v. United States*, 254 U. S. 141, 41 Sup. Ct. 55, 65 L. Ed. 188.

The judgment of the Court of Claims is Affirmed.

(260 U. S. 516)

ROSENBERG BROS. & CO., Inc., v. CURTIS BROWN CO.

(Argued Nov. 16, 1922. Decided Jan. 2, 1923.)

No. 102.

1. Appeal and error  78(2)—**Order quashing summons for want of jurisdiction is a "final judgment."**

An order quashing the summons on the ground that the defendant corporation was not found within the state, though in form an order to quash, and not a dismissal of the suit, was a final judgment reviewable by the Supreme Court on writ of error, under Judicial Code, § 238 (Comp. St. § 1215).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. Corporations  668(15) — **Purchase of goods by officer within the state does not show corporation was present therein.**

The fact that an officer of a foreign corporation not authorized to do business within the state was in the state to purchase goods for resale by the corporation at its place of business in its home state does not establish that the corporation was present within the state, so as to enable the court to obtain ju-

risdiction over it by service of process on its president.

3. Corporations — 665(3)—Cause of action arising within state does not give jurisdiction over corporation not present therein.

The fact that the cause of action sued on arose within the state does not give the state court jurisdiction, where the corporation was not found within the state.

In Error to the District Court of the United States for the Western District of New York.

Action by Rosenberg Bros. & Co., Inc., against the Curtis Brown Company, begun in the state court and removed to the United States District Court. A motion to quash the summons was granted (285 Fed. 879,) and plaintiff brings error. Affirmed.

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*Messrs. G. H. Harris, of Rochester, N. Y., and Manton M. Wyvell, of Washington, D. C., for plaintiff in error.

Mr. J. H. Corn, of New York City, for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

[1] Rosenberg Bros. & Co., Inc., a New York corporation, brought this suit in the Supreme Court of that state against Curtis Brown Company, an Oklahoma corporation. The only service of process made was by delivery of a summons to defendant's president while he was temporarily in New York. Defendant appeared specially; moved to quash the summons on the ground that the corporation was not found within the state, and, after evidence was taken but before hearing on the motion, removed the case to the federal court for the Western District of New York. There the motion to quash was granted, upon the ground that the defendant was not amenable to the process of the state court at the time of the service of the summons. A writ of error was sued out under section 238 of the Judicial Code (Comp. St. § 1215), and the question of jurisdiction was duly certified. The order entered below, although in form an order to quash the summons, and not a dismissal of the suit, is a final judgment, and the case is properly here. *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113. Compare *The Pesaro*, 255 U. S. 216, 217, 41 Sup. Ct. 308, 65 L. Ed. 592.

[2] The sole question for decision is whether, at the time of the service of process, defendant was doing business within the state of New York in such manner and to such extent as to warrant the inference that it was present there. *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 265, 37 Sup. Ct. 280, 61 L. Ed. 710. The District Court found that it was not. That decision

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was clearly correct. The Curtis Brown Company is a small retail dealer in men's clothing and furnishings at Tulsa, Okl. It never applied, under the foreign corporation laws, for a license to do business in New York; nor did it at any time authorize suit to be brought against it there. It never had an established place of business in New York; nor did it, without having such established place, regularly carry on business there. It had no property in New York, and had no officer, agent, or stockholder resident there. Its only connection with New York appears to have been the purchase there from time to time of a large part of the merchandise to be sold at its store in Tulsa. The purchases were made, sometimes by correspondence, sometimes through visits to New York of one of its officers. Whether, at the time its president was served with process, he was in New York on business or for pleasure, whether he was then authorized to transact any business there, and to what extent he did transact business while there, are questions on which much evidence was introduced, and some of it is conflicting.

[3] But the issues so raised are not of legal significance. The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the state. Compare *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537. And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial. Compare *Chipman, Limited, v. Thomas B. Jeffery Co.*, 251 U. S. 373, 379, 40 Sup. Ct. 172, 64 L. Ed. 314.

Affirmed.

(260 U. S. 490)

OSAKA SHOSEN KAISHA et al. v. PACIFIC EXPORT LUMBER CO.

THE SAIGON MARU.

(Submitted Nov. 23, 1922. Decided Jan. 2, 1923.)

No. 129.

1. Maritime liens §16—General rules of maritime law cannot be changed by state statute.

The rights and liabilities of the parties depending on general rules of maritime law are not subject to material alteration by state enactments, such as Or. L. § 10281, declaring every vessel navigating the waters of the state subject to a lien for damages resulting from nonperformance of affreightment contracts.

2. Shipping §133—Lien does not attach for breach of affreightment contracts until cargo is received.

The lien against a vessel for damages resulting from a breach of an affreightment contract does not attach before the cargo is delivered to and received on board the vessel.

3. Maritime liens §26—Cannot be extended by construction or analogy.

The maritime lien, though adhering to a vessel, is a secret one, which may operate to the prejudice of general creditors and purchasers without notice, and is therefore stricti juris, and cannot be extended by construction, analogy, or inference.

4. Shipping §133—Receipt of part of cargo gives no lien by shipper on vessel for damages for refusal to receive the rest.

Since the lien on a vessel for damages caused by breach of an affreightment contract, and the lien of the vessel on the cargo for the freight are mutual and reciprocal, receipt of part of the cargo called for by the contract does not entitle the shipper to a lien on the vessel for damages caused by its refusal to receive the rest of the cargo called for by the contract.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Libel by the Pacific Export Lumber Company against Japanese steamer Saigon Maru, of which the Osaka Shosen Kaisha was claimant, to release which the claimant gave bond. A decree for libellant (The Saigon Maru, 267 Fed. 881) was affirmed by the Circuit Court of Appeals (272 Fed. 799), and the claimant and surety on the bond bring certiorari. Reversed.

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*Mr. Wm. H. Hayden, of Tacoma, Wash., Mr. Wm. H. Hayden, of Tacoma, Wash., for petitioners.

Mr. Erskine Wood, of Portland, Or., for respondent.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

March 19, 1917, through its agent at Ta-

coma, Wash., Osaka Shosen Kaisha, incorporated under the laws of Japan and owner of the Japanese steamer Saigon Maru, then at Singapore, chartered the whole of that vessel, including her deck, to respondent Lumber Company to carry a full cargo of lumber from the Columbia or Willamette river to Bombay. In May, 1917, the vessel began to load at Portland, Or. Having taken on a full under-deck cargo and 241,559 feet upon the deck, the captain refused to accept more. After insisting that the vessel was not loaded to capacity and ineffectively demanding that she receive an additional 508,441 feet, respondent libeled her, setting up the charter party and the captain's refusal, and claimed substantial damages. The owner gave bond; the vessel departed and safely delivered her cargo.

The Lumber Company maintains that it suffered material loss by the ship's refusal

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to accept a full load; that *she is liable therefor under the general admiralty law and also under the Oregon statute (Olson's Laws of Oregon, § 10281), which declares every vessel navigating the waters of the state shall be subject to a lien for the damages resulting from nonperformance of affreightment contracts.

Petitioner excepted to the libel upon the ground that the facts alleged showed no lien or right to proceed in rem. The trial court ruled otherwise and awarded damages upon the evidence. The Saigon Maru (D. C.) 267 Fed. 881. The Circuit Court of Appeals approved this action. 272 Fed. 799.

[1] Little need be written of the claim under the state statute. The rights and liabilities of the parties depend upon general rules of maritime law not subject to material alterations by state enactments. The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770; Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; Union Fish Co. v. Erickson, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261.

[2] Both courts below acted upon the view that while the ship is not liable in rem for breaches of an affreightment contract so long as it remains wholly executory, she becomes liable therefor whenever she partly executes it, as by taking on board some part of the cargo. In support of this view, it is said: Early decisions of our circuit and district courts held that under maritime law the ship is liable in rem for any breach of a contract of affreightment with owner or master. That The Freeman (1856) 18 How. 182, 188, 15 L. Ed. 341, and The Yankee Blade (1857) 19 How. 82, 89, 90, 91, 15 L. Ed. 554, modified this doctrine by denying such liability where the contract remains purely executory, but left it in full force where the vessel

has partly performed the agreement, as by accepting part of the indicated cargo. *The Hermitage*, 12 Fed. Cas. 27, No. 6,410; *The Williams*, 29 Fed. Cas. 1342, No. 17,710; *The Ira Chaffee* (C. C.) 2 Fed. 401; *The Director* (D. C.) 26 Fed. 708; *The Starlight* (C. C.) 42 Fed. 167; *The Oscoda* (D. C.) 66 Fed. 347; *The Helios* (D. C.) 108 Fed. 279; *The Oceano* (D. C.) 148 Fed. 131; *Wilson v. Peninsula Bark & Lumber Co.*, 188 Fed. 52, 110 C. C. A. 190, were cited.

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*We think the argument is unsound.

Prior to *The Freeman* and *The Yankee Blade*, this court had expressed no opinion on the subject; but, so far as the reports show, the lower courts had generally asserted liability of the ship for breaches of affreightment contracts. "It is grounded upon the authority of the master to contract for the employment of the vessel, and upon the general doctrine of the maritime law, that the vessel is bodily answerable for such contracts of the master made for her benefit." *The Flash*, 1 Abbott, 67, 70, Fed. Cas. No. 4,857; *The Rebecca*, 1 Ware, 188, Fed. Cas. No. 11,619; *The Ira Chaffee*, supra. Since 1857, some of the lower courts have said that the ship becomes liable for breaches of affreightment contracts with her owner or master whenever partly executed by her; but it is forcibly maintained that in none of the cases was the point directly involved. *The Hermitage*, *The Williams*, *The Ira Chaffee*, *The Director*, *The Starlight*, *The Oscoda*, *The Helios*, *The Oceano*, and *Wilson v. Peninsula Bark & Lumber Co.*, supra.

The Freeman and *The Yankee Blade* distinctly rejected the theory of the earlier opinions. They are inconsistent with the doctrine that partial performance may create a privilege or lien upon the vessel. And in so far as the lower courts express approval of this doctrine in their more recent opinions, they fail properly to interpret what has been said here.

While, perhaps, not essential to the decision, this court, through Mr. Justice Curtis, said in *The Freeman*:

"Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it."

In *The Yankee Blade*, Mr. Justice Grier, speaking for the court, declared:

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*"The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a 'jus in re,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding against per-

sonal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings in rem, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore 'stricti juris,' and cannot be extended by construction, analogy, or inference. 'Analogy,' says Pardessus (*Droit Civ.* vol. 3, 597), 'cannot afford a decisive argument, because privileges are of strict right. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another.' * * *

"Now, it is a doctrine not to be found in any treatise on maritime law that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance. This lien or privilege is founded on the rule of maritime law as stated by Cleirac (597): 'Le batel est obligée à la marchandise et la marchandise au batel.' The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter party), and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where

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there is a charter party, its 'covenants will define the duties imposed on the ship. Hence it is said (1 Valin, *Ordon. de Mar.* b. 3, tit. 1, art. 11) that 'the ship, with her tackle, the freight, and the cargo, are respectively bound (affectée) by the covenants of the charter party.' But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the nondelivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases. * * * 'And this court has decided, in the case of *The Schooner Freeman v. Buckingham*, 18 How. 188, 15 L. Ed. 341, that the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it.'"

In *Bulkley*, Claimant of the *Barque Edwin v. Naumkeag Steam Cotton Co.*, 24 How. 386, 393 (16 L. Ed. 599), the barque was libeled to recover damages for not delivering part of the cotton—707 bales—which the master had agreed to carry from Mobile to Boston. With most of the cargo on board the vessel was towed below the bar, there to

receive the remainder from lighters. A lighter carrying 100 bales sank, and the cotton was lost or damaged. The barque delivered 607 bales at Boston in good condition. The owner of the vessel claimed exemption for her upon the ground that she never received the 100 bales. This court said:

"In the present case the cargo was delivered

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"in pursuance of the contract, the goods in the custody of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it."

Later opinions approve the same general rule.

"The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed and so long settled, that it would be useless labor to restate it, or the principles which lie at its foundation. The case of the Schooner *Freeman v. Buckingham*, decided by this court, is decisive of this case." *The Lady Franklin*, 8 Wall. 325, 329 (19 L. Ed. 455).

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it." *The Keokuk*, 9 Wall. 517, 519 (19 L. Ed. 744).

[3, 4] The maritime privilege or lien, though adhering to the vessel, is a secret one which may operate to the prejudice of general creditors and purchasers without notice and is therefore *stricti juris* and cannot be extended by construction, analogy or inference. *The Yankee Blade*, *supra*. The contract of affreightment itself creates no lien, and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not

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attach until the cargo is on board or in the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the shipowner upon the cargo. See *The Thomas P. Sheldon* (D. C.) 113 Fed. 779, 782, 783.

The theory that partial acceptance of the designated cargo under a contract of affreightment creates a privilege or lien upon

the ship for damages resulting from failure to take all, is inconsistent with the opinions of this court and, we think, without support of adequate authority. In *The S. L. Watson*, 118 Fed. 945, 952, 55 C. C. A. 439, 446, the court well said:

"The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact. It is in harmony with this rule that no lien lies in behalf of a vessel against her cargo for dead freight, or against a vessel for supplies contracted for, but not actually put aboard. *The Kiersage*, 2 Curt. 421, Fed. Cas. No. 7,762; *Pars. Ship. & Adm.* (1869) 142, 143. It follows out the same principle that Mr. Justice Curtis states in *The Kiersage*, 2 Curt. 424, Fed. Cas. No. 7,762, that admiralty liens are *stricti juris*, and that they cannot be extended argumentatively, or by analogy or inference. He says: 'They must be given by the law itself, and the case must be found described in the law.'"

Reversed.

(260 U. S. 447)

WALKER v. GISH.

(Argued Nov. 28, 29, 1922. Decided Jan. 2, 1923.)

No. 135.

I. Courts $\S$ 388—Constitutional question held properly raised in District of Columbia courts, and reviewable in United States Supreme Court.

The constitutional validity of the building regulations of the District of Columbia, which by Act June 14, 1878, are given the effect of congressional legislation, was seasonably raised by request for charge at the trial in the Supreme Court of the District, and by proper assignment of error in the proceedings for review, so that the question can be reviewed by the United States Supreme Court under Judicial Code, $\S$ 250 (Comp. St. $\S$ 1227).

2. Customs and usages $\S$ 5—Custom has extended regulations of original federal city to newer portions of Washington.

The regulations issued by President Washington governing the sale of lots in the original federal city, and providing for the use of party walls by adjoining owners on the payment of a proportionate part of the cost, which were adopted as the building regulations of the District commissioners under the authority of Act June 14, 1878, which provided the regulations should have the force of law, and which have been adopted and followed by numerous lot owners outside the federal city, have become such a general custom as to raise an implied agreement that, where party walls were erected in the outlying district, the same

obligation to contribute to the cost of the wall arose as in the case of a wall in the federal city, if the adjoining owner used the wall.

3. Constitutional law —42—User of party wall, in action for share of cost, cannot complain regulations were unconstitutional as against those not using.

One who had used a party wall erected by an adjoining owner under the building regulations of the District of Columbia cannot resist an action to compel him to pay his proportion of the cost of such wall under those regulations on the ground that the regulations were unconstitutional, as unfairly discriminating against an adjoining owner who could not or did not use the party wall.

In Error to the Court of Appeals of the District of Columbia.

Action by Genevieve K. Gish against Ernest G. Walker to recover for the use of a party wall. A judgment for plaintiff was affirmed by the Court of Appeals of the District of Columbia (51 App. D. C. 4, 273 Fed. 366), and defendant brings error. Affirmed.

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*Mr. S. Herbert Giesy, of Washington, D. C., for plaintiff in error.

Mr. Chief Justice TAFT delivered the opinion of the Court.

[1] Genevieve K. Gish sued Ernest G. Walker in the Municipal Court of the District of Columbia for \$150 for the use of a party wall on premises 2327 Ashmead Place, Washington, in that part of the District of Columbia not included in the original federal city, and recovered \$144.63. Walker appealed the case to the Supreme Court of the District. That court on the first trial directed a verdict for Walker, the defendant, on the ground that he had not used the wall. On appeal, the Court of Appeals of the District (48 App. D. C. 42) reversed the judgment because the question whether the defendant used the wall was a disputable fact which should have been submitted to the jury. On the second trial, the court submitted the issue to the jury which found

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for the plaintiff, and fixed *the value of the use at \$85. The Court of Appeals (51 App. D. C. 4, 273 Fed. 366) affirmed the judgment, and the case comes here by writ of error on the issue of the constitutional validity of the building regulations of the District of Columbia, which by the Act of June 14, 1878, 20 Stat. 131, ch. 194, are given the effect of congressional legislation. It is urged that they deprive defendant of his property without due process of law, in violation of the Fifth Amendment. The question was seasonably raised by a request for a charge on the trial and by proper assignment of error in the proceedings for review. Judicial Code, § 250 (Comp. St. § 1227); *Smoot v. Heyl*, 227 U. S. 518, 522, 33 Sup. Ct. 336, 57 L. Ed. 621.

The history of the law of party walls in Washington is interesting. Its application is not free from difficulty in that part of the present Washington which was not included within the original federal city. The original proprietors of the land in the federal city conveyed it in trust to certain named persons to be laid out in such streets, squares and lots as the President of the United States should approve. Under the trust provisions, the lots to be sold or distributed were to be subject to such terms and conditions as might be thought reasonable by the President for regulating the materials and manner of the buildings and improvements. President Washington issued regulations, one of which is in force to-day. They provided that a person appointed to superintend buildings might enter on the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, that the foundations were to be laid equally upon each lot and to be of the breadth and thickness thought proper by the superintendent, that the first builder was to be reimbursed one-half of the cost of the wall, or as much thereof as the next builder might use, but that such use could not begin till he had paid the amount fixed by the superintendent. This has been held

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to be a condition *annexed to every house lot in the original Washington. *Miller v. Elliot*, 5 Cranch, C. C. 543, 17 Fed. Cas. 315, No. 9,568. It has been decided to be the only source of the right of a lot owner in Washington to put his party wall on his neighbor's land. *Fowler v. Saks*, 7 Mackey, 570, 579, 7 L. R. A. 649.

[2] By the Act of Congress of 1878, supra, the District Commissioners were authorized to establish building regulations which should have the force of law; but the regulation of General Washington was continued in force by them and applied not only to the federal city, but to the whole of Washington. The question then arose what was the effect of this regulation as applied to the outlying districts of the city which were not included in the lots of the federal city, and which were not affected by the grant upon condition by the original owners of that city. This question was fully considered in the case of *Fowler v. Koehler*, 43 App. D. C. 349, Ann. Cas. 1916E, 1161, which was a suit like the one at bar for the value of appropriated use of a party wall in the newer part of the city. The Court of Appeals of the District held that, because party walls had in thousands of instances been erected by one of the adjoining owners on the lot of the other in the belief of both that it was the exercise of a lawful right as in the original city, a custom had grown up. So general was this that the court felt justified when erection of a party wall by

one owner was without objection by the other, in implying an agreement which would rebut inference of a trespass. Thus there had developed a practical uniformity as to practice in respect of party walls and the law governing them between the lots in the federal city and those outside, except where, in the outlying district, the adjoining owner objected to the erection of the wall at the time of the construction and took measures to prevent it. The court in *Fowler v. Koehler* further held that where party walls were erected in the outside district under such implied agreements, the same obligation to

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*contribute to the cost of the wall arose in the outlying district as against the adjoining owners as in the federal city if they used the party wall, and that the relations between the parties were regulated by the District building regulations.

We think the reasoning of the court in *Fowler v. Koehler* sustains its conclusion, and that the conclusion helps to the solution of an unfortunately difficult matter of much importance. The status of party wall in the case at bar is thus established. There is no evidence of the circumstances under which the party wall was erected and we must presume that it was done by the predecessor in title of the plaintiff below with the consent of a grantor of the defendant below.

[3] Plaintiff in error says that even if this be true, the effect of the District regulations is equivalent to a statute and deprives him of his property without due process of law. The effect of sections 74 and 56 of those regulations is, shortly stated, this: One of the two adjoining owners may build a two-story house and a party wall 9 inches thick, occupying $4\frac{1}{2}$ inches of his neighbor's land. If, thereafter, his neighbor wishes to build a house of three stories, that neighbor is required to have his wall 13 inches thick. He can take down the existing party wall, but he can occupy only $4\frac{1}{2}$ inches of the other's lot, and must pay all the expenses of the change, including the damage done to the owner of the two-story house, so that his party wall will be $8\frac{1}{2}$ inches on his own land, while he uses but $4\frac{1}{2}$ inches of his neighbor's. Or he can build a 9-inch wall against the two-story wall, and widen his wall to 13 inches when it reaches the third story, resting on $4\frac{1}{2}$ inches of the original party wall on his own land. He thus is compelled to occupy with his wall 13 inches of his own lot, and let his neighbor have $4\frac{1}{2}$ inches of his land without corresponding advantage.

Counsel for plaintiff in error urges that

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the fundamental idea in the *institution of party walls is mutual benefit (*Smoot v. Heyl*, 227 U. S. 518, 523, 33 Sup. Ct. 336, 57 L. Ed. 621), which implies equality of ease-

ment of support and of occupation of land between the neighbors, and that to give to the builder of the first wall such great advantage over his neighbors as these regulations give him deprives his neighbor of property without due process of law.

The questions thus raised might justify discussion if the plaintiff in error were in a position to urge them, and had not used the original party wall of which he complains. His contention below was that he had not used the wall of his neighbor, that he had built a new wall at the side of the original party wall as high as the original wall and then had widened it to 13 inches so as to extend over the original wall without resting on it. The jury found against him on this issue. If he did use the original wall, then he must pay for the value of the use. *Fowler v. Saks*, 7 Mackey, 570, 581, 7 L. R. A. 649; *Fowler v. Koehler*, 43 App. D. C. 349, 360, Ann. Cas. 1916E, 1161. In using it, he waived the right to object to the regulations with which he complied without objection, until he was called upon to pay his share of that which he had taken and used.

The judgment is affirmed.

(260 U. S. 459)

**KANSAS CITY SOUTHERN RY. CO. v.
VAN ZANT.**

(Argued Dec. 4, 1922. Decided Jan. 2, 1923.)

No. 142.

1. Carriers $\S$ 307(2)—Hepburn Act governs conditions on the use of passes to employees permitted by it, so that right to limit liability is determined by federal laws.

The Hepburn Act, amending the Interstate Commerce Act, and prohibiting a common carrier subject to its provisions from issuing free passes, except to its employees and their families, takes charge, not only of the permission and use of such passes, but of the limitations and conditions on their use, so that the right to limit liability for a passenger traveling on such pass is to be determined by the federal laws, and not by the state statutes.

2. Carriers $\S$ 307(2)—Interstate pass can exempt carrier from liability.

An interstate pass, issued to a passenger who was permitted to receive it under the Hepburn Act, can provide that the carrier shall not be liable for injuries caused by any accident.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

Action by Elizabeth Van Zant against the Kansas City Southern Railway Company. A judgment for the plaintiff was affirmed by the Supreme Court of Missouri (232 S. W. 696), and defendant brings certiorari. Reversed and remanded.

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*Messrs. Samuel W. Moore, of New York City, and Cyrus Crane, of Kansas City, Mo., for petitioner.

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*Mr. Charles H. Montgomery, of Joplin, Mo., for respondent.

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*Mr. Justice McKENNA delivered the opinion of the Court.

The case presents the effect of a condition in a free pass issued by petitioner to respondent and used by her in transportation in interstate commerce—whether determined by the provisions of section 1 of the Hepburn Act (34 Stat. 584 [Comp. St. § 8563]) or by the laws of Kansas and Missouri.

There is practically no dispute about the facts. The pass was authoritatively and gratuitously issued and she sustained injuries in Missouri while using it in an interstate journey. This injury she alleged and prayed judgment against the railway company in the sum of \$25,000.

The railway company opposed the pass to the action. It contained the following condition:

"The person accepting and using it, thereby assumes all risk of accident and damage to person and baggage."

The company averred that it was an interstate carrier by rail and issued the pass under article 5 of the federal law, known as the Interstate Commerce Act (24 Stat. 379), and it was to be "interpreted and controlled in its effect and operation by decisions of the federal courts" construing the act.

To the defense respondent replied that at the time of receiving the pass she resided in Kansas, and that in accepting it "she did not and could not assume the risk of accident or damage to her person and baggage, caused by the negligence" of the company, and that the condition upon the pass expressing such effect was void under the provisions of article 3, c. 98, of the General Statutes of

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the State of Kansas of 1915, relating to railroads and other carriers, and that under the statutes and the common law of Kansas the condition was against public policy.

She further pleaded that under the laws of Missouri the condition was also against public policy and void, and that the action was not, and is not, brought "upon any federal statute or under any federal law, but upon the common-law liability in force in Missouri, and that the action was, and is, brought in the circuit court of Jasper county, Mo., under the laws of the state of Missouri," and that the company's liability to her was to be determined by the laws of that state.

The trial court took that view of the determining law, took and expressed the view that the condition upon the pass was void under the laws and public policy of both states, and ruled that the condition upon it constituted no defense to the action and excluded it from the case. Declarations of law recognizing the relevancy and controlling effect of the condition were refused.

The court thereupon found for respondent

(plaintiff) and fixed her damages at \$8,000—that amount having been stipulated as representing her injury. Judgment was entered for that amount, and was affirmed by the Supreme Court of the state.

The Supreme Court discussed at some length the Hepburn Act, the extent of its regulation, and what it permitted to state powers or excluded from them, and said, adopting the language of the railroad commissioner of the state:

"Our conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability, and that therefore these matters remain the subject of regulation by the several states."

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*The comment concedes the supremacy of federal control, and leaves only the inquiry: Has control been exerted in the Hepburn Act?

[1] The act was passed June 29, 1906, and was an amendment to the Interstate Commerce Act of 1887. It was, as the act it amended was, a regulation of carriers in interstate commerce, and it provided that no common carrier subject to its provisions "shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families. * * *" And a carrier violating the act is subject to a penalty, and any person not of those excepted, who uses the pass, is also subject to a penalty.

[2] The provision for passes, with its sanction in penalties, is a regulation of interstate commerce, to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use; or to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. *Northern Pacific Railway Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; *Boering v. Chesapeake Beach Railway Co.*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742.

Those cases were considered and applied as giving validity to the stipulations of passes is-

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sued under the act *in *Charleston & Western Carolina Railway Co. v. Thompson*, 234 U.

S. 576, 34 Sup. Ct. 964, 58 L. Ed. 1476, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right and its incident obligations, and be a means of exacting from the company indefinite damages. In this case the prayer was for \$25,000; the recovery was for \$8,000. Circumstances might have made it the larger sum; and this, it is the contention and decision, is the determination of state laws which could neither permit nor forbid the gift. We cannot assent. The pass proceeded from the federal act; it is controlled necessarily in its incidents and consequences by the federal act, to the exclusion of state laws and state policies, and such is the effect of the cited cases.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

(260 U. S. 469)

**ST. LOUIS MALLEABLE CASTING CO. v.
GEORGE C. PRENDERGAST
CONSTRUCTION CO.**

(Argued Dec. 7 and 8, 1922. Decided Jan. 2, 1923.)

No. 154.

1. Municipal corporations ⚖️488, 489(10)—
Property owner connecting with sewer is estopped from attacking tax bill for its construction.

An owner of property situated within a sewer district, who had applied for permission to connect his property with the sewer and had made such connection, is estopped thereafter to attack the validity of a tax bill issued to pay for the construction of the sewer.

2. Constitutional law ⚖️43(1)—Holding owner estopped to attack tax bill does not enforce unconstitutional law by estoppel.

A decision that a property owner was estopped by connecting his property with a sewer to attack the tax bill issued against his property for the construction of the sewer on the ground that it violated the Fourteenth Amendment to the United States Constitution is not the enforcement of a law as of validity by estoppel to particular persons, though it is invalid under the Constitution to all of the world besides.

3. Courts ⚖️399(1)—Effect of ruling plaintiff was estopped to attack tax bill not lessened by consideration of constitutional questions.

The effect of a ruling by the state Supreme Court that a property owner was estopped to attack a tax bill issued against his property on constitutional grounds was not lessened because the court ruled as well on the constitutional questions, so as to require the Supreme Court to review the ruling on the constitutional questions.

In Error to the Supreme Court of the State of Missouri.

Suit in equity by the St. Louis Malleable Casting Company against the George C. Prendergast Construction Company to have declared invalid and canceled a tax bill issued against the property of plaintiff for the construction of sewers. A decree of the trial court dismissing the suit was affirmed by the Supreme Court of Missouri (231 S. W. 989), and plaintiff brings error. Affirmed.

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*Mr. Lambert E. Walther, of St. Louis, Mo., for plaintiff in error.

Mr. Wm. K. Koerner, of St. Louis, Mo., for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Suit in equity to have declared invalid and canceled a tax bill issued against the property of plaintiff in error, herein designated as plaintiff, for the construction of sewers in Braden sewer district No. 2, city of St. Louis.

There is a charge of excess and resultant invalidity in the tax bill, because the taxing district (sewer district) does not contain tracts of land which it should contain and that are within its drainage area.

The Fourteenth Amendment is invoked against the tax: (1) In that the limits of the sewer district and the apportionment of the costs between the several lots or parcels of land and their respective owners, without a hearing being accorded, deny plaintiff due process of law. (2) In the exclusion from the district of tracts of land as above stated plaintiff is denied due process of law and the equal protection of the law.

There is an elaborate detail of the particulars upon which the charges are alleged to rest. The particulars include the charter of the city and the various ordinances passed in executing its purpose, the action of the board of aldermen, and the action of the board of public service in execution of the direction to contract for the construction of the sewers, and, when constructed, to cause

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the entire expense to be computed, to levy and assess such expense as a special tax in accordance with the requirements of the charter, and to issue a special tax bill against each parcel of ground liable.

And it is alleged that the defendant was awarded, under the requirement and directions of the ordinances, the contract, and received from the city special tax bills as authorized by the charter and ordinances, among which was one issued against the property of plaintiff for \$9,168.86 which, it is alleged, purports to confer upon the holder thereof a lien authorized by the charter of the city.

The trial court, after reciting that it found "in favor of the defendant on the issues

joined" and that the plaintiff "was not entitled to the relief prayed," adjudged and decreed that the suit be dismissed.

The Supreme Court (231 S. W. 989) affirmed the decree. The court reviewed at length the pleadings of plaintiff and said that it, the plaintiff, made "a very plausible case by the allegations of its petition, but it is not supported by either the evidence in the case or the finding of the trial court." The conclusion of the court, therefore, was that there was no arbitrary or discriminating exclusion of property from the district that was within the benefit of the sewer, and, further, that:

"Defendant's evidence tended to show: The sewer, for proportionate part of the cost of which appellant's ground was assessed, had been fully completed when this suit was brought, and appellant had *connected its said premises with this sewer and was in actual enjoyment of the benefits thereof.* [Italics ours.] The evidence fails to show any act of commission or omission on the part of the contractor. The appellant does not question the utility of the sewer. Yet, without offering to pay any part of its cost, appellant comes into a court of equity and asks that the entire assessment against its property be canceled."

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[1] *The conclusion, in effect, was that the fact of connecting its premises with the sewer estopped plaintiff from denying the validity of the tax bill, and the conclusion was supported by the citation of a number of cases, including *Wight v. Davidson*, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900.

The evidence leaves no doubt of the fact that plaintiff, during the construction of the district sewer, made application for a license to connect with it, and afterward did connect with it. The only reply that counsel makes is that the court meant nothing more by its conclusion and the cases cited "than the statement of an abstract legal principle" which was "in no way connected up with the evidence." It is further said that:

"Nowhere in the statement does the Supreme Court find any facts constituting an estoppel."

[2] The comment is not justified. Our quotations from the court's opinion established the contrary, and that the plaintiff did something more than stand by and make no protest; it availed of the benefits of the sewer. The state cases cited are, therefore, not in point. Nor is *O'Brien v. Wheelock*, 184 U. S. 450, 489, 22 Sup. Ct. 354, 46 L. Ed. 636, of relevant consideration. It is not attempted here, as there, to enforce a law as of validity by estoppel to particular persons, though invalid, under the Constitution of the state, to all of the world besides.

[3] Finally, it is said that, if the Supreme Court had intended to hold plaintiff estopped from raising the questions under the fed-

eral Constitution, the case would have been peremptorily disposed of without discussing or ruling against those questions. And "neither is it conceivable," it is further said, "that the petition for writ of error to this court would have been granted by the Chief Justice of the Supreme Court of Missouri if the case had been decided against plaintiff in error upon a question of local law." The propositions are not estimable in meaning, except there is concession in them that if the

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estoppel *was ruled it was adequate to justify the court's decree. It was ruled. The effect is not lessened because the court ruled as well on the constitutional questions. As we have seen, the court said that the "plausible case" made by plaintiff "by the allegations of its petition" was "not supported by either the evidence in the case or the finding of the trial court." Whether this conclusion received or needed aid from the force the court considered should be assigned to the establishment of the sewer district as furnishing an indisputable presumption of notice, is not absolutely clear. Nor is it clear whether the court considered that notice of the meeting of the board of public service and opportunity to be heard before the board satisfied the constitutional requirements urged by plaintiff.

However, we are not called upon to resolve the uncertainty, if any there be, in the grounds of the court's ruling upon the constitutional questions. It is enough for our action that the court considered plaintiff estopped to contest the validity of the sewer or the validity of the tax which was imposed by connecting its premises with the sewer. In that conclusion we concur.

Decree affirmed.

(260 U. S. 452)

BLAMBERG BROS. v. UNITED STATES.

(Argued Dec. 5, 1922. Decided Jan. 2, 1923.)

No. 165.

Admiralty  40—Cannot be libeled in personam, unless vessel is in United States port.

The provision of Suits in Admiralty Act March 9, 1920, § 1, limiting the prohibition of arrest and seizure of United States vessels to the United States or its possessions, must be read into the second section, which is in pari materia and provides that in cases where, if such vessel had been privately owned, a proceeding in admiralty could be maintained, a libel in personam may be brought against the United States, in view of section 7 of the act, relating to seizure of United States vessels in foreign ports, so that the District Court is without jurisdiction over a libel in personam against the United States, where the vessel of the United States on which the cargo was shipped was not within a port of the United States or one of her possessions.

Appeal from the District Court of the United States for the District of Maryland.

Libel in personam by Blamberg Bros. against the United States. From a judgment of the District Court, dismissing the libel for want of jurisdiction (272 Fed. 978), libellant appeals. Affirmed.

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*Messrs. D. Roger Englar and Harold V. Amberg, both of New York City, for appellant.

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*Mr. Solicitor General Beck, of Washington, D. C., for the United States.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is an appeal from the District Court of Maryland on a question of jurisdiction duly certified by the District Judge.

The appellant, a corporation of Maryland, February 26, 1921, filed a libel in personam against the United States under the suits in Admiralty Act, approved March 9, 1920 (41 Stat. 525). The libel alleged that on October 6, 1920, the libellant had shipped 1,500 bags of corn from Baltimore to Havana, Cuba, to its own order, upon the barge Catskill, that the corn had never been delivered in accordance with the terms of the bills of lading, and that due to the delay the corn had greatly deteriorated in value, whereby libellant had been damaged in the sum of \$15,000. The libel contained this averment:

"Third, That said barge Catskill is now, or will be, during the pendency of process hereunder, within this district and within the jurisdiction of this honorable court."

The United States made answer April 22, 1921, through the district attorney. It admitted that it was the qualified owner of the Catskill, but denied that it was, or had ever been, in charge of the operation of the barge. It alleged that it entered into a contract for the sale of the barge July 26, 1920, for \$60,000, \$6,000 in cash and the balance in monthly installments of \$3,000, that the vendee had defaulted in all the monthly pay-

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ments, that the barge was delivered to the vendee June 30, 1920, and the United States had no control over her management or operation, and did not make the contract of affreightment described in the libel. In answer to the third paragraph of the libel the respondent alleged that it was advised that the barge was in Havana and had no knowledge when it would arrive in the jurisdiction of the court. On May 3, 1921, having obtained leave of court, the United States as respondent filed a suggestion of want of jurisdiction in which it averred positively that the barge was then in the port of Havana, Cuba, where it had been libeled in the sum of \$3,725 for wage claims. It further averred that libels in personam had been filed against it in three other District Courts of the United States for claims aggregating a sum in

excess of the value of the barge, which was alleged not to exceed \$50,000. The suggestion concludes that the respondent cannot be proceeded against by a libel in personam, or by a libel in the nature of an in rem proceeding as provided for by the Suits in Admiralty Act, for the reason that at the time of filing the libel, and at all times thereafter the barge Catskill was and had been at the port of Havana, Cuba, and without the jurisdiction of the court. The libellant answering the suggestion alleged that, although under the facts as alleged, no direct personal liability arose against the respondent under the general law, yet under the Suits in Admiralty Act, a right to bring a libel in personam was created as a substitute for an ordinary libel in rem, and that the presence of the barge in the jurisdiction of the court was not essential to such jurisdiction in personam.

The first section of the Suits in Admiralty Act provides that no vessel or cargo owned by the United States—

"shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions."

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*The second section provides that in cases where, if such vessel were privately owned, a proceeding in admiralty could be maintained, a libel in personam may be brought against the United States, provided the vessel is employed as a merchant vessel or a tugboat. The suits are to be brought in the United States District Court where the libellants live or have their principal place of business in the United States, or in which the vessel or cargo charged with liability may be found. Provision is made for manner of service and upon application of either party for the transfer of such libels to any other district in the discretion of the court.

By the seventh section of the act, if any vessel or cargo of the United States is seized by process of a court of any country other than the United States, the Secretary of State of the United States in his discretion, upon request of the Attorney General, may direct the United States consul residing near the port of seizure to claim immunity from such suit and seizure or to execute a bond on behalf of the United States as the court may require for the release of the vessel or cargo.

The District Court on the facts stated held that it was without jurisdiction under this statute to entertain a libel in personam against the United States. We agree with that holding. The first section of the act is limited in its inhibition of seizures of vessels and cargoes of the United States to ports of the United States and its possessions. The second section is in pari materia, and the same limitation must be implied in its construction. This act was passed to avoid the

embarrassment to which the Government found itself subjected by the Act of September 7, 1916 (39 Stat. 728), by the ninth section of which (Comp. St. Ann. Supp. 1919, § 8146e) vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime

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liens. The *Lake Monroe*, 250 U. S. *246, 39 Sup. Ct. 460, 63 L. Ed. 962. It was intended to substitute this proceeding in personam, as the first section of the act expressly indicates, in lieu of the previous unlimited right of claimants to libel such vessels in rem in the ports of the United States and its possessions. Congress had no power, however, to enact immunity from seizure in respect of such vessels when in foreign ports, and therefore the embarrassment of seizures was to be mitigated in another way; i. e., by claiming immunity on international grounds and, if that failed, by stipulation or bond in the name of the United States. The provisions of the seventh section confirm the construction by which provisions of the second section are limited in their application to vessels within the jurisdiction of the United States.

A number of important questions as to the construction of this statute have arisen in other cases, and the argument before us has taken a wide range. Those questions do not require decision here, and we do not decide them. All we hold here is that the District Court was right in construing the second section of the Suits in Admiralty Act not to authorize a suit in personam against the United States as a substitute for a libel in rem when the United States vessel is not in a port of the United States or of one of her possessions.

Affirmed.

(260 U. S. 482)

UNITED STATES et al. v. CARVER et al.

(Argued Dec. 6, 1922. Decided Jan. 2, 1923.)

No. 402.

1. Maritime liens ⇨28—Materialman charged with knowledge of charter party which he could "ascertain" by inquiry.

Under Act June 23, 1910 (Comp. St. §§ 7783-7787), and Ship Mortgage Act, being section 30, subsecs. P-R, of Merchant Marine Act June 5, 1920, providing that nothing therein shall be construed to confer a lien, when the furnisher knows, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party the person ordering the repairs or other necessities was without authority to bind the vessel, the materialman cannot rely on presumptions until he is put on inquiry, but is called on to inquire, since to "ascertain" is to find out by investigation, and he is chargeable with notice of the

existence of the charter, and with its terms, if he could have ascertained either by reasonable investigation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ascertainment—Ascertainment.]

2. Maritime liens ⇨28—Charter held not to authorize master to contract lien.

A charter of a vessel, which provided that the charterer would not suffer or permit to be continued any lien, and would satisfy or discharge the vessel from such lien in any event within 15 days after it was imposed, did not authorize the master to bind the vessel for supplies furnished to it, since the primary undertaking was that the lien should not be imposed, and the provision for removal applied only if such lien were imposed in spite of the primary undertaking.

3. Courts ⇨400—Denial of writ of certiorari by Supreme Court imports no opinion on merits.

The denial by the Supreme Court of a writ of certiorari imports no opinion on the merits of the case.

On Certificate from United States Circuit Court of Appeals for the Second Circuit.

Libel in personam by Amos D. Carver and Joseph B. Morrell, copartners doing business under the name of Baker, Carver & Morrell against the United States, as owner of the steamships *Clio* and *Morganza*, and others. On questions certified by the Circuit Court of Appeals as to whether a maritime lien would have arisen against the vessels if they had been privately owned, whether the United States is liable for the lien, and whether it is liable for the supplies furnished regardless of the lien. Questions as to the existence of the lien answered in the negative.

The Attorney General and Mr. Norman B. Beecher, of New York City, for the United States.

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*Mr. E. Curtis Rouse, of New York City, for Carver and Morrell.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a libel in personam against the United States and the receiver of State Steamship Corporation, a company of the State of Delaware, bankrupt, to charge the United States for supplies furnished to the steamships *Clio* and *Morganza*. Act of March 9, 1920, c. 95, 41 Stat. 525. The United States owned the vessels, but they were in the possession of the corporation under charters by which the corporation was to pay all costs and expenses incident to the use and operation of the vessels, and "will not suffer nor permit to be continued any

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lien, incumbrance, or charge which might

have priority over the title and interest of the owner in said vessel." It was stipulated further that in any event within fifteen days the charterer would make adequate provision for the satisfaction or discharge of every claim that might have priority over the title, &c., or would cause such vessel to be discharged from such lien in any event within fifteen days after it was imposed. Supplies or necessities were furnished to the *Clio* upon the orders of the corporation's port captain who was charged with the duty of procuring them. The libellants did not know any facts tending to show that the corporation did not own the vessel, and so far as appears made no inquiry or effort to sustain what the facts might be. The case of the *Morganza* is similar except that before furnishing some of the supplies the libellants' agent who dealt with the corporation knew facts putting the libellants upon inquiry but preferred to avoid making it. The liability of the corporation is admitted. That of the vessels is asserted under the Act of June 23, 1910, c. 373, 36 St. 604 (Comp. St. §§ 7783-7787), and the Ship Mortgage Act, being section 30 of the Merchant Marine Act, 1920; Act of June 5, 1920, c. 250, § 30, subsections P, Q, and R, 41 Stat. 988, 1000, 1005.

The questions certified are whether a maritime lien would have arisen against (1) the *Clio* or (2) the *Morganza*, if they had been privately owned; (3) if yes, whether the United States is liable for the amount of what would have been the lien; and (4) whether the United States is liable for the personal indebtedness of the State Steamship Corporation for supplies in respect of which no maritime lien would have arisen if the vessel had been privately owned.

[1] We take up first questions 1 and 2. The Act of 1910 by which the transactions with the *Clio* were governed after enlarging the right to a maritime lien and providing who shall be presumed to have authority for

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the owner to *procure supplies for the vessel, qualifies the whole in section 3 (Comp. St. § 7785) as follows:

"But nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for the sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor."

We regard these words as too plain for argument. They do not allow the materialman to rest upon presumptions until he is put upon inquiry, they call upon him to inquire. To ascertain is to find out by investigation. If by investigation with reasonable diligence the material man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms. In this case it would seem that there would have been no difficulty in finding out both. The Ship Mortgage Act of 1920 repeats the words of the Act of 1910.

[2, 3] But it is said that the charter party if known would have shown that the master at least, if not the agent who ordered the supplies, had authority to impose a lien, since the charter party contemplated the possibility of one being created and provided for its removal. The *South Coast*, 251 U. S. 519, 40 Sup. Ct. 233, 64 L. Ed. 386, is cited as establishing the position. But there is a sufficient difference in the language employed there and here to bring about a different result. In *The South Coast* the contract went no farther than to agree to discharge liens within a month. Here the primary undertaking was that "the charterers will not suffer nor permit to be continued any lien," etc. We read this as meaning will not suffer any lien nor permit the same to be continued. Naturally there are provisions for the removal of the lien if in spite of the primary undertaking one is imposed or claimed. But

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the primary undertaking *is that a lien shall not be imposed. We are of opinion that the libellants got no lien upon the *Clio*, and a fortiori that the *Morganza* was free. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. Therefore it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer. The *Yankee*, sub nom. *Rivers & Harbors Imp. Co. v. Latta*, 243 U. S. 649, 37 Sup. Ct. 476, 61 L. Ed. 946; *The Oceana*, sub nom. *Morse Dry Dock & Repair Co. v. Conron Bros. Co.*, 245 U. S. 656, 38 Sup. Ct. 13, 62 L. Ed. 533.

As the libellants disclaim the contention that the United States is liable even if the vessels would not have been subject to a lien it is unnecessary to answer the fourth question. It is enough that the first and second are answered, No.

Answer to questions 1 and 2, No.

(260 U. S. 512)

GREENPORT BASIN & CONSTRUCTION
CO. v. UNITED STATES.

(Argued Nov. 17, 1922. Decided Jan. 2, 1923.)

No. 31.

I. Appeal and error —5—Action against United States to recover tax paid is reviewable by writ of error.

An action, under Judicial Code, § 24, par. 20 (Comp. St. § 991), begun in the United States District Court against the United States to recover a portion of the excess profits tax levied on and collected from plaintiff, is properly reviewable in the Supreme Court on writ of error.

2. Internal revenue —25—Exemption is not to be deducted before apportioning income into brackets for excess profits tax.

In assessing the excess profits tax imposed by Revenue Act Oct. 3, 1917, §§ 201, 203 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 6336%^b, 6336%^d), the exemption allowed thereby is not to be deducted from the net income, and only the balance remaining to be apportioned into the several brackets prescribed by that act, but the entire net income is to be first apportioned into the brackets, and then the exemption deducted from the first bracket, and from as many of the higher brackets successively as is necessary to cover the full exemption.

3. Statutes —224—Analogy to similar statute not considered, where language is clear.

Where the language of a revenue act is clear, there is no room for argument as to construction drawn from other revenue measures.

In Error to and Appeal from the District Court of the United States for the Eastern District of New York.

Action by the Greenport Basin & Construction Company against the United States to recover a portion of the excess profits tax imposed upon it for the year 1917. Judgment for defendant, after demurrer to the petition was sustained (269 Fed. 58), and plaintiff brings error and appeals. Affirmed.

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*Messrs. M. Hampton Todd, of Philadelphia, Pa., and Percy L. Housel, of Riverhead, L. I., N. Y., for appellant.

Mr. Assistant Attorney General Ottinger, for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

[1] The Greenport Company had, in 1917, an invested capital of \$215,615.55. Its net income was \$76,361.20 in the taxable year ending October 31, 1917. Its pre-war annual net income, calculated on a 7 per cent. basis, was \$15,093.08, and the fixed statutory deduction \$3,000. The company was thus subject (for five-sixths of the year) to the excess profits tax imposed by the Revenue Act of October 3, 1917, c. 63, §§ 201, 203, 40 Stat.

300, 303, 304, being Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 6336%^b, 6336%^d).¹ The government, following Treasury Regulation No. 41, articles 16, 17, and form 1103, assessed the tax at \$16,837.76. The company insisted that the correct amount was \$12,417.36; paid the tax as assessed, under protest; and brought this suit for the difference,

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\$4,420.40, in the *federal court for the Eastern District of New York, under the Tucker Act (Judicial Code, § 24, par. 20 [Comp. St. § 991]). That court sustained a demurrer to the petition and entered judgment for defendant. 269 Fed. 58. The case is brought here by both writ of error and appeal. It is properly here on writ of error, *Chase v. United States*, 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 234; *J. Homer Fritch, Inc., v. United States*, 248 U. S. 458, 39 Sup. Ct. 158, 63 L. Ed. 359. The sole question presented for decision is whether the method of calculating the taxes adopted by the Treasury is in harmony with the provisions of the Revenue Act.

[2] The rate of exaction imposed by the excess profits tax grows, in stages, with the increase in the percentage earned on the capital. In the first stage—net income up to 15 per cent. on capital—the rate of exaction is four-twentieths. In the second stage—net income from 15 to 20 per cent.—the rate is five-twentieths. In the third stage—net income from 20 to 25 per cent.—the rate is seven-twentieths. In the fourth stage—net income from 25 to 33 per cent.—the rate is nine-twentieths. In the last stage—net in-

¹ Section 201: "That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax * * * equal to the following percentages of the net income:

"Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

"Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

"Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

"Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

"Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital."

Section 203: "That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided:

"(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) \$3,000."

come over 33 per cent.—the rate is twelve-two methods of calculation are shown in the twentieths. What the net income is to which the respective rates of exaction apply is the question for decision. The company con-

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tends, in effect, that net income as used concerning each stage, means not the whole net income—but the balance remaining after deducting from the net income the allowance for pre-war profits and the fixed deduction. Under this contention the base to which the exactions should be applied would be, not \$76,261.20, but that sum less \$18,093.08, or \$58,268.12. The government insists that the exaction should be applied to the whole net income, except that from the net income prescribed for the first stage the allowances specifically provided for are to be deducted.² The differences in detail resulting from the

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[3] *The method of calculation adopted by the Treasury follows the clear language of the act; and its correctness is confirmed by the statement, and the illustrative tables, presented by the chairman of the Ways and Means Committee in submitting the Conference Report on the bill. Cong. Record, 65th Congress, 1st Session, part 7, pp. 7580-7593. As the language of the act is clear, there is no room for the argument of plaintiff drawn from other revenue measures. Nor is there anything in *La Belle Iron Works v. United States*, 256 U. S. 377, 383-388, 41 Sup. Ct. 528, 65 L. Ed. 993, which lends support to plaintiff's contention.
Affirmed.

² Treasury Regulation No. 41, article 17, provided that if the deduction exceeded 15 per cent. of the invested capital the amount in excess should be applied to the next succeeding tax bracket and so on until the deduction should be absorbed. Compare section 301(d), Act of February 24, 1919, c. 6, 40 Stat. 1057, 1089 (Comp. St. Ann. Supp. 1919, § 6336¹/_{18aa}).

* Methods of Computation.

I. GOVERNMENT'S METHOD.

First, apportion the net income into the tax brackets:

Percentages of Invested Capital.	Amount.
(1) 0 to 15%.....	\$32,342.33
(2) 15% to 20%.....	10,780.77
(3) 20% to 25%.....	10,780.77
(4) 25% to 33%.....	17,249.24
(5) Above 33%	5,208.09

Total net income..... \$76,361.20

Second, apply the deduction to the first tax bracket:

(1) \$32,342.33 minus \$18,093.08 leaves \$14,249.25.

Third, compute the tax:

(1) \$14,249.25 at 20%.....	\$ 2,849.85
(2) \$10,780.77 at 25%.....	2,695.19
(3) \$10,780.77 at 35%.....	3,773.27
(4) \$17,249.24 at 45%.....	7,762.15
(5) \$ 5,208.09 at 60%.....	3,124.85

\$58,268.12 Total tax \$20,205.31
Pro rate (%)..... \$16,837.76

II. PLAINTIFF'S METHOD.

First, apply the deduction:

\$76,361.20 minus \$18,093.08 leaves \$58,268.12 as taxable income.

Second, apportion the taxable income into the tax brackets:

Percentages of Invested Capital.	Amount.
(1) 0 to 15%.....	\$32,342.33
(2) 15% to 20%.....	10,780.77
(3) 20% to 25%.....	10,780.77
(4) 25% to 33%.....	4,364.25
(5) Above 33%	none

Total taxable income....., \$58,268.12

Third, compute the tax:

(1) \$32,342.33 at 20%.....	\$ 6,468.47
(2) \$10,780.77 at 25%.....	2,695.19
(3) \$10,780.77 at 35%.....	3,773.27
(4) \$ 4,364.25 at 45%.....	1,963.91
(5) none at 60%.....	none

\$58,268.12 Total tax \$14,900.84
Pro rate (%) \$12,417.36

(260 U. S. 438)

HEITLER v. UNITED STATES. PERLMAN v. SAME. GREENBERG v. SAME. McCANN v. SAME. QUINN v. SAME.

(Submitted Dec. 11, 1922. Decided Jan. 2, 1923.)

Nos. 185-189.

1. Courts $\hookrightarrow$ 527½, New, vol. 17A Key-No. Series—Provision for transfer of causes to proper court should be liberally construed.

Act Sept. 14, 1922, providing that, if an appeal or writ of error has been taken to, or issued out of, the Supreme Court, in a case where it should have been taken to, or issued out of, the Circuit Court of Appeals, it shall not be dismissed, but shall be transferred to the proper court, is a remedial statute, which should be construed liberally, and the fact that it gives litigants an opportunity at times to prolong the litigation unduly is no reason for denying the remedy, when the case comes clearly within the language of the statute.

2. Courts $\hookrightarrow$ 527½, New, vol. 17A Key-No. Series—Writs of error to Supreme Court on unsubstantial constitutional question transferred to Circuit Court of Appeals.

Where writs of error to review convictions under the National Prohibition Act were issued out of the Supreme Court, on the assumption the attack on the constitutionality of those acts presented a substantial question, and numerous errors were assigned besides those based on constitutional questions, the writs will not be dismissed because the constitutional questions are not substantial since a prior decision sustaining the validity of that act, but will be transferred to the Circuit Court of Appeals for review of the other assignments of error, under Act Sept. 14, 1922.

In Error to the District Court of the United States for the Northern District of Illinois.

Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann, and George F. Quinn were separately convicted of violating the National Prohibition Act (274 Fed. 401), and they bring error. Cases transferred to the Circuit Court of Appeals.

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*Messrs. Walter Howe, of Washington, D. C., and Weymouth Kirkland, of Chicago, Ill., for plaintiffs in error.

Mr. Solicitor General Beck, of Washington, D. C., for the United States.

Mr. Chief Justice TAFT delivered the opinion of the Court.

These were writs of error issued directly to the District Court under section 238 of the Judicial Code (Comp. St. § 1215) to review sentences of fine and imprisonment on the ground that they were cases in which the constitutionality of the National Prohibition Act, under which the convictions were had, was drawn in question. In addition to the constitutionality of the Prohibition Act

(41 Stat. 305), the assignments of error raised many questions as to the admissions of evidence and the charge of the court. We held that, in view of our previous decision affirming the validity of the National Prohibition Act (National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946), the plaintiffs in error were precluded from raising the question again and basing thereon a claim of jurisdiction for a writ of error under section 238, that the question made was therefore not substantial, but frivolous, and that the writ should be dismissed for want of jurisdiction on the authority of *Sugarman v. United States*, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550, and cases cited. *Heitler et al. v. The United States*, Per Curiam, 260 U. S. 703, 43 Sup. Ct. 163, 67 L. Ed. —, decided November 27, 1922. This conclusion made it impossible for us to consider the other errors assigned.

The plaintiffs in error now invite our attention to an act of Congress approved September 14, 1922, which provides that—

"If an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a Circuit Court of Appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination

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thereof, with the same force *and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

[1] This is a remedial statute, and should be construed liberally to carry out the evident purpose of Congress. The fact that the opportunity therein given to litigants in the Circuit Courts of Appeals, where they have mistakenly sought a review in this court, may at times be abused, and unduly prolong the litigation, and delay the successful party below, is no reason why when the case comes clearly within the language of the statute the transfer should not be made. The successful party below may avoid undue delay by a prompt motion to dismiss in this court in such cases.

[2] The cases before us are clearly within the remedy of the statute. Based on the assumption of the presence of a real constitutional question in the case, plaintiffs in error sought review here, not only of that question, but of the numerous other errors assigned in the record. *Williamson v. United States*, 207 U. S. 425, 432, 434, 28 Sup. Ct. 163, 52 L. Ed. 278; *Goldman v. United States*, 245 U. S. 474, 476, 38 Sup. Ct. 166, 62 L. Ed. 410. We find that there is no constitutional question of sufficient substance to give us jurisdiction to consider these other errors. In other words, we find that, to have

such alleged errors considered and reviewed, the writ of error herein should have issued out of the Circuit Court of Appeals of the proper circuit. Accordingly we hold that these several cases should be transferred to the Circuit Court of Appeals of the Seventh Circuit at the costs of the respective plaintiffs in error, that that court be thereupon possessed of the jurisdiction of the same and proceed to the determination of said writs of error as if such writs had issued out of such court.

And it is so ordered.

(260 U. S. 532)

STOCKLEY et al. v. UNITED STATES.

(Argued Nov. 20, 1922. Decided Jan. 2, 1923.)

No. 74.

1. Public lands ⚡98—After issuance of receiver's receipt, issuance of register's certificate not required before limitations begin to run.

Act March 3, 1891, § 7 (Comp. St. § 5113), providing that, after the lapse of two years from the issuance of the receiver's receipt on the final entry, when there shall be no pending contest or protest against such entry, a final entryman shall be entitled to a patent, does not require the issuance of a register's certificate approving the final proof before the period of limitation stated therein begins to run, since it must be assumed Congress was familiar with the operations and practice of the Land Department and knew the difference between a receiver's receipt and a register's certificate.

2. Public lands ⚡98—Change in department's practice does not change effect of statute of limitations, after receiver's receipt is issued.

The fact that after the enactment of the statute (Act March 3, 1891, § 7 [Comp. St. § 5113]) entitling an entryman to patent two years after the receiver's receipt is issued, the prior practice of the Land Department not to issue the receiver's receipt until the register's certificate accepting the final proof was also issued, was changed so as to permit the issuance of the receiver's receipt when final proof was made, without waiting for its approval, cannot have the effect of changing the plain limitation prescribed by that statute, so as to require the issuance of the register's certificate also before the period starts to run.

3. Public lands ⚡98—Receiver's receipt for final payment is "receipt upon the final entry."

A receiver's receipt, issued to a homestead claimant at the time the claimant made final proof showing compliance with all the requirements to entitle him to a patent under the homestead laws and paid all fees and commissions lawfully due, was a "receipt upon the final entry" under the homestead laws, within Act March 3, 1891, § 7 (Comp. St. § 5113), entitling the claimant to patent two years

after the issuance of such receipt, if no contest or protest is then pending.

4. Public lands ⚡98—Receipt issued in excess of receiver's authority starts running of limitations.

Even if a receiver of the land office had no authority under the instructions of the land department to issue receiver's receipt to a homestead entryman at the time he did, the issuance of such receipt starts the running of the two-year period of limitation prescribed by Act March 3, 1891, § 7 (Comp. St. § 5113).

5. Public lands ⚡98—Limitation of two years after issuance of receipt forecloses inquiry into mineral character of land.

The expiration of the two-year period of limitations after the issuance of the receiver's receipt upon final entry which, under Act March 3, 1891, § 7 (Comp. St. § 5113), entitles the entryman to a patent if no contest or protest is then pending, precludes a subsequent inquiry as to whether the entryman knew or should have known that the land was chiefly valuable for its minerals at the time he made his entry and final proof.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Suit in equity by the United States against Thomas J. Stockley and others to have plaintiff adjudged to be the owner of a tract of land, to enjoin all interference therewith, and to require defendants to account for the value of oil and gas abstracted by them therefrom. Decree for plaintiff was affirmed by the Circuit Court of Appeals (271 Fed. 632), and defendants appeal. Reversed, and cause remanded to the District Court, with directions to dismiss the bill of complaint.

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*Mr. S. L. Herold, of Shreveport, La., for appellants.

Mr. Assistant Attorney General Riter, for the United States.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is a suit in equity brought by the United States, as plaintiff, against the appellants, as defendants, by which a decree was sought adjudging the plaintiff to be the owner of a tract of land in the parish of Caddo, La., enjoining all interference therewith, and requiring the defendants to account for the value of oil and gas extracted by them therefrom.

The United States District Court for the Western District of Louisiana, upon the report of a master, found for the plaintiff and entered a decree in accordance with the prayer of the bill ordering a restoration of possession and awarding damages against some of the defendants, including Stockley, for about \$62,000.

The case comes to this court by appeal from the decree of the Circuit Court of Ap-

peals affirming the decree of the District Court. 271 Fed. 632.

The defendants denied plaintiff's title and alleged that the land was the property of the defendant Stockley by virtue of his compliance with the homestead laws of the United States.

The conceded facts are that in 1897 Stockley took possession of the land and on November 13, 1905, made a preliminary entry thereof as a homestead. He complied with the provisions of the homestead laws, submitted final proof, including the required non-mineral affidavit, paid the commissions and fees then due, and on January 16, 1909, obtained the receiver's receipt therefor. Prior to that time, viz. on December 15, 1908, a large body of public lands, embracing within its boundaries the land in question, was withdrawn by an order of the President of the United States from all forms of appropriation. The withdrawal order was expressly made "subject to existing valid claims." The receiver's receipt, omitting unnecessary matter, is in the following words:

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"Received of Thomas J. Stockley * * * the sum of three dollars and one cent in connection with Hd. Final, Serial 0188 for [lands described] 71.25 acres. * * *"

On March 17, 1910, Stockley leased the property in question to the defendant the Gulf Refining Company, which company subsequently drilled wells and developed oil. The rights of the other defendants are wholly dependent upon the title asserted on behalf of Stockley.

On July 16, 1910, after the report of a special agent confirming Stockley's claim of residence upon and cultivation and improvement of the lands, the Commissioner of the General Land Office ordered the case "clear-listed and closed as to the Field Service Division." Subsequently, and more than three years after the issuance of the receiver's receipt, viz. on February 27, 1912, a contest was ordered by the Commissioner of the General Land Office before the local register and receiver upon the charge that the land was mineral in character, being chiefly valuable for oil and gas, and that when Stockley made his final proof he knew or, as an ordinarily prudent man, should have known this fact. After a hearing, the register and receiver decided in favor of Stockley, but the Commissioner of the General Land Office reversed the decision and ordered the entry canceled. The Secretary of the Interior affirmed the Commissioner, with a modification allowing Stockley to obtain a patent for the surface only, under the provisions of the Act of July 17, 1914, c. 142, 38 Stat. 509 (Comp. St. §§ 4640a-4640c).

The defendants contended that the Commissioner of the General Land Office and the Secretary of the Interior were without authority to entertain this contest because

prior thereto full equitable title had vested in Stockley and he had become entitled to a patent by virtue of the provisions of section 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099 (Comp. St. § 5113). That section, so far as necessary to be stated, provides:

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"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber culture, desert land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

The court below rejected defendants' contention, holding that the receipt issued to Stockley was not a "receiver's receipt upon the final entry" for the reason that, in the view of that court, a final entry could not become effective until the issuance of the certificate of the register. In other words, it was the opinion of the lower court that in order to constitute a final entry within the meaning of the statute above quoted, there must be an adjudication upon the proofs and the issuance of a final certificate, evidencing an approval thereof.

[1] We think the language of the statute does not justify this conclusion. It must be assumed that Congress was familiar with the operations and practice of the Land Department and knew the difference between a receiver's receipt and a register's certificate. These papers serve different purposes. One, as its name imports, acknowledges the receipt of the money paid. The other certifies to the payment and declares that the claimant on presentation of the certificate to the Commissioner of the General Land Office shall be entitled to a patent.

The evidence shows that prior to the passage of the statute, and thereafter until 1908, the practice was to issue receipt and certificate simultaneously upon the submission and acceptance of the final proof and payment of the fees and commissions. In 1908 this practice was changed, so that the

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receipt was issued upon the submission of the final proof and making of payment, while the certificate was issued upon approval of the proof and this might be at any time after the issuance of the receipt. The receiver and register act independently, the former alone being authorized to issue the receipt and the latter to sign the certificate. The receipt issued to Stockley was after submission of his proof and payment of all that he was required to pay under the law. No certificate was ever issued by the register.

[2] It is contended by the government that the receiver's receipt named in the statute should be restricted to a receipt issued simultaneously with the register's certificate

after approval of final proofs, and that, after the change of 1908 in the practice of the department, a receipt issued before such approval does not come within the meaning of the statute. Such a receipt, it is contended, obtains no validity as a "receiver's receipt upon the final entry" until after the proof has in fact been examined and approved.

[3] We cannot accept this conception of the law. A change in the practice of the Land Department manifestly could not have the effect of altering the meaning of an act of Congress. What the act meant upon its passage, it continued to mean thereafter. The plain provision is that the period of limitation shall begin to run from the date of the "issuance of the receiver's receipt upon the final entry." There is no ambiguity in this language and, therefore, no room for construction. There is nothing to construe. The sole inquiry is whether the receipt issued to Stockley falls within the words of the statute. In *Chotard v. Pope*, 12 Wheat. 586, 588 (6 L. Ed. 737), this court defined the term entry as meaning:

"That act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the epithet of an

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entrytaker, and corresponding *very much in his functions with the registers of land offices, under the acts of the United States."

It was in this sense that the term "final entry" was used in this statute. Having submitted to the proper officials proof showing full compliance with the law, and having paid all the fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him. No subsequent receipt was contemplated or required. From the date of the receipt the entry may be held open for the period of two years, during which time its validity may be contested. Thereafter the entryman is entitled to a patent and the express command of the statute is that "the same shall be issued to him." *Lane v. Hoglund*, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. Ed. 1066; *Payne v. United States ex rel. Newton*, 255 U. S. 438, 41 Sup. Ct. 368, 65 L. Ed. 720.

That Stockley's acts constituted final entry is borne out by rulings of the Land Department. Thus in *Gilbert v. Spearing*, 4 Land Dec. 463, 466, Secretary Lamar said:

"When the homestead application, affidavit and legal fees are properly placed in the hands of the local land officers, and the land applied for is properly subject to entry, from that moment the right of entry is complete and in contemplation of law the land is entered."

See, also, *Iddings v. Burns*, 8 Land Dec. 224, 226.

We are not at liberty to add to or take from the language of the statute. When Congress has plainly described the instrument from whose date the statute begins to run as the "receipt upon the final entry," there is no warrant for construing it to mean only a receipt issued simultaneously with the certificate or one issued after the adjudication on the final proof, which might be—and in this instance was—postponed indefinitely. It was to avoid just such delays for an unreasonable length of time—that is, for more than two years—that the statute was enacted. *Lane v. Hoglund*, supra, and *Land Department*

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decisions cited. The purpose and effect of the statute are clearly and accurately stated by the Commissioner of the General Land Office in Instructions of June 4, 1914, 43 Land Dec. 322, 323, in the course of which it is said:

"There is no doubt that Congress chose the date of the receiver's receipt rather than of the certificate of the register as controlling, for the reason that payment by the claimant marks the end of compliance by him with the requirements of law. It would be manifestly unjust to make the right to a patent dependent upon the administrative action of the register, subjecting it to such delays as are incident to the conduct of public business and over which the claimant has no control. Payment, of which the receiver's receipt is but evidence, is, therefore, the material circumstance that starts the running of the statute, inasmuch as a claimant is and always has been entitled to a receipt when payment is made."

[4] It is urged, however, that in any event the receiver exceeded his authority in issuing the receipt, since the Commissioner of the General Land Office, on December 15, 1908, had instructed the register and receiver, among other things, as follows:

"Applications, selections, entries, and proofs based upon selections, settlements, or rights initiated prior to the date of withdrawal may be received by you and allowed to proceed under the rules up to and including the submission of final proofs. You must not, however, in such cases receive the purchase money or issue final certificate of entry, but must suspend the entries and proofs pending investigation as to the validity of the claims with regard to the character of the land and compliance with the law in other respects."

These instructions were issued, as shown upon their face, in view of the presidential withdrawal order of the same date. We suggest, without deciding, that, inasmuch as the withdrawal order was expressly made

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subject to *existing valid claims, and Stockley's claim was obviously existing and valid, this instruction of the Commissioner was itself without authority, since, as applied to Stockley, it was in conflict with the withdrawal order. This has nothing to do with the question as to whether the lands were, in fact, mineral in character, which is another and different matter dealt with later.

However, Stockley, as already shown, did, in act, make final entry and the receiver did, in fact, issue and deliver his receipt thereon. The case, therefore, falls within the terms of the statute and must be governed by it, unless the receipt be held for naught on the ground that it was issued contrary to the Commissioner's instructions. But the very object of the statute was to preclude inquiry upon that or any other matter, except as provided by the statute, after the expiration of two years from the date of the receiver's receipt. In *United States v. Winona & St. Peter Railroad Co.*, 165 U. S. 463, 476, 17 Sup. Ct. 368, 371 (41 L. Ed. 789) this court had under consideration section 8 of the same act (26 Stat. 1099 [Comp. St. § 5114]), limiting the time within which suits by the United States might be brought to annul patents. That section, it was said, recognizes:

"That when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the government, such conveyances should, after the lapse of a prescribed time, be conclusive against the government, and this notwithstanding any errors, irregularities or improper action of its officers therein."

It was said further:

"Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the Land Department."

In *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 450, 28 Sup. Ct. 579, 580 (52 L. Ed. 881), this section of the act was again under *543 consideration. A patent was attacked as void for the alleged reason that the land which it purported to convey had been reserved for public purposes, and upon that ground the application of the statute was denied, but this court said:

"It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use."

To hold that the receipt here under consideration falls outside the terms of the statute would be to defeat the purpose of the statute and perpetuate the mischief which it sought to destroy. Prior to the decision in the case of *Jacob A. Harris*, 42 Land Dec.

611, 614 (quoted with approval in *Lane v. Hoglund*, supra), it had been held that the statute did not affect the conduct or action of the Land Department in taking up and disposing of final proof of entrymen after the lapse of the two-year period (*Mertie C. Traganza*, 40 Land. Dec. 300), but this view was sharply challenged and overruled in the *Harris Case*, where it was said:

"Passed, primarily, to rectify a past and to prevent future abuses of the departmental power to suspend entries, the proviso is robbed of its essential purpose and practically repealed by the decision in the *Traganza Case*."

[5] The effective character of the receiver's receipt being established, the question, after the lapse of the two-year period, as to whether the land was mineral bearing, was no longer open. Inquiry upon that ground was then foreclosed, along with all others. *Payne v. United States ex. rel. Newton*, supra.

The bar of the statute likewise prevails, notwithstanding the executive withdrawal of December 15, 1908. The validity of that or-

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der is, of course, settled by the decision *in *United States v. Midwest Oil Co.*, 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673, but, as already stated, there is excepted from the operation of the order "existing valid claims." Obviously this means something less than a vested right, such as would follow from a completed final entry, since such a right would require no exception to insure its preservation. The purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into a title. The effect of a preliminary homestead entry is to confer upon the entryman an exclusive right of possession, which continues so long as the entryman complies in good faith with the requirements of the homestead law. *Stearns v. United States*, 152 Fed. 900, 906, 82 C. C. A. 48; *Peyton v. Desmond*, 129 Fed. 1, 12, 63 C. C. A. 651. Since it is conceded that Stockley made such an entry in 1905 and his compliance with the requirements of the homestead law prior to the withdrawal order is not questioned, it follows that he had, when that order was issued, an existing valid claim, within the meaning of the exception. The action of the Commissioner of the General Land Office, therefore, in directing a contest against Stockley's entry three years after the issuance to him of the receiver's receipt was unauthorized and void.

The decree of the Circuit Court of Appeals is reversed, and the cause remanded to the District Court, with directions to dismiss the bill of complaint.

(260 U. S. 441)

SIOUX CITY BRIDGE CO. v. DAKOTA COUNTY, NEB.

(Argued Nov. 20, 1922. Decided Jan. 2, 1923.)

No. 105.

1. Constitutional law §229(3) — Intentional undervaluation of other property contravenes constitutional right of owner taxed on full valuation.

The intentional systematic undervaluation by state officials of other property in the same class contravenes the constitutional rights of one taxed on the full value of his property.

2. Taxation §451—Taxpayer can have assessment of full value reduced to proportion at which other property was intentionally assessed.

A taxpayer whose property was assessed at its full valuation as required by the state Constitution and laws, though other property of the same class was intentionally and systematically assessed by the state officials at less than its full value, can have its assessment reduced to the same proportion of its full value that other similar property is assessed, since a remedy by seeking to have the assessment of other property increased to its full value is impracticable, and the requirement of uniformity and equality is to be preferred over the requirement of assessment at full value where it is impossible to secure both.

3. Taxation §40(8)—Undervaluation of other property gives no right to relief, unless intentional.

Mere errors of judgment in the assessment of other property do not support a claim of discrimination entitling a taxpayer to reduction of his assessment below the actual value of his property, but there must be something more, something which in effect amounts to an intentional violation of the principle of practical uniformity.

On Writ of Certiorari to the Supreme Court of Nebraska.

Appeal by Sioux City Bridge Company against Dakota County, Neb., for review of assessment of property. The assessment, as increased by the Board of Equalization, was affirmed by the district court and by the Supreme Court of the state (105 Neb. 843, 182 N. W. 485), and the taxpayer brings certiorari. Reversed and remanded.

Messrs. F. W. Sargent, of Chicago, Ill., and Wymer Dressler, of Omaha, Neb., for petitioner.

Mr. R. A. Van Orsdel, of Omaha, Neb., for respondent.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This case is here by writ of certiorari to the Supreme Court of Nebraska. The question is whether the taxing authorities of the state of Nebraska and of Dakota county in assessing taxes against the petitioner, the

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Sioux City Bridge Company, upon that part of its bridge across the Missouri river at South Sioux City, which is in the jurisdiction of Nebraska, deprived the Bridge Company of due process of law and denied it the equal protection of the laws in violation of the Fourteenth Amendment.

For a number of years before 1918, the Bridge Company had returned the Nebraska part of the bridge for taxation at \$600,000. In that year the assessor of Dakota county sent the blank return to the Bridge Company as usual, but the Bridge Company sent back the proposed return, refusing to sign, and insisting that the valuation was too high. The assessor then returned the bridge at \$600,000 as formerly. The Bridge Company appealed to the board of equalization of the county. Only the counsel for the Bridge Company and for the city of South Sioux City appeared. No witnesses were called and no evidence produced, but the board of equalization, on the appeal of the Bridge Company for reduction, raised the assessment above that of the assessor \$100,000. From this ruling an appeal was taken to the district court of Dakota county for relief against the action of the board of equalization on the ground that the valuation was excessive, was without evidence and arbitrary, that it violated the Constitution of the state requiring a uniformity of taxing burdens, and that it deprived the Bridge Company of due process and equal protection of the law as forbidden by the Fourteenth Amendment.

Seventy-four per cent. of the total value of the bridge is in Dakota county, Neb., and 26 per cent. is in Iowa. The original cost of the bridge was \$941,000, but some wooden trestles in the original construction were taken out and steel substituted and this increased the original cost to \$1,022,000. The bridge was built in 1888. Since 1907 it has been under lease to two railroads and jointly they maintain the bridge, pay the taxes and 8 per cent. on the original cost of \$945,-

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800. The leases are short-time leases because the bridge, while in good repair, is too light for modern traffic and can only be used under burdensome and expensive restrictions. One of the railroad companies has made soundings for a new bridge. The engineers report the existing bridge to be totally out of date and estimate a depreciation in its value on this account of \$300,000 from its original cost. The same witnesses testified that to build the bridge just as it was would cost at present prices from \$1,300,000 to \$1,500,000, but that it would be most foolish to build a bridge of that old type now.

A tax commissioner of one of the lessee railroads, with long experience in taxation and valuation, testified that from an examination of the sales of real estate as shown

by deeds of record in Nebraska and in Dakota county and the tax list, the acre property in Dakota county was assessed at 55.70 per cent. of its value; that improvements in city property were assessed at 49.29 per cent. of their selling value, and had been so assessed for seven years. The county assessor thought such sales were not best evidence of true value in money, and denied that there was any attempt to value at less than such value.

The district court held the reasonable value of the bridge in Nebraska to be more than \$700,000, as assessed, and dismissed the appeal. It made no finding upon the issue as to whether there was an under valuation of other real estate and improvements in Dakota county or the state and did not refer to it.

The Bridge Company carried the case on appeal to the Supreme Court. That court found from the evidence that \$700,000 as the true value was not so manifestly wrong that it was justified in disturbing the assessment. Taking up the objection that the real property and improvements were undervalued in Dakota county, the court said:

"It is finally urged that this court should reduce the true value of the bridge as found by

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the court to 55 *per cent. of such value, for the reason that other property in the district is assessed at 55 per cent. of its true value, and that it would be manifestly unjust to appellant to assess its property at its true value while other property in the district is assessed at 55 per cent. of its value.

"While undoubtedly the law contemplates that there should be equality in taxation, we are of the view that the plan of equalization proposed by appellant is not the proper remedy. The rule is now settled by a recent decision of this court that when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced. *Lincoln Telephone & Telegraph Company v. Johnson County*, 102 Neb. 254.¹ In the argument of appellant the soundness of this ruling is assailed, and authorities in other jurisdictions are cited which seem at variance with our holding. We are not willing, however, to recede from the rule of that case."

Section 1, article 9, of the Constitution of Nebraska, contains the following:

"The Legislature shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the Legislature shall direct. * * *

Section 6300 of the Revised Statutes of Nebraska provides:

"All property in this state not expressly exempt therefrom shall be subject to taxation, and shall be valued at its actual value which

shall be entered opposite each item and shall be assessed at 20 per cent. of such actual value. Such assessed value shall be entered in separate column opposite each item and shall be

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taken *and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made. Actual value as used in this chapter shall mean its value in the market in the ordinary course of trade."

[1] In the case of *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U. S. 350, 352, 353, 38 Sup. Ct. 495, 62 L. Ed. 1154, this court said:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond v. Chicago Union Traction Company*, 207 U. S. 20, 35, 37."

Analogous cases are *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 516, 517, 518, 37 Sup. Ct. 673, 61 L. Ed. 1280; *Cummins v. National Bank*, 101 U. S. 153, 160, 25 L. Ed. 903; *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 364, 365, 372, 374, 31 C. C. A. 537; *Louisville & N. Ry. Co. v. Bosworth* (D. C.) 209 Fed. 380, 452; *Washington Water Power Co. v. Kootenai County* (C. C. A.) 270 Fed. 369, 374.

The charge made by the Bridge Company in this case was that the state, through its duly constituted agents, to wit, the county assessor and the county board of equalization, improperly executed the Constitution and taxing laws of the state and intentionally and arbitrarily assessed the Bridge Company's property at 100 per cent. of its true value and all the other real estate and its improvements in the county at 55 per cent.

[2] The Supreme Court does not make it clear whether it thinks the discrimination charged was proved or not, but assuming the discrimination, it holds that the Bridge Company has no remedy except "to have the

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property *assessed below its true value raised rather than to have property assessed at its true value reduced." The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent. of the value of their property in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the federal courts in the

¹ 166 N. W. 627.

enforcement of the uniformity clauses of state statutes and constitutions and of the equal protection clause of the Fourteenth Amendment. The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 364, 365, 31 C. C. A. 537, and the language of that court was approved and incorporated in the decision of this court in *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 516, 517, 518, 37 Sup. Ct. 673, 61 L. Ed. 1280. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In sub-

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stance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment.

[3] But we construe the action of the court not to be equivalent to a finding that such intentional discrimination existed between the valuation of the Bridge Company's property and that of all other real property and improvements in the county, but rather a ruling that even if it did exist, the Bridge Company must continue to pay taxes on a full 100 per cent. valuation of its property. It was on the same principle, doubtless, that the district court ignored the issue of discrimination altogether. It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U. S. 350, 353, 38 Sup. Ct. 495, 62 L. Ed. 1154.

The judgment of the Supreme Court of Nebraska is reversed, and is remanded for further proceedings not inconsistent with this opinion.

SOUTHERN RY. CO. v. WATTS et al.

No. 368.

ATLANTIC & Y. RY. CO. v. SAME.

No. 369.

SEABOARD AIR LINE RY. CO. v. SAME.

No. 381.

ATLANTIC COAST LINE R. CO. v. SAME.

No. 382.

NORFOLK SOUTHERN R. CO. v. SAME.

No. 383.

(Argued Nov. 22, 23, 1922. Decided Jan. 2, 1923.)

1. Courts ⇨263—In cases raising substantial federal questions, state questions also must be decided.

Objections to the validity of state tax legislation and of the assessments thereunder, whether arising out of the federal Constitution or out of the Constitution and statutes of the state, may be presented in a single suit, and if, in such cases, jurisdiction of the federal court rests on substantial federal questions, that court must determine the state, as well as the federal, questions, though it is reluctant to do so before they have been passed on by the state courts.

2. Constitutional law ⇨229(3)—Taxation ⇨452—Valuation statute can provide different machinery for assessing railroads, and for appeal from assessment.

Revenue Act N. C. 1921, does not deny railroads the equal protection of the laws because real estate owners are given an appeal on assessments from the county board to the state board of equalization, while railroads are not, nor because section 28g provides for reduction of a railroad valuation only where it applies therefor, while under section 28 reductions in the value of all real estate within the county could be made provisionally, if the previous valuation was as a whole in excess of the fair value, since differences in the classes of property and in the conditions of ownership made differences in treatment unavoidable.

3. Constitutional law ⇨229(3)—Taxation ⇨37—Undervaluation of similar property does not deny equal protection, unless intentional and systematic.

The rule that a taxpayer, though assessed on not more than the full value of his property, may be unlawfully discriminated against, so as to be denied the equal protection of the laws by undervaluation of the property in the same class, does not apply, unless the undervaluation of the other property was intentional and systematic.

4. Taxation ⇨40(8)—Facts held not to show systematic undervaluation of other property.

That the county boards in North Carolina, proceeding under the Revenue Act N. C. 1921, § 28a, reduced the valuation of real estate in 67 counties of the state, the reduction varying

from 1 to 50 per cent, but that in 33 counties, including those in which the largest cities were located, no reduction was made, and that the state board, acting under section 28g of that act, reduced the valuation of one railroad, does not show clearly an intentional and systematic undervaluation of property other than railroad property, which is necessary to establish discrimination against the railroads.

5. Taxation ⚡608(5)—Errors of judgment in valuation cannot be reviewed in proceedings for injunction against collection.

Valuations of property for taxation made by the Legislature of North Carolina in 1920, after ample opportunity to be heard was offered and availed of, cannot in the absence of any suggestion of bad faith be reviewed in proceedings by railroad companies for injunction against the state officials for mere errors of judgment.

6. Commerce ⚡73—State taxation of interstate railroad property within its borders is not taxation of interstate commerce.

The taxation by a state of the property belonging to an interstate railroad within its borders was not a taxation of interstate commerce, where there was no showing that any property without the state was taxed.

7. Taxation ⚡365—Statute held not to prescribe mandatory method for valuing railroad property.

Revaluation Act N. C. 1919, which required railroads to furnish certain data to the state board to be used in valuing their property, but did not prescribe the method for valuation, and provided that the revaluation should be approved by the Legislature, did not make mandatory any particular method of valuation by the board.

8. Taxation ⚡365—Adoption by Legislature of valuation by state board cures irregularities in method.

The failure of the state board to follow methods of valuation prescribed by earlier statutes does not invalidate a revaluation made by the board which was tentative merely, and which became an assessment when approved by the Legislature by Laws N. C. Ex. Sess. 1920, c. 1.

9. Taxation ⚡40(2)—Franchise tax may be measured by property value without becoming property tax.

The franchise tax on railroad companies imposed by Laws N. C. Ex. Sess. 1920, c. 1, § 82, and Revenue Act 1921, is not converted into property tax because it is measured by the value of the property, or by the fact that in such measure was included property not used in the transportation service.

10. Taxation ⚡390(1)—Railroads may be taxed differently from other property.

Railroads differ in so many respects from other properties that they may as a class be taxed differently or additionally, if that is not inconsistent with the Constitution of the state.

11. Commerce ⚡73—State franchise tax on railroads held not violation of commerce clause.

The North Carolina Franchise Tax, imposed on railroads by Laws Ex. Sess. 1920, c.

1, § 82 (6½), and Revenue Act 1921, is a tax on the privilege of doing intrastate business, which is not a burden on interstate commerce, since payment is not made a condition precedent to granting the railroad permission to do interstate business, and the aggregate burden imposed by the property tax, the franchise tax, and the income tax levied by the state does not operate to obstruct interstate commerce.

12. Taxation ⚡390(1)—State statute regulating calculation of corporate franchise tax held not applicable to railroads.

Revenue Act N. C. 1921, § 82 (3½), regulating the calculation of the franchise tax imposed on corporations generally, has no application to railroads, in view of the history of the legislation.

Appeals from the District Court of the United States for the Western District of North Carolina as to cases Nos. 368 and 369.

Appeals from the District Court of the United States for the Eastern District of North Carolina, as to cases Nos. 381, 382, and 383.

Separate suits by the Southern Railway Company, by the Atlantic & Yadkin Railway Company, by the Seaboard Air Line Railway Company, by the Atlantic Coast Line Railroad Company and by the Norfolk Southern Railroad Company, all against A. D. Watts, individually and as Commissioner of Revenue, and others. From a decree in each suit denying an interlocutory injunction, complainant appeals. Decree affirmed in each suit.

See, also, 259 U. S. 576, 42 S. Ct. 585, 66 L. Ed. 1071.

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*Messrs. S. R. Prince and L. E. Jeffries, both of Washington, D. C., for appellants in Nos. 368 and 369.

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*Messrs. Murray Allen, of Raleigh, N. C., James F. Wright, of Norfolk, Va., and Forney Johnston, of Washington, D. C., for appellant in No. 381.

Mr. Thomas W. Davis, of Wilmington, N. C., for appellant in No. 382.

Mr. W. B. Rodman, of Norfolk, Va., for appellant in No. 383.

Messrs. Wm. P. Bynum and Sidney S. Alderman, both of Greensboro, N. C., and James S. Manning, of Raleigh, N. C., for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

These five cases were heard together and present largely the same questions of law. Each is an appeal from a decree entered by a federal District Court for North Carolina under section 266 of the Judicial Code (Comp. St. § 1243) denying an interlocutory injunction. In each a railroad company engaged in interstate commerce seeks to enjoin the taxing officials from collecting the ad valorem property taxes for the year 1921,

imposed for local purposes, and the franchise tax imposed for state purposes. Some of the corporations plaintiff are foreign; some, domestic. One has its lines wholly within the state; four have lines also in other states. But these differences are without legal significance in this connection. The property taxes are assailed on the ground that, as assessed, they violate the equal protection clause, the due process clause, and the commerce clause of the federal Constitution, the uniformity provision of the state Constitution, and the statutory method of valuation.

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The franchise taxes are assailed on *the ground that the statute under which they are laid violates the commerce clause, the equal protection clause, and the due process clause of the federal Constitution, as well as the uniformity clause of the state Constitution; that the amounts of these taxes were illegally calculated, in violation of the statutes of the state; and that since they are fixed by a percentage of the ad valorem valuations, they must fall because those valuations were illegally made.

[1] Many of the objections made raise questions as to the meaning and effect of recent statutes of the state which have not yet been construed by its courts; and we are reluctant to pass upon these questions. Some of the objections raise issues of fact on which the evidence is submitted by affidavit and is in certain respects conflicting. But in all the cases jurisdiction rests upon substantial federal questions. The objections to the validity of the legislation and of the assessments, whether arising out of the federal Constitution or out of the Constitution or statutes of the state, may be presented in a single suit. We must, therefore, determine state, as well as federal, questions. *Michigan Central Railroad Co. v. Powers*, 201 U. S. 245, 291, 26 Sup. Ct. 459, 50 L. Ed. 744; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *Davis v. Wallace*, 257 U. S. 478, 42 Sup. Ct. 164, 66 L. Ed. 325. All the objections urged have been considered. We are of opinion that none of them should be sustained. The more important ones will be discussed.

The controversy arose in this way.¹ By

¹ See Constitution of North Carolina, articles 5 and 7; Laws of North Carolina 1919, c. 90 (Revenue Act) particularly sections 3, 76, 77, 78 and 82; chapter 84 (Revaluation Act) particularly sections 1, 3, 4, 7, 25, 26 and 31; Laws of North Carolina 1920, c. 1, adopting revaluation, particularly sections 1, 2, 3, 4, 5, 7a, 7b, 7d, and 82(6½); Laws of North Carolina 1921, c. 34 (Revenue Act) particularly sections 1, 2, 3, 26, 76, 77, 79, 79a, 80, 81, 82, 82(1), 82(2), 82(3), 82(3½), 82(4), 82(6), 82(6½), 82(7), 82(8), 82(9), 82(10), 82(11), 82(12), 82(13), 82(15), 82(16), 82(17) and 82(18); chapter 38 (Machinery Act) particularly sections 28a, 28b, 28c, 28d, 28e, 28f, 28g, 61, 62, 62a, 63, 64 and 65; chapter 40 (transferring powers of state tax commission to state department of revenue) §§ 1, 2 and 3; Act of Special Session December, 1921 (Pub. Laws Ex. Sess. 1921, c. 102) to amend chapter 34 of Public Laws 1921, §§ 1, 2 and 3; to amend chap-

the Constitution of North Carolina taxation of real and personal property must be uniform and ad valorem *523

"according to *its true value in money." In the assessments made prior to 1920 nearly all classes of property had been grossly undervalued; but the undervaluation varied greatly in degree. The Revaluation Act of 1919 (Public Laws 1919, chapter 84) was passed in order to provide for new and fundamentally changed valuations of all property at full values. The valuation of real estate was to be made by county officials; that of railroad property by a state board under an application of the unit rule; and the assessment so made was to be allocated by the state board to the counties on a mileage basis.² By that act the valuations made by these taxing boards were to become effective as assessments only upon approval by the Legislature. When so approved, they were to be the basis of the taxation for the years 1920 to 1923 inclusive. Revaluations of real estate and of railroads were made under that act and were approved by the Legislature in August, 1920. Public Laws 1920, chapter 1. Through these revaluations the assessments of railroad property were, on the average, doubled, as compared with the assessments prevailing in

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1919,³ and *those of real estate were quadrupled. The aggregate assessment of all the railroad properties as revalued in 1920 was \$250,587,158; the aggregate of the real estate, \$2,006,124,997; that of the personal property, \$807,866,443; and that of industrial and financial institutions \$444,748,145.

The relatively larger increase in the revaluations of real estate and of other property resulted in railroad taxes for 1920 lower than had prevailed theretofore, and these taxes were duly paid. But widespread objection to continuing the 1920 revaluations as a basis for the taxation of real estate developed in the latter part of 1920. A severe depression in business had occurred; there was an abrupt decline in commodity prices, particularly farm products, and real estate values were affected by this decline. The Legislature, thereupon, made provision (Public Laws 1921, c. 38, § 28) under which, upon application of taxpayers, the 1920 revaluations of real estate could be reviewed by county

ter 38 of Public Laws 1921 (Pub. Laws Ex. Sess. 1921, cc. 103, 107); Act Dec. 19, 1921 (Pub. Laws Ex. Sess. 1921, c. 96) to refund tax illegally assessed.

² Prior to 1921 railroad property was valued and assessed (apart from the action by the Legislature in 1920) by the State Tax Commission. In 1921 the powers of the State Tax Commission were transferred to the Department of Revenue under a commissioner of revenue. In this opinion "state board" is used throughout to refer to state authorities, as distinguished from county boards, which assessed local real estate.

³ The increases were: Southern Railway, \$46,869,942 to \$96,605,694; Atlantic & Yadkin Railway, \$1,975,806 to \$4,104,710; Seaboard Railway, \$20,191,720 to \$34,768,440; Atlantic Coast Line Railway, \$34,645,345 to \$50,867,800.

boards and those of railroad property by the state board. These boards were authorized to make corrections wherever assessments were found to exceed existing values. By proceedings under the act of 1921 reductions were made in 67 counties, varying from 1 to 50 per cent. in the valuations of real estate (including that belonging to the railroads not used in the transportation service). In 33 counties no reduction in the valuations of real estate was allowed. The Legislature of 1921 had made no provision for reviewing the revaluations of personal property; and the assessments thereon remained unchanged, although the valuations of personal property had also been greatly increased in 1920. Under the Transportation Act of 1920, the Interstate Commerce Commission issued, in the latter part of 1920, orders pursuant to Ex parte 74, Increased Rates, 58 Interst. Com. Com'n. R. 220, raising freight rates in North Carolina 25 per cent. and passenger rates 20 per cent. over those prevailing when the re-

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valuation of 1920 *was made. Thereafter the five railroads applied to the state board for reduction of their valuations as the basis for taxation in 1921 and subsequent years. The application of the Norfolk & Southern was granted in part; and its assessment was reduced from \$27,023,462 to \$22,840,932. But, after due hearing, and rehearings, the state board refused to modify the assessments of the other four railroads which had been fixed by the Legislature of 1920. Thereupon these suits were begun.

[2] The contention of the railroads that the property taxes as assessed are obnoxious to the federal Constitution was rested here mainly on the claim that there is a denial of equal protection of the laws. This claim is asserted on several grounds. It is contended, in the first place, that the act of 1921 providing for the review of valuations is void. The argument is that the railroads were discriminated against, because real estate owners are given an appeal on assessments from the county board to the state board of equalization, but that no such appeal is provided from the assessment of railroads. It is also argued that there is discrimination in this: While chapter 38, § 28g, provides for reduction by the state board in the valuation of a railroad only where it applies therefor, reductions in the value of all real estate within the county were, under section 28a, to be made provisionally, if the county board determined that the 1920 valuation was, as a whole, in excess of a fair value, and that in such event the percentage of the average excess would be applied to each parcel in the county, unless and until the assessment of individual real estate owners should be revised by the state tax commission. The differences in the classes of property, and in the conditions of ownership, obviously made difference in treatment unavoidable. Differences in the machinery for as-

essment or equalization do not constitute a denial of equal protection of the laws. *New York v. Barker*, 179 U. S. 279, 21 Sup. Ct. 121, 45 L. Ed. 190.

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[3, 4] *The claim that plaintiffs have been denied equal protection of the laws appears to rest more largely on the charge that discrimination has been practiced against them in administering the tax laws. It is urged that county boards, proceeding under section 28a, of the act of 1921, reduced real estate valuations quite generally, but that the state board, acting under section 28g, refused to reduce the valuation of any railroad except that of the Norfolk & Southern. The rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others. *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757. This may be true, although the discrimination is practiced through the action of different officials. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88. But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 353, 38 Sup. Ct. 495, 62 L. Ed. 1154; *Chicago, Burlington & Quincy Ry. Co. v. Babcock*, 204 U. S. 535, 27 Sup. Ct. 326, 51 L. Ed. 636; *Coulter v. Louisville & Nashville R. R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 43 Sup. Ct. 190, 67 L. Ed. —, decided this day. Plaintiffs have clearly failed to establish that there was intentional and systematic undervaluation by the county boards. Strong evidence to the contrary is furnished by the fact that in 33 counties, including those in which the largest cities are located, no reduction was made in the valuation of real estate and that in the remaining 67 counties the reduction varied from 1 to 50 per cent. Plaintiffs have failed, likewise, in showing systematic refusal on the part of the state board to allow a proper reduction in the valuation of any railroad. The further contention that by reduction of the Norfolk & Southern's assessment the other plaintiffs were discriminated against is also unfounded.

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[5] *The claims that the assessments made by the Legislature in 1920 violate the due process and commerce clauses of the federal Constitution and the true value and uniformity clauses of the state Constitution, rest largely upon the contentions that the valuations were made on wrong principles and are excessive. There was ample opportunity to be heard; and the opportunity was availed of. There is no suggestion of bad faith. At the most there have been errors of judgment;

and mere errors of judgment are not subject to review in these proceedings. *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Brooklyn City R. R. Co. v. State Board of Tax Com'rs*, 199 U. S. 48, 52, 25 Sup. Ct. 713, 50 L. Ed. 79.

[6] There was no taxation of interstate commerce. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 39 L. Ed. 311; *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49. There is not shown any taxation of property without the state as in *Wallace v. Hines*, 253 U. S. 66, 40 Sup. Ct. 435, 64 L. Ed. 782. Because these several constitutional objections are, in our opinion, unfounded, we do not deem it necessary to consider the contention of defendants that there was open to plaintiffs the opportunity of reviewing the assessments in the state courts by writ of certiorari, and that, unless and until such remedy had been exhausted, there was no right to seek relief by these bills in equity. See *Keokuk & Hamilton Bridge Co. v. Salm*, 258 U. S. 122, 125, 42 Sup. Ct. 207, 66 L. Ed. 496.

[7] The claim that the railroads' property taxes are void under the statutes of the state seems to rest, in the main, on the charge that in valuing them in 1920, and in passing upon the application for reduction under the act of 1921, the state board failed to follow the method of valuation prescribed. It is argued, among other things, that there was no separate assessment of tangible and intangible property, or, if so, that plaintiffs were not notified as to what that separation was; that there was no due consideration of the actual cost of replacement of the property, with just allowance for depreciation of

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rolling stock; that *the franchise or intangible value was not assessed by a due consideration of the gross earnings as compared with operating expenses, or of the market value of the stocks and bonds; that the particular method prescribed by the statutes for assessing interstate roads was not followed; and that erroneous methods of valuation were adopted. To these contentions there appear to be several answers. The Revaluation Act did not make mandatory any particular method of valuation. The Legislature recognized that the difficulties inherent in valuing a railroad are great. It desired that the valuers should have access to every fact which might aid them in performing their duty. The data concerning the railroads referred to in the act, like the methods of valuation referred to in earlier and later legislation, are among those commonly used when an attempt is made to ascertain the value of a railroad. But they are merely aids. Such data are commonly in the possession of the railroad companies; and are often not readily accessible to others. The Legislature, by the Revaluation Act authorized the state board to require the railroads

to furnish the information. But it did not undertake to prescribe to what extent or how the information should be used by them. Their duty was merely to exercise an informed and honest judgment in fixing values for purposes of taxation. Compare *Minnesota Rate Cases*, 230 U. S. 352, 434, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

[8] Another answer to plaintiffs' contention is that mere failure to follow methods of valuation referred to in earlier statutes could not, in any event, render illegal the revaluation made by the state board in 1920; since it was, by the Revaluation Act, made tentative merely. That tentative valuation became an assessment by the Legislature, and, hence the law, through approval by chapter 1, Laws Extra Session 1920, which made it the assessment for the next four years. The state board, when applied to in 1921, had power to reduce the statutory assessment; but in

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acting on the applications it was not, *as we read the statutes, required to make a new valuation, or to apply any particular method of valuation.⁴

[9, 10] The railroad franchise tax, equal to one-tenth of 1 per cent. of the value of the company's property within the state, is imposed wholly for the support of the state government. Such taxes are expressly authorized by the state Constitution. Article 5. Before 1920 the contribution of railroads toward the expenses of the state government was made partly by a small privilege tax, dependent on gross earnings per mile, partly from a percentage of the ad valorem property tax paid by them, and in valuing railroad property there was included among the intangibles what is frequently called the franchise or the corporate excess. In 1920 this mileage privilege tax was abolished; pay-

*The following statutory provisions show that no assessment was made by the state tax commission in 1920 or 1921, or by the commissioner of revenue in 1921, but that the assessment was made by the Legislature in 1920. The only power of the commissioner of revenue in 1921 was to make reductions in certain cases.

Revaluation Act (Public Laws 1919, c. 84) § 6, provided that all real property should be valued as of May 1, 1919, and such value should be used for all tax purposes for 1920, 1921, 1922, and 1923. Section 31 provided for a complete revaluation of all railroad companies to be used as the basis for computing taxes for such companies for 1920, 1921, 1922 and 1923. Section 3 provided that the assessment made under said act was not to be used as a basis for computation of taxes until it had been approved by the Legislature.

Acts of Special Session 1920, c. 1, § 1, approved the "assessment or valuation" made under Revaluation Act of 1919 and adopted it as the basis for levy of tax rates by the state and all subdivisions thereof for 1920 and the valuation of real property so fixed was adopted for 1921, 1922 and 1923, "except as such valuations may be hereafter changed according to law."

Machinery Act (Public Laws, 1921, c. 38) § 64, provided for the valuation of railroads (laying down rules therefor) "at such dates as real estate is required to be assessed for taxation."

ment for general state purposes of a percentage of the property tax was discontinued; and by section 82 (6½) of chapter 1, Laws

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Extra Session 1920, and Revenue Act *of 1921, c. 34, the so-called franchise tax here in question was imposed. It is argued that this franchise tax is an additional property tax which is not imposed on others, and that, consequently, it violates the uniformity clause of the state Constitution and the equal protection clause of the federal Constitution. It is true that the franchise tax is measured by the value of property already subjected to the ad valorem tax. But a privilege tax is not converted into a property tax because it is measured by the value of property (compare *Clark v. Titusville*, 184 U. S. 329, 333, 334, 22 Sup. Ct. 382, 46 L. Ed. 569); nor by the fact that in this measure is included property not used in the transportation service. Railroads differ in so many respects from other properties that they may, as a class, be taxed differently or additionally, if that is not inconsistent with the Constitution of the state.

[11] Nor is there any basis for the claim that the Franchise Tax Act violates the commerce clause. The tax appears to be upon the privilege of doing an intrastate business. Compare *Armour Packing Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451. It is not of the character which is held a burden upon interstate commerce. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 119, 120, 41 Sup. Ct. 45, 65 L. Ed. 165; *St. Louis-San Francisco Ry. Co. v. Middlekamp*, 256 U. S. 226, 41 Sup. Ct. 489, 65 L. Ed. 905. Payment of the tax is not made a condition precedent to granting a railroad permission to do interstate business. Compare *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 119, 41 Sup. Ct. 45, 65 L. Ed. 165. And there is no basis for the contention that the aggregate burden imposed by the property tax, the franchise tax, and the income tax, operates to obstruct interstate commerce.

[12] The remaining objections to the franchise taxes relate merely to the amounts at which they are calculated. It is insisted that section 82 (3½) of the Revenue Act of 1921 applies, and that therefore upon the facts stated the tax should be for one-twentieth, not for one-tenth, of 1 per cent. of the

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value of the company's property within *the state. The Norfolk & Southern, insisting likewise that the section applies, argues that the taxes assessed upon others thereunder would be only one-half the percentage it is required to pay, and therefore contends that the act denies to it equal protection of the laws. Upon

this question of statutory construction the courts of the state have not yet passed. The taxing officials insist that section 82 (3½) has no application to railroads, and in support of their contention point to the history of the legislation. We think that they are right.

A further objection peculiar to the Atlantic & Yadkin Railway should be mentioned. This road is located wholly within North Carolina. Its entire capital stock is owned by the Southern, and it is operated as a part of the Southern System. The state board assessed all the lines operated by the Southern System at \$101,960,413, and then apportioned to the Atlantic & Yadkin the sum of \$4,104,710, a sum alleged to be grossly excessive. Defendants aver that the amount represents the actual value of the property. They say, further, that the apportionment was made in accordance with the plan suggested by the tax commissioner of the Southern System; that neither the Southern Railway nor the Atlantic & Yadkin was, in any way, prejudiced by assessing the property together, or by allocating this amount to the latter; that if the Atlantic & Yadkin was overassessed, the Southern was, to that extent, underassessed; and that the company is estopped by its conduct from questioning the assessment on this ground. A doubt is raised whether the taxes assessed upon this plaintiff should be sustained. But even if the objection can be availed of in this suit, the state of the record is not such as to justify us in reversing, on this ground, the decree denying an interlocutory injunction to the Atlantic & Yadkin. It will, of course, be open to this plaintiff to renew the objection upon the final hearing.

Affirmed.

(260 U. S. 477)

UNITED STATES v. STAFFOFF. BROOKS
v. UNITED STATES. UNITED
STATES v. REMUS et al.

(Argued Nov. 29, 1922. Decided Jan. 2,
1923.)

Nos. 26, 197, and 403.

I. Internal revenue — 2—Act continuing in force revenue laws cannot give retrospective criminality to acts before its passage.

Act Nov. 23, 1921, § 5, providing that all laws in regard to the manufacture of and traffic in intoxicating liquor, and all penalties for violation of such laws in force when the National Prohibition Act was enacted, shall be continued in force, except such provisions as are directly in conflict with the National Prohibition Act, or the act of 1921, even if it purported to construe the National Prohibition Act as leaving in force the prior statutes which the Supreme Court had declared were repealed by the Prohibition Act, could not give retrospective criminality to acts that were done before it was passed, and that were not criminal, except for the statutes held to have been repealed.

2. Statutes $\Rightarrow$ 220—Act declaring intent of earlier act is not controlling.

A statute purporting to declare the intent of an earlier act might be of great weight in assisting a court when in doubt, though not entitled to control judicial action.

3. Internal revenue $\Rightarrow$ 2—National Prohibition Act repealed revenue statutes relating to intoxicating liquors.

The National Prohibition Act repealed Rev. St. § 3258 (Comp. St. § 5994), imposing a penalty for possessing a still without having registered it, section 3282 (Comp. St. § 6022), imposing a penalty for manufacturing a mash fit for distilling on premises not an authorized distillery, and section 3242 (Comp. St. § 5965), imposing a penalty for carrying on the business of a rectifier or liquor dealer without having paid the special tax.

4. Internal revenue $\Rightarrow$ 2—Statute continuing revenue laws in force was in effect a re-enactment of them.

Section 5 of the act supplemental to the National Prohibition Act (Act Nov. 23, 1921), providing that all laws in regard to the manufacture of and traffic in intoxicating liquor, and all penalties for violation of such laws in force when the National Prohibition Act was enacted, shall continue in force, except such provisions as are directly in conflict with the National Prohibition Act, or the supplemental act, was in effect a re-enactment of the provisions of the revenue laws relating to manufacture and sale of intoxicating liquors, which had been repealed by the National Prohibition Act, so that prosecutions may be maintained for the violation of those revenue acts, committed after the supplemental act took effect, though not for such acts subsequent to the National Prohibition Act, and before the effective date of the supplemental act.

5. Internal revenue $\Rightarrow$ 47—Prohibition Act prevented conviction under indictment for possessing still to make liquors for beverage and commercial purposes.

The repeal of Rev. St. § 3258 (Comp. St. § 5994), which imposed a penalty for possessing a still without having registered it with the collector of internal revenue, by the National Prohibition Act, invalidated an indictment for the unlawful possession of a still, even though it was alleged therein that the liquor was to be manufactured for commercial as well as for beverage purposes.

6. Courts $\Rightarrow$ 384—Certified question as to effect of National Prohibition Act on revenue laws generally is too broad to require answer.

A question certified by the Circuit Court of Appeals, in which was pending a writ of error to review a conviction for violation of three revenue statutes relating to the manufacture and sale of intoxicating liquors, as to the effect of the National Prohibition Act on the revenue laws generally, is too broad to require an answer.

7. Internal revenue $\Rightarrow$ 47—Conviction under Revenue Act held not sustainable as one under Prohibition Act.

Where the indictment plainly purported to be drawn under the provisions of the revenue

laws which were subsequently declared to have been repealed by the National Prohibition Act, it would be unjust to treat the conviction as covering an offense under the National Prohibition Act, which was a law of fundamentally different policy, even though facts could be spelled out that might fall within the latter, so that defendant cannot be sentenced under the National Prohibition Act after a conviction under such indictment.

In Error to the District Court of the United States for the Eastern District of Missouri.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

In Error to the District Court of the United States for the Southern District of Ohio.

Chris Elioff Stafoff, alias Chris Elioff, was indicted with another for having in possession a still intended for the production of distilled spirits for beverage and commercial purposes, without having registered it, and for having unlawfully manufactured on premises other than an authorized distillery a mash fit for the production of distilled spirits. A demurrer to both counts was sustained (268 Fed. 417), and the United States brings error. Affirmed.

James L. Brooks was convicted of having in possession a still, and of manufacturing a mash, and of having carried on the business of a distiller without having given the bond required by law, and he brought error to the Circuit Court of Appeals, which certified to the Supreme Court questions as to whether the statutes on which the indictment was based had been repealed by the National Prohibition Act, and as to whether defendant could be sentenced under the National Prohibition Act. Questions as to the repeal answered "Yes," and question as to the sentence answered "No."

George Remus and others were indicted for having carried on the business of a liquor dealer and rectifier without having paid the special tax required by law. A demurrer to the indictment was sustained as to six of the seven counts of the indictment (283 Fed. 685), and the United States brings error. Judgment on counts 2, 4, and 6 affirmed, and that on counts 3, 5, and 7 reversed.

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*Mrs. Assistant Attorney General Willebrandt, for the United States.

Samuel Herrick, of Washington, D. C., for Brooks.

E. N. Zoline, of New York City, for Remus and others.

Mr. Justice HOLMES delivered the opinion of the Court.

In the first of these cases Stafoff was indicted with another for having had in their possession a still intended for the production of distilled spirits for beverage and com-

mercial purposes, without having registered it with the Collector of Internal Revenue, as required by Rev. St. § 3258 (Comp. St. § 5994), and in a second count for having unlawfully manufactured on premises other than an authorized distillery a mash fit for the production of distilled spirits, to wit, whisky, contrary to Rev. St. § 3282 (Comp. St. § 6022). A demurrer to these counts was sustained (268 Fed. 417), and the United States brings the case here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (Comp. St. § 1704).

The case of Brooks comes here on a certificate from the Circuit Court of Appeals for the Ninth Circuit. Brooks was convicted under the above mentioned sections 3258 and 3282, and also under Rev. St. § 3281 (Comp.

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St. § 6021), for having *carried on the business of a distiller without having given bond as required by law. The third and fourth counts under section 3282 respectively charged the making of a mash as above and the separating by distillation of alcoholic spirits from a fermented mash. The questions certified are whether the three sections mentioned are repealed by the National Prohibition Act of October 28, 1919, c. 85, 41 Stat. 305, and whether if they are repealed the cause should be remanded with directions to enter judgment and impose sentence under the last-named act.

In the third case Remus and his associates were charged in six counts with having carried on the business of a wholesale liquor dealer, that of a retail liquor dealer, and that of a rectifier, without having paid the special tax as required by law. Rev. St. § 3242 (Comp. St. § 5965). A demurrer to these counts was sustained. 283 Fed. 685. The United States took a writ of error under the Criminal Appeals Act.

[1] In *United States v. Yuginovich*, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. 1043, it was decided that sections 3281 and 3282 were repealed by the later law, at least as to the production of liquor for beverage purposes. Since that decision and with reference to it, as appears from the House Report, No. 224, 67th Congress, 1st Session, and the debates, 61 Cong. Record, part 3, pp. 3095, 3096, the Act Supplemental to the National Prohibition Act was passed. Act of November 23, 1921, c. 134, § 5, 42 Stat. 222, 223. By section 5 of this statute:

"All laws in regard to the manufacture * * * of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this act."

[2, 3] But if an act violates both the former and the latter a conviction under one is

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a bar to prosecution under the *other. This section is not declaratory even in form. It

does not purport to construe the National Prohibition Act as leaving in force what this Court has declared to have been repealed. It could not in this way give a retrospective criminality to acts that were done before it was passed and that were not criminal except for the statutes held to have been repealed. *Ogden v. Blackledge*, 2 Cranch, 272, 277, 2 L. Ed. 276; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886. Of course a statute purporting to declare the intent of an earlier one might be of great weight in assisting a court when in doubt, although not entitled to control judicial action. But that is not this case. The decision in *United States v. Yuginovich* must stand for the law before November 23, 1921. In that case, besides what we have mentioned, it was held also that the penalty imposed by Rev. St. § 3257 (Comp. St. § 5993), on a distiller for defrauding the United States of the tax on the spirits distilled by him was repealed. So far as the liquor is for beverage purposes the same reasoning must apply to the penalty in section 3242 for carrying on the business of rectifier or wholesale or retail liquor dealer without having paid the special tax imposed by law.

[4, 5] But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. *Swigart v. Baker*, 229 U. S. 187, 198, 33 Sup. Ct. 645, 57 L. Ed. 1143. Of course Congress may tax what it also forbids. 256 U. S. 462.¹ For offenses committed after the new law, *United States v. Yuginovich* cannot be relied upon. Three counts in the Remus Case charge carrying on the business mentioned up to April 1, 1922, and therefore are governed in part by the Supplemental Act. So far as the decision of

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the Court below neglected this distinction it was wrong. The decision in *Staffoff's Case* dealt with conduct before the date of the Supplemental Act and was right. The keeping of a still to make liquor for beverage purposes contrary to section 3258 is within the principle of the *Yuginovich Case*, and the addition of the words 'and commercial' to the statement of the purposes does not seem to us enough to take it out. The reference to this section in title 3, section 8, of the Prohibition Act may have been inserted simply for greater caution. It is one of several considerations tending to a different conclusion in *United States v. Yuginovich*, but as they did not prevail then they cannot prevail now.

[6, 7] There remain the questions certified in *Brooks v. United States*. They are somewhat broader than we indicated in our summary statement, as they include the Revenue

¹ 41 Sup. Ct. 551, 65 L. Ed. 1043.

Laws generally as well as the sections 3258, 3281 and 3282. The general question manifestly is too broad to require an answer. From the summary given of the indictment we infer that what we have said is sufficient with regard to the sections named. The fourth question, whether, in view of what we have decided, the case should be remanded for judgment and sentence under the National Prohibition Act must be answered, No. The indictment plainly purported to be drawn under the old law and it would be unjust to treat the conviction as covering an offense under a law of fundamentally different policy if facts could be spelled out that might fall within the latter, although alleged with no thought of it or any suggestion to the accused that he must be prepared to defend against the different charge.

No. 26. Judgment affirmed.

No. 403. Judgment on counts 2, 4 and 6 affirmed. Judgment on counts 3, 5 and 7 reversed.

No. 197. Questions 1, 2 and 3, as limited above answered, Yes. Question 4 answered, No.

(260 U. S. 545)

MASON et al. v. UNITED STATES.

No. 117.

EUBANK et al. v. SAME.

No. 115.

McMULLEN et al. v. SAME.

No. 116.

MATHEWS et al. v. SAME.

No. 114.

HUNSICKER et al. v. SAME.

No. 104.

NORVELL et al. v. SAME.

No. 113.

PALMER et al. v. SAME.

No. 111.

ARKANSAS NATURAL GAS CO. v. SAME.

No. 112.

(Argued Nov. 17-20, 1922. Decided Jan. 2, 1923.)

1. Public lands ☞47—Withdrawal in aid of future legislation was within executive authority.

The executive order of December 15, 1908, withdrawing certain public lands in Louisiana from settlement and entry or other form of appropriation to secure the public interests, and in aid of such legislation as might thereafter be proposed or recommended, was within the power of the executive.

2. Statutes ☞194—Rule of ejusdem generis not applied to destroy meaning of general words.

The rule limiting general words associated with specific words to matters similar to those specifically enumerated is a rule of construc-

tion, to be resorted to only as an aid to ascertain the meaning of doubtful words and phrases, and cannot be employed to render the general words meaningless, as in a case where the specific words exhaust the genus.

3. Mines and minerals ☞9—Withdrawal from settlement and entry and other form of appropriation withdraws from mining location.

In an executive order withdrawing certain public lands from settlement and entry and other forms of appropriation, the words "settlement and entry" include all forms of appropriation of public lands similar thereto, so that the expression "other forms of appropriation" cannot be so limited as to exclude the location and development of mining claims, especially since the purpose of the order evidently was to preserve the mineral rights in the land.

4. Mines and minerals ☞7—Location held in moral good faith within state law so that locators were entitled to expense of drilling in suit for oil removed.

A mining location of public lands withdrawn from entry or settlement by executive order, made under advice of counsel that the order was void, or at least did not affect such location, concerning which there existed doubt among the profession until such authority was upheld by the Supreme Court by a divided court, was in moral good faith, so that, under Civ. Code La. art. 501, the locators were entitled to credit for the expense of drilling the wells and producing the oil in suits to recover from them the value of the oil removed from the lands.

5. Appeal and error ☞1094(4)—Master's finding as to good faith after seeing witnesses will be accepted.

The explicit finding of the master that the locators proceeded in moral good faith in making their locations, which finding was made after hearing and seeing the witnesses and was supported by evidence, will be accepted by the Supreme Court, notwithstanding doubts suggested by the Circuit Court of Appeals respecting the motives of the locators.

6. Mines and minerals ☞34 — Lease of oil claim under prior understanding is not fraudulent.

There is nothing in the federal mining laws which renders fraudulent a lease of a mining location made on the same day as the location in pursuance of an understanding had prior thereto.

7. Courts ☞363—Exception of equity jurisdiction from application of state statute does not except substantial rights enforceable in equity.

The exception to the general rule that the statutes of the state are binding on the federal courts sitting within the state, which prevents those statutes from enlarging or diminishing the federal equity jurisdiction, does not deny to a party to a federal equity suit substantial rights conferred by the state statute.

8. Courts ☞363 — State statute governing damages for appropriation of products of land applies in federal equity suit.

Civ. Code La. art. 501, providing that the owner of land, the products from which were

taken by another in good faith, can recover the value of the product on reimbursing the other person for his expenses, will be applied in a federal suit in equity by the United States to enjoin continuing trespasses on its land and to recover for the conversion of oil taken therefrom.

9. Courts — 362 — Federal statute making state statutes applicable in common-law trials does not exclude application in equity suits.

Rev. St. § 721 (Comp. St. § 1538), providing that the laws of the several states shall be regarded as rules of decision in trials at common-law in the courts of the United States, is merely declarative of the rule which would exist in the absence of a statute, and the fact that it is less broad than the rule because limited to actions at common law does not impliedly prohibit the application of state statutes in suits in equity.

10. Mines and minerals — 7—Payers and receivers of royalty for oil taken are jointly liable therefor.

Where oil had been taken by certain of the defendants from public lands and royalty therefor paid to other defendants, the latter are liable for the full amount of such royalty, since they have been to no expense in producing the oil, and the other defendants are jointly liable as joint tort-feasors to the same amount, though the royalties exceeded the difference between the value of the oil produced and the expenses of producing it, for which, under the circumstances, the defendants were entitled to credit.

11. Mines and minerals — 7—Judgment held erroneous as allowing double recovery of oil royalties.

Where oil was taken from public lands under circumstances entitling the defendants to credit for the expense of extracting it, and the net value exceeded the amount of the royalties paid, a judgment holding the producers liable for the net value of the oil produced, and the producers liable in solido for the royalties in addition thereto, was erroneous, as entitling the government to recover the amount of the royalties twice.

Appeals from the Circuit Court of Appeals for the Fifth Circuit.

Eight separate suits by the United States against Sam W. Mason and others, against Dillard P. Eubank and others, against Lydia H. McMullen and others, against W. H. Mathews and others, against Henry Hunsicker and others, against B. R. Norvell and others, against E. G. Palmer and others, and against the Arkansas Natural Gas Company, consolidated for trial in the District Court, as well as for hearing in the Circuit Court of Appeals. Decrees in the District Court for part of the relief claimed in each suit were affirmed generally by the Circuit Court of Appeals, but reversed in so far as they allowed drilling and operating costs as a credit in defendants' favor (Mason v. United States, 273 Fed. 185; Norvell v. United

States, 273 Fed. 142), and the defendants in each suit appeal. Decrees of the Circuit Court of Appeals reversed, and those of the District Court affirmed, in all cases except that against Sam W. Mason and others, in which the decree was modified by reducing the amount, and, as so modified, affirmed.

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*Messrs. R. L. Batts, of Pittsburgh, Pa., and S. L. Herold and Hampden Story, both of Shreveport, La., for appellants.

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*Mr. Assistant Attorney General Riter, for the United States.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

These cases, involving the same questions, were consolidated for trial in the District

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Court, as well as for hearing on appeal in the Circuit Court of Appeals, and argued together here.

The United States, as plaintiff, brought separate suits in equity in the United States District Court for the Western District of Louisiana against the several groups of appellants (defendants in the bills) to have its title to various parcels of land confirmed, possession thereof restored, and defendants enjoined from setting up claims thereto, extracting oil or other minerals therefrom, or going upon or in any manner using the same. There was in addition a prayer for an accounting in respect of the oil and gas removed from the lands by the defendants. The cases were referred to a master, and upon his report the District Court entered decrees in favor of the plaintiff in all the cases, from which appeals were taken by defendants and cross-appeals by plaintiff to the Circuit Court of Appeals. That court affirmed the decrees generally, but reversed the trial court in so far as it had allowed drilling and operating costs as a credit against the value of the oil extracted and converted by the defendants, respectively. 273 Fed. 135, 142. The cases come here by appeal.

The lands in question were public lands of the United States, and the only claim there- to asserted by the defendants was based upon locations purporting to have been made under the mining laws. The lands were withdrawn on December 15, 1908, by an executive order which reads:

"To secure the public interests, and, in aid of such legislation as may hereafter be proposed or recommended, the public lands in townships 15 to 23 north and ranges 10 to 16 west, Louisiana meridian, Natchitoches Land Office, Louisiana, are, subject to existing valid claims, withdrawn from settlement and entry, or other form of appropriation."

After the promulgation of this order, at various times, mining locations were made

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upon the several parcels of *land by the respective groups of defendants or persons in privity with them. These locations, it will be assumed for the purposes of the case, complied with the requirements of the laws relating to the acquisition of mining rights. Before the locations were made the question had been submitted by some of the defendants to counsel learned in the law, who advised that the President was without authority to make the withdrawal, and that the order, in any event, did not include appropriations of lands valuable for their deposits of mineral substances. All the locations, it is claimed, were made by the defendants in the honest belief that the order not only was made without authority, but that it did not purport to preclude appropriations under the mining laws.

[1] Whatever legitimate doubts existed at the time of the locations respecting the validity of the executive order were resolved by the subsequent decision of this Court in *United States v. Midwest Oil Co.*, 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673, where it was held that a similar order, issued in 1909, was within the power of the executive. Upon the authority of that case the order here in question must be held valid.

[2, 3] Passing this, it is insisted that the order does not apply to the cases here presented. The point sought to be made rests upon the rule of statutory construction that words may be so associated as to qualify the meaning which they would have standing apart. Here, it is said, the general words of the order, "or other form of appropriation," must be read in connection with the specific words "settlement and entry" immediately preceding, and that so read they must be restricted to appropriations of a similar kind with those specifically enumerated. The words "settlement and entry," it is said, apply only to the act of settling upon the soil and making entry at a land office, as, for example, under the homestead laws; that mining lands are acquired, not by settlement or entry, but by location and develop-

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ment; and that this *process is not covered by the words "other form of appropriation," limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. The rule is one well established and frequently invoked, but it is, after all, a rule of construction, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules, that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural

meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate. See *United States v. Mescall*, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77; *Danciger v. Cooley*, 248 U. S. 319, 326, 39 Sup. Ct. 119, 63 L. Ed. 266; *Higler v. People*, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267; *United States v. First National Bank (D. C.)* 190 Fed. 336, 344. If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized? None has been suggested and we can think of none. A purchase of land or an appropriation for railroad uses or rights of way, if not actually involving settlement and entry, is no more akin to that method than an appropriation for mining purposes. Reasons which, under the rule, would justify the exclusion of one from the operation of the general words would equally justify the exclusion of all. It would therefore result, there being nothing ejusdem generis, that the application of the rule contended for would nullify the general words altogether. Moreover, the circumstances leading up to and accompanying the issuance of the order demonstrate conclusively that its main, if not its only, purpose was to preserve from

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private appro*riation the oil and gas which the lands were thought to contain pending investigation and congressional action, and this purpose would have been subverted by appropriations of the nature here involved quite as much as by other forms. We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order and consequently were prohibited by it.

The trial court so decided, but, following the report of the master, held that these locations were made in moral good faith, and that under the laws of Louisiana, where the lands are situated, the defendants were liable only for the value of the oil after deducting therefrom the cost of drilling, equipping and operating the wells, through and by means of which the oil was extracted. It was to reverse this latter holding that the cross appeals were prosecuted. The Circuit Court of Appeals reversed the District Court in this particular upon the ground that the defendants' mistake, if any, was one of law, and constituted no excuse, and that the Louisiana law could have no application since the suit was one in equity, to be governed by general principles and not by local laws or rules of decision.

[4] Whether the defendants were innocent trespassers within the principles of the common law we find it unnecessary to determine. That the measure of damages applied by the District Court was in consonance with the statute law of Louisiana as interpreted by

the highest court of that state is clear. The Louisiana Civil Code (article 501), in terms provides that the "fruits produced by the thing belong to its owner, although they may have been produced by the work and labor of the third person * * * on the owner's reimbursing such person his expenses." This provision is taken substantially from article 548 of the Code Napoléon, respecting which Laurent, a distinguished commentator, says:

"This is a principle of equity which will not permit the *owner to enrich himself at the expense of another, even though he be in bad faith. This applies to all the expenses to which the possessor has been subjected." *Martel v. Jennings-Heywood Oil Syndicate*, 114 La. 351, 359, 38 South. 253.

The decisions of the Supreme Court of Louisiana have settled the rule that under the provisions of this article of the Louisiana Civil Code in awarding damages to the owner of property from which oil has been extracted the cost of production must be first deducted from the value of the oil produced, even though the defendant went into possession in technical bad faith but in moral good faith. *Cooke v. Gulf Refining Co.*, 135 La. 610, 618, 65 South. 758, and cases cited.

[5] The defendants here, it is true, took possession of the lands in violation of the withdrawal order, but they did so in the honest, though mistaken, belief that the order was wholly without authority. Some of them had legal advice from competent counsel to that effect. It is common knowledge that the validity of the withdrawal order in question, as well as the later order of 1909, was in grave doubt until the decision of this court in *United States v. Midwest Oil Co.*, supra. Not only was a substantial opinion to be found among members of the profession that the order was invalid, but the decision here was by a divided court. In view of these circumstances, we think it fair to conclude that the mining locations by defendants and the occupation and use of the lands thereunder were in moral good faith, within the meaning of the Louisiana Code and decisions. *New Orleans v. Gaines*, 131 U. S. 191, 218, 9 Sup. Ct. 745, 33 L. Ed. 99. The Circuit Court of Appeals suggested doubts respecting the honesty of defendants' motives in seeking or in acting upon advice of counsel; but we cannot ignore the finding of the master explicitly to the effect that the locators proceeded in "moral good faith." His finding was made after hearing and seeing the witnesses and, having support in the evidence, will be accepted here. See *Adamson v. Gilliland*, 242 U. S. 350, 353, 37 Sup. Ct. 169, 61 L. Ed. 356.

[6] *The Norvell Case is sought to be distinguished from the others. It appears that the location covered one hundred and sixty

acres and was made by an association of eight persons. The lands were leased to the Gulf Refining Company upon the same day in pursuance of an understanding had prior to the location. But there is nothing in the federal mining laws which renders such a transaction fraudulent, and a careful reading of the evidence discloses nothing in the circumstances which would make the Louisiana statute as to the measure of damages inapplicable.

[7] Was the lower court right in its conclusion that the Louisiana law was not applicable in an equity suit?

Subject to certain exceptions, the statutes of a state are binding upon the federal courts sitting within the state, as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the federal equity jurisdiction. *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052. That jurisdiction is conferred by the Constitution and laws of the United States and must be the same in all the states. *Neves v. Scott*, 13 How. 268, 14 L. Ed. 140. But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation. See *Missouri, Kansas, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 358, 19 Sup. Ct. 179, 43 L. Ed. 474. In *Brine v. Insurance Co.*, 96 U. S. 627, 639 (24 L. Ed. 858), this court said:

"We are not insensible to the fact that the industry of counsel has been rewarded by finding cases even in this court in which the proposition that the rules of practice of the federal courts in suits in equity cannot be controlled by the laws of the states, is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial

rights *conferred by the statute of a state, or to add to or to take from a contract that which is made a part of it by the law of the state, except where the law impairs the obligation of a contract previously made."

See, also, *Independent District of Pella v. Beard* (C. C.) 83 Fed. 5, 13, where it is said:

"It is undoubtedly true that the United States courts sitting as courts of equity have a freedom of action in this respect which they do not possess as courts of common law, and that, as a general proposition, the equity jurisdiction of the federal courts cannot be limited or restrained by a state. *Green v. Creighton*, 23 How. 90; *Payne v. Hook*, 7 Wall. 430; *Ridings v. Johnson*, 128 U. S. 212, 9 Sup. Ct. 72; *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75. But these decisions relate to the practice, the impairing of jurisdiction, rather than

to the determination of the rights of parties after jurisdiction has been acquired."

[8] Here, while the suit is one in equity, the statute and decisions relied upon have nothing to do with the general principles of equity or with federal equity jurisdiction, but simply establish a measure of damages applicable alike to actions at law and suits in equity. The case presented by the bills is primarily one involving title to land and seeking an injunction against continuing trespasses. The conversion of the oil, for which damages are sought, is incidental and dependent. The entire cause of action is therefore local (*Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913), and the matter of damages within the controlling scope of state legislation. See *Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co.*, 255 Fed. 645, 647, 187 C. C. A. 21. The enforcement of such a statute in an equity suit in no manner trammels or impairs the equity jurisdiction of the national courts.

[9] It was urged upon the argument that section 721 of the Revised Statutes (Comp. St. § 1538), which provides that the laws of the several states shall be regarded as rules of decision in trials at common law in the

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courts of the United States, by implication excludes such laws as rules of decision in equity suits. The statute, however, is merely declarative of the rule which would exist in the absence of the statute. *Bank of Hamilton v. Dudley*, 2 Pet. 492, 525, 7 L. Ed. 496; *Bergman v. Bly*, 66 Fed. 40, 43, 13 C. C. A. 319. And it is not to be narrowed because of an affirmative legislative recognition in terms less broad than the rule. The rule that an affirmative statute, without a negative express or implied, does not take away the common law (*Potter's Dwaris*, 68; *Sedgwick Statutory Construction*, 29, 30) affords an analogy. See *Bailey v. Commonwealth*, 11 Bush (Ky.) 688, 691; *Johnston v. Straus* (C. C.) 26 Fed. 57, 69.

There are numerous cases, both in this court and in the lower federal courts, where the rule has been applied in suits in equity, and while section 721 was not mentioned, it is scarcely possible that it was overlooked. See, for example, *Jackson v. Ludeling*, 99 U. S. 513, 519 (25 L. Ed. 460), a suit in equity, where this court held that a law of Louisiana based upon the civil law, relating to the measure of damages, was controlling. The law there involved was article 2314 of the Civil Code, which provides:

"He to whom property is restored must refund to the person who possessed it, even in bad faith, all he had necessarily expended for the preservation of the property."

The general purpose and principle of that provision and of the provision which is relied upon in the instant case are the same.

[10, 11] The defendants in some of the cases enumerated in the title complain of the action of the master and the District Court in charging against them various sums paid to codefendants as royalties, notwithstanding the fact that the cost of drilling, equipping and operating the wells exceeded the value of the oil extracted, or that the exaction was in addition to the value after deducting such cost. These royalties arose from and were paid out of proceeds of the oil; but this oil belonged to the plaintiff as owner of the property from which it had

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been taken. The defendants who received the royalties were obviously not entitled to retain them, and having incurred no expense in connection with the mining operations, were liable for the entire amount and the defendants who paid the royalties were jointly liable as wrongdoers. A joint judgment against all was therefore proper. In the *Mason Case*, however, the net value of the oil extracted exceeded in amount the royalties paid. The gross value was \$67,732.94, the drilling and operating cost was \$34,067.13, which, being deducted, left the net value of \$33,665.81. Royalties were paid by the producer, the Gulf Refining Company, to its codefendants, amounting to \$11,294.20. The master found and the District Court held that the Gulf Refining Company was liable for the \$33,665.81, and that the recipients of the royalties and the Gulf Refining Company were liable in solido for the additional sum of \$11,294.20, making the total judgment \$44,960.01. We think this was erroneous. For reasons already stated, plaintiff was entitled to recover the amount of the royalties without deduction in any event, but it was not entitled to recover them twice and this is clearly the effect of the decree, the amount of which should be reduced to \$33,665.81.

The District Court reserved the question of the adjustment of equities among the several defendants in respect of the royalties and no doubt an opportunity will be afforded by that court for its presentation and consideration. As to the rights of the respective defendants in that matter, however, we express no opinion.

The decrees of the Circuit Court of Appeals are reversed and those of the District Court are affirmed in all the cases, except that the decree in the *Mason Case* is modified by reducing the amount to \$33,665.81—\$22,371.61 against the Gulf Refining Company and \$11,294.20 against that defendant and the respective royalty recipients in solido—and, as so modified, it is affirmed.

(260 U. S. 561)

JEEMS BAYOU FISHING & HUNTING CLUB et al. v. UNITED STATES.**UNITED STATES v. JEEMS BAYOU HUNTING & FISHING CLUB et al.**

(Argued Nov. 21 and 22, 1922. Decided Jan. 2, 1923.)

Nos. 119, 137.

1. Waters and water courses —89—Patent does not extend to water shown on plat where land was not surveyed.

The rule that, where public lands are patented according to official plat of survey showing meander lines along or near the margin of a body of water, the plat is to be treated as a part of the conveyance, and the water itself constitutes the boundary, does not apply, where the facts conclusively show that no body of water existed or exists at or near the place indicated on the plat, or where there never was, in fact, an attempt to survey the land in controversy.

2. Estoppel —62(2)—United States held not estopped from claiming lands by letters of land officers.

The United States is not estopped from claiming title to the land in controversy because of certain correspondence with the Commissioner of the General Land Office, and an official letter from the Director of the Geological Survey stating that there were no unsurveyed lands in the locality in question.

3. Mines and minerals —7—Innocent trespassers are entitled to credit for cost of producing oil in accounting for oil taken.

Where the land in controversy had been for many years treated by government officials as having been conveyed by patent to defendants' predecessor in title, and defendants were in possession of the land and extracted the oil therefrom in good faith, they were innocent trespassers and entitled to credit for the cost of drilling and operating the wells on the land in an accounting for the value of the oil produced therefrom.

Appeals from the United States Circuit Court of Appeals for the Fifth Circuit.

Suit in equity by the United States against the Jeems Bayou Fishing & Hunting Club and others to confirm the title of plaintiff to certain land, enjoin assertion of claims thereto by defendants, and have an accounting for oil removed therefrom by defendants. Decree for plaintiff, awarding damages for the value of the oil removed, after deducting the cost of drilling and operating the wells, was affirmed by the Circuit Court of Appeals (274 Fed. 18), and both parties appeal. Affirmed.

Messrs. Hampden Story, of Shreveport, La., and Harry T. Klein, of New York City, for Jeems Bayou Fishing & Hunting Club.

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*Mr. Assistant Attorney General Riter, for the United States.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The United States brought suit in equity in the District Court of the United States for the Western District of Louisiana, against the defendants (appellants and cross-appellees here), to have its title to 85.22 acres of land in the parish of Caddo, La., confirmed, possession restored, assertion of claims thereto by defendants enjoined, and an accounting had for the value of oil removed therefrom by the defendants, or any of them.

That court, upon the report of a master, entered a decree for the plaintiff and awarded damages for the value of the oil removed, after deducting the cost of drilling and operating the wells by means of which the oil was recovered.

The case is here by appeal from the decree of the Circuit Court of Appeals, affirming that of the District Court. 274 Fed. 18.

The Fishing & Hunting Club claimed title through mesne conveyances from one Stephen D. Pitts, to whom a patent had been issued in 1860 for the southwest fractional quarter of section 10, in township 20 north, range 16 west, "according to the official plat of the survey of said lands, returned to the General Land Office by the Surveyor General." The other defendants depend upon a lease from the Fishing & Hunting Club to the Producers' Oil Company. The official plat referred to in the Pitts patent was the plat of a survey made by A. W. Warren, in 1839, and approved and filed in the General Land Office the same year. The fractional quarter section described contained about 48 acres, though the patent erroneously gave it as

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23 acres. The land in question lies west and south and immediately adjoining, but other lands still intervene between it and the permanent lake shore. According to the plat, the land so patented to Pitts borders upon Ferry Lake, or Jeems Bayou, a navigable body of water, and is shown on the plat as a small peninsula extending into the water and connected by a narrow neck with the mainland. The evidence which is voluminous and substantially uncontroverted, makes it very clear that no such peninsula exists or existed at the time of the survey in 1839. On the contrary, a later survey, called an extension survey, made in 1916-17 shows that a large compact body of upland, more than 500 acres in extent, which is, and in 1839 was, well timbered with a growth of pine, oak and other trees, lies between this supposititious peninsula and the shore line of the lake in every direction, except for a short distance along the east boundary as delineated upon the plat. This body of land extends beyond the boundaries of section 10 into the adjoining sections 9, 15, and 16. Across the lands in controversy, which are included in the larger body just mentioned, the actual shore line of the lake is, and was

in 1839, from a few hundred feet to three-quarters of a mile distant from the outside boundaries of the land patented to Pitts, as shown on the Warren plat.

The Warren field notes describe the peninsular-shaped tract of land, not by lines purporting to meander the margin of any body of water, but by courses and distances. There is nothing in the field notes to indicate a water boundary, unless as a matter of mere inference, which the most casual inspection of the locality would instantly dissipate. The inaccuracy of the plat is plainly apparent upon a like inspection. Why Warren made the survey and returned the plat as he did is a matter of speculation, but the facts demonstrated that no survey of the large, compact body of land, which includes the tract in controversy, was ever made.

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The circumstances, as well as the *extent and character of the lands, necessitate the conclusion that the omission was of deliberate purpose, or the result of such gross and palpable error as to constitute in effect a fraud upon the government.

[1] The defendants rely upon the rule that where lands are patented according to an official plat of survey, showing meander lines along or near the margin of a body of water, the plat is to be treated as a part of the conveyance and the water itself constitutes the boundary. The rule is familiar and has received the approval of this court many times. *Producers' Oil Co. v. Hanzen*, 238 U. S. 325, 338, 35 Sup. Ct. 755, 59 L. Ed. 1330, and cases cited. But it is not absolute, as this court has also frequently decided. It will not be applied where, as here, the facts conclusively show that no body of water existed or exists at or near the place indicated on the plat or where, as here, there never was, in fact, an attempt to survey the land in controversy. *Security Land & Exploration Co. v. Burns*, 193 U. S. 167, 24 Sup. Ct. 425, 48 L. Ed. 662; *Lee Wilson & Co. v. United States*, 245 U. S. 24, 38 Sup. Ct. 21, 62 L. Ed. 128; *Producers' Oil Co. v. Hanzen*, supra; *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68; *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800; *Chapman & Dewey Lumber Co. v. St. Francis Levee District*, 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. 564.

[2] But it is asserted that plaintiff is estopped from claiming title to the land because of certain correspondence with the Commissioner of the General Land Office, in 1897, wherein that officer said that there were no unsurveyed lands in the locality in question and because of an official letter from the Director of the Geological Survey to the same effect. It is clear, however, that the United States cannot be so estopped. *Lee Wilson & Co. v. United States*, supra; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408, 37 Sup. Ct. 387, 61 L. Ed. 791.

[3] We think the measure of damages adopted by the courts below was correct. The defendants were in possession of the land and extracted the oil therefrom in good

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faith. *The land had been for many years treated by the officials of the government as having been conveyed by the Pitts patent. The defendants were innocent trespassers within the rule laid down by this court in *United States v. St. Anthony Railroad Co.*, 192 U. S. 524, 542, 24 Sup. Ct. 333, 48 L. Ed. 548. Moreover, the case is governed in this respect by the more liberal rule of the Louisiana Civil Code (article 501), as interpreted by the decisions of the highest court of that state. *Mason et al. v. United States*, 260 U. S. 545, 43 Sup. Ct. 200, 67 L. Ed. —, this day decided.

The decree of the Circuit Court of Appeals is affirmed.

(260 U. S. 584)

**AMERICAN RY. EXPRESS CO. v.
LINDENBURG.**

(Argued Dec. 4, 1922. Decided Jan. 8, 1923.)

No. 138.

1. Carriers ⇐163—Proof that tariff was filed with Interstate Commerce Commission and charges based thereon held to raise presumption of authority to establish rates dependent on declared values.

Proof that an express company had filed with the Interstate Commerce Commission a tariff, specifically referring to an order of the Commission in proceedings to which the express company was not a party, which permitted a limitation of liability to a stated value, and containing the form of receipt therein authorized, and that thereafter it made its charges in conformity with tariff, raises a presumption that the express company was authorized by the Commission to establish and maintain rates dependent on declared or agreed values.

2. Evidence ⇐69—Act creates presumption of performance of prior act necessary to render it legal.

Where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it the presumption of due performance of the prior act.

3. Carriers ⇐35—Separable void provisions of receipt as to limitation of liability held not to affect valid provision.

Provisions in an express company's receipt for a shipment which were invalid under the Cummins Amendment, as amended by Act August 9, 1916 (Comp. St. § 8604a), such as limitation of the carrier's liability to transportation over its own lines, but which were separable from the provision permitted by that amendment, limiting the liability to a stated value, unless greater value was declared, do not invalidate the latter provision.

4. Carriers ⚡153—Acceptance of receipt without signature binds shipper to limited valuation.

Under the Cummins Amendment (Comp. St. §§ 8592, 8604a), permitting the carrier to limit its liability to a stated value, unless a greater value is declared in writing by the shipper or agreed on in writing as the released value of the property, it is not essential that an express receipt limiting the liability to the basic valuation in consideration of the reduced rate be signed by the shipper to be binding on him, though such signature would be additional evidence of his agreement, but his acceptance of the receipt, the contents of which he is presumed to know, is an assent to its terms, so as to make it the written agreement of the parties.

5. Carriers ⚡158(2)—Shipper, accepting lesser rate, is estopped from asserting higher value.

A shipper, who takes advantage of the lower rate offered by a carrier for a shipment of limited valuation, is estopped, after the loss or damage of the goods, to assert that they were of greater value.

On Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia.

Action by A. J. Lindenburg against the American Railway Express Company. Judgment for plaintiff was affirmed by the Supreme Court of West Virginia (88 W. Va. 439, 106 S. E. 884), and defendant brings certiorari. Reversed and remanded.

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*Messrs. A. M. Hartung, of New York City, and D. C. T. Davis, Jr., of Charleston, W. Va., for petitioner.

Messrs. E. B. Dyer and Morgan Owen, both of Charleston, W. Va., for respondent.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

On July 22, 1918, at Indianapolis, Ind., respondent caused to be delivered to petitioner two trunks weighing 200 pounds and 100 pounds, respectively, and a package weighing 10 pounds, for transportation to him at Charleston, W. Va. A receipt was given for the property, which recited that its terms and conditions were agreed to by the shipper. The receipt, among other things, stipulated that in no event—

"shall this company be held liable or responsible, nor shall any demand be made upon it beyond the sum of fifty dollars upon any shipment of 100 pounds or less, and for not exceeding 50 cents per pound upon any shipment weighing more than 100 pounds, and the liability of the express company is limited to the value above stated unless the just and true value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under this company's schedule of charges for excess value."

This receipt was produced at the trial and put in evidence by the respondent in support

of his action. At the time of the shipment the value of the property was neither stated by the respondent nor demanded by the petitioner. The charges paid were on the basis of the limited liability set forth in the receipt.

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One of the trunks when delivered *at destination was in bad order, some of the goods therein being damaged and others destroyed. Respondent alleged damages in the sum of \$1,500. Petitioner answered, admitting liability for \$110, under the terms of the receipt. The trial court gave judgment for \$916.15, which the state appellate court affirmed. 88 W. Va. 439, 106 S. E. 884. The case is here on certiorari.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441 (Comp. St. § 8604a). The amendment requires every common carrier receiving property for interstate transportation to issue a receipt or bill of lading, and makes it liable for the full, actual loss, damage or injury to such property caused by it or any connecting carrier participating in the transportation on a through bill of lading, notwithstanding any limitation of liability of the amount of recovery or representation or agreement as to value. Any such attempted limitation is declared to be unlawful and void. Then follows a proviso, which appears in full in the margin,¹ and the question for determination is whether, under the facts, the case is within its terms.

The Interstate Commerce Commission on April 2, 1917, in a proceeding wherein the Adams Express Company and a number of other express companies (but not including

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*this petitioner) were parties, made an order

¹ "Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation."

in conformity with this proviso, authorizing the express companies to maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property. The basic rate to be established was upon a valuation not exceeding \$50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound for any shipment in excess of 100 pounds, the rates to be progressively increased with increased valuations. The express companies were further authorized, after notice, to amend the terms and conditions of the uniform express receipt in accordance with a form prescribed.

The new form, so prescribed, contained a provision to the effect that "in consideration of the rate charged for carrying the property, which rate is dependent upon the value thereof and is based upon an agreed valuation of not exceeding \$50 for a shipment of 100 pounds or less, and not exceeding 50 cents per pound for any shipment in excess of 100 pounds," the shipper agrees, unless a greater value be declared at the time of shipment, that the company shall not be liable in any event for more than these amounts. At the time of the shipment, the evidence shows there was in effect a tariff of petitioner governing transportation between Indianapolis

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and Charleston, duly published and filed *with the Interstate Commerce Commission, setting forth the form of receipt prescribed by the Commission, and that the charges made were in accordance with this tariff. The receipt issued by petitioner, it will be seen, limits the liability of the petitioner, not in the precise words of, but substantially in accordance with, the provision contained in the receipt authorized by the Commission; but it was upon an old form which had been used previous to the order of the Commission and contained some conditions which were contrary to and declared to be void by the Cummins Amendment (Comp. St. §§ 8592, 8604a). Neither the receipt nor any declaration or agreement was signed by respondent or by any one in his behalf.

The judgment of the state appellate court is made to rest upon the sole ground that petitioner did not take from the shipper a written declaration of value or a written agreement as to value *signed by him*. Respondent here seeks to justify the judgment upon other grounds as well, and these we first consider.

[1] In the first place, it is said that petitioner was never expressly authorized or required by the Interstate Commerce Commission to establish or maintain rates dependent upon declared or agreed values. It is true the order of the Commission, hereinbefore referred to, was made in a proceeding in which petitioner's name did not appear, but petitioner subsequently published and filed with the Commission a tariff, specifically re-

ferring to the order of the Commission in that proceeding and containing the form of receipt therein authorized, which tariff was in effect at the time of the shipment, and had been in effect for more than a year prior thereto. The transportation charges were in conformity with the tariff, and the receipt issued, in so far as the limitation of liability is concerned, was in substantial accord with the authorized receipt. The petitioner appears to have proceeded upon the assumption that the publication and filing of the tariff

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were *authorized by the Commission's order, and there is nothing in the record to indicate that the Commission did not so regard it. A copy of the tariff, certified by the secretary of the Commission, was put in evidence. If these facts do not warrant the logical inference of a grant of authority they do afford the basis for a legal presumption to that effect, for, if petitioner was not duly authorized by the Commission, its action in attempting to limit its liability was unlawful, and, as this court said in *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Rankin*, 241 U. S. 319, 327, 36 Sup. Ct. 555, 558 (60 L. Ed. 1022, L. R. A. 1917A, 265):

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct."

[2] It is a rule of general application that:

"Where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act." *Knox County v. Ninth National Bank*, 147 U. S. 91, 97, 13 Sup. Ct. 267, 37 L. Ed. 93. See also *New York Central, etc., R. R. v. Beaham*, 242 U. S. 148, 151, 37 Sup. Ct. 43, 61 L. Ed. 210; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752; *Insurance Co. v. Plummer*, 70 Me. 540, 544.

In the absence of proof to the contrary, we therefore indulge the presumption that in basing its transportation charges upon the values recited in the receipt, the petitioner had due authority.

[3] It is next contended that the receipt which was issued was unlawful and void because it contained conditions forbidden by the Cummins Amendment and prior statutes, the principal condition being a limitation of the carrier's liability to its own routes or

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lines. But it does not appear *that the shipment in question came within the terms of any of these conditions or that the obligations of petitioner in respect of the matter were in any way affected thereby. Assuming their unlawful character, there is no difficulty in

separating them from the condition limiting the liability by the declared valuation. We do not, therefore, deem it necessary to inquire in respect of the nature or extent of these alleged unlawful conditions, since, in any event, their presence would not have the effect of rendering unenforceable the severable, valid provision here relied upon. *McCullough v. Virginia*, 172 U. S. 102, 113, 19 Sup. Ct. 134, 43 L. Ed. 382; *United States v. Bradley*, 10 Pet. 343, 260, 9 L. Ed. 448; *Chicago, etc. Co. v. Pullman Car Co.*, 139 U. S. 79, 91, 11 Sup. Ct. 490, 35 L. Ed. 97. In *Pickering v. Ilfracombe Railway Company*, L. R. 3, C. P. C. 235, 250, the rule is stated by Willes, J., as follows:

"The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

See also *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 185, 26 Sup. Ct. 208, 50 L. Ed. 428.

[4] We come now to the point on which the judgment of the state appellate court is grounded. That court held that the petitioner should have given the shipper—

"a receipt specifying the value fixed by himself, and evidenced by his signature. * * * A writing not signed by him, although specifying value, was not a declaration or agreement in writing by him." 88 W. Va. 439, 443, 444, 106 S. E. 884, 886.

Neither the statute nor the order of the Commission requires the signature of the shipper. The pertinent words of the statute are:

"* * * Rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value. * * *"

It is not to be supposed that the Commission would attempt to add anything to

the substantive requirements of the statute, and its order does not purport to do so; but the form of receipt which the express companies were authorized to adopt contains a recital to the effect that as evidence of the shipper's agreement to the printed conditions he "accepts and signs this receipt," and a blank space is provided for his signature. Naturally, such signature would be desirable as constituting the most satisfactory evidence of the shipper's agreement, but it is not made a prerequisite without which no agreement will result, and a subsequent report of the Commission on the subject of bills of lading is persuasive evidence that there was no such intention. Bills of Lading, 52 Interst. Com. Com'n R. 681, where it is said:

"It is sufficient if the shipper accepts the carrier's bill of lading without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading."

[5] The respondent, by receiving and acting upon the receipt, although signed only by the petitioner, assented to its terms and the same thereby became the written agreement of the parties. *McMillan v. Railroad Co.*, 16 Mich. 79, 93 Am. Dec. 208; *The Henry B. Hyde (D. C.)* 82 Fed. 681. In the absence of a statutory requirement, signing by the respondent was not essential. *Missouri, Kansas & Texas Railway v. McCann*, 174 U. S. 580, 590, 19 Sup. Ct. 755, 43 L. Ed. 1093; *Inman & Co. v. Seaboard Air Line Ry. (C. C.)* 159 Fed. 960, 966. His signature, to be sure, would have brought into existence additional evidence of the agreement but it was not necessary to give it effect. See *Girard Life Insurance Co. v. Cooper*, 162 U. S. 529, 543, 16 Sup. Ct. 879, 40 L. Ed. 1062. And his knowledge of its contents will be presumed. *Cau v. Texas & Pacific Railway Co.*, 194 U. S. 427, 431, 24 Sup. Ct. 663, 48 L. Ed. 1053; *Kansas City Southern Railway Co. v. Carl*, 227 U. S. 639, 652, 653, 656, 33 Sup. Ct. 391, 57 L. Ed. 683. "The receipt which was accepted showed that the charge made was based upon a valuation of \$50 unless a greater value should be stated therein. The

*592 knowledge of the shipper *that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." *Adams Express Co. v. Croninger*, 226 U. S. 491, 508, 509, 510, 33 Sup. Ct. 148, 153 (57 L. Ed. 314, 44 L. R. A. [N. S.] 257). Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing. *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 340, 5 Sup. Ct. 151, 28 L. Ed. 717; *Adams Express Co. v. Croninger*, supra. In *Kansas City Southern Railway Co. v. Carl*, supra, this court said:

"To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

The judgment of the state appellate court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

(260 U. S. 568)

FEDERAL TRADE COMMISSION v. CURTIS PUB. CO.

(Argued Nov. 17, 1922. Decided Jan. 8, 1923.)

No. 86.

1. Trade-marks and trade-names and unfair competition $\S$ 80 $\frac{1}{2}$, New, vol. 8A Key-No. Series—Whether method is unfair competition, or agreement tends to create monopoly, is for the court.

The ultimate determination of what constitutes unfair competition in interstate commerce, and whether the leases, sales, agreements, or understandings substantially lessen competition or tend to create monopoly, is for the court, and not for the Trade Commission.

2. Trade-marks and trade-names and unfair competition $\S$ 80 $\frac{1}{2}$, New, vol. 8A Key-No. Series—Court need not remand to commission for further findings, if circumstances show justice requires decision.

Under the Federal Trade Commission Act (Comp. St. §§ 8836a-8836k), making the findings of fact supported by evidence conclusive, but granting jurisdiction to the Circuit Court of Appeals to make and enter, on the pleadings, testimony, and proceedings, a decree affirming, modifying, or setting aside an order of the commission, the court can examine the whole record, and ascertain whether there are material facts not reported by the commission, and if there is substantial evidence relating to such facts, from which different conclusion reasonably might be drawn, the matter should be remanded to the commission to make additional findings; but if, from all the circumstances, it clearly appears that in the interest of justice the controversy should be decided without further delay, the court has full power to do so.

3. Monopolies $\S$ 17(2)—Contracts with distributors held agency and not sales agreements.

Contracts between a publisher and a large number of distributors, some of whom had been wholesale dealers in magazines and others not, whereby the distributors agreed to requisition from the publisher the number of magazines required for their territory, title to remain in the publisher until sold, and to train and supervise boys who were to sell the magazines, are contracts of agency and not of sale on condition, so that they do not violate Clayton Act, § 3 (Comp. St. § 8835c), prohibiting lease or sale contracts which prohibit the lessee or buyer from handling the product of competitors, even though the contracts contained clauses prohibiting the distributors from handling other magazines, unless with the consent of the publisher.

4. Trade-marks and trade-names and unfair competition $\S$ 68—Employment of exclusive agents is not "unfair competition."

The employment of competent agents obligated to devote their entire time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, is not unfair competition, within Federal

Trade Commission Act, § 5 (Comp. St. § 8836e).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]

Mr. Chief Justice Taft and Mr. Justice Brandeis, doubting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Complaint by the Federal Trade Commission against the Curtis Publishing Company. An order of the Commission requiring the company to desist from entering into certain contracts or enforcing certain provisions of outstanding contracts was set aside by the Circuit Court of Appeals (270 Fed. 881), and the Commission brings certiorari. Affirmed.

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*Mr. Solicitor General Beck and Adrian F. Busick, both of Washington, D. C., for petitioner.

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*Mr. John G. Milburn, of New York City, for respondent.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The court below entered a decree setting aside an order of the Trade Commission, dated July 21, 1919, which directed respondent Publishing Company to cease and desist from entering into or enforcing agreements prohibiting wholesalers from selling or distributing the magazines or newspapers of other publishers. (C. C. A.) 270 Fed. 881. And the cause is here by certiorari.

The commission issued an original complaint July 5, 1917, based mainly on a restrictive clause in existing contracts with so-called district agents. Thereafter respondent changed its agreement. An amended complaint followed, which amplified the original allegations and attacked the second contract and consequent conditions.

The first section of the amended complaint declares there is reason to believe that respondent has been and is using unfair methods of competition contrary to section 5, Act of Congress approved September 26, 1914, c. 311, 38 Stat. 717 (Comp. St. §§ 8836a-8836k),¹

¹ Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said com-

and specifically charges: That respondent, a

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*Pennsylvania corporation with principal place of business at Philadelphia, has long engaged in publishing, selling and circulating weekly and monthly periodicals in interstate commerce. That with intent, purpose and effect of suppressing competition in the publication, sale and circulation of periodicals it now refuses and for some months past has refused to sell its publications to any dealer who will not agree to refrain from selling or distributing those of certain competitors to other dealers or distributors. That with the same intent, purpose and effect it is making

and for several months last past has made contracts with numerous wholesalers to distribute its periodicals as agents, and not to distribute those of other publishers without permission. That wholesalers so restricted are the principal and often the only medium

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for proper distribution of weekly and *monthly periodicals in various localities throughout the United States, and many of the so-called agents formerly operated under contracts with respondent which abridged their liberty of resale.

The second section declares there is reason to believe respondent is violating section 3, Act of Congress approved October 15, 1914

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(Clayton Act) c. 323, 38 Stat. 730,² and *specifically charges: That respondent publishes, sells and circulates weekly and monthly periodicals in interstate commerce. That for some months past, in such commerce, it has sold and is now selling and making contracts for the sale of its publications and periodicals for use and resale and is fixing the price charged on condition, agreement or understanding that the purchaser shall not sell other publications or periodicals, thereby substantially lessening competition and tending to create a monopoly.

Respondent replied to the notice to show cause why it should not be required to desist "from the violations of law charged in this complaint." It denied unlawful conduct and claimed that the parties contracted with as agents were such in fact; that their services were necessary for the maintenance of the plan originated by it of distributing publications through school boys, who require special superintendence; and further, that such agents had lawfully agreed to abstain from other connections and devote their time and attention to superintending the boys and to the general upbuilding of sales. Copies of respondent's first and second agreements with distributors accompanied the answer. The first had then been superseded and largely discontinued.

plaint. The person, partnership or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. * * * If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. * * *

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. * * *

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

² Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Comp. St. § 8335c.

Section 11 (Comp. St. § 8335f) authorizes the Trade Commission to enforce section 3, with certain exceptions, and directs that this shall be done as prescribed by the act establishing the commission, supra, with like power of review in the courts.

The second contract provides that upon requisition respondent will consign its publications to the agent as he may require, retaining title until they are sold; that the agent will supply the demand of boys and dealers at specified prices, and will use reasonable ef-

orts and devote all necessary time to promoting the sales of such publications; "that without the written consent of the publisher he will not display, deliver, or sell any copies of any one of said publications before the authorized publication date, as specified in the printed requisition blanks, or dispose of any copies of said publications in the territory of any other district agent or special agent of the publisher, or *act as agent for or supply at wholesale rates any periodicals other than those published by the publisher, or directly or indirectly furnish to any other publisher or agent the names and addresses of the persons to whom the publisher's publications are sold or delivered;*" that subject to the principal's direction and control the agent shall train, instruct and supervise an adequate force of boys for distributing the publications; and that he will return unsold copies, their cover pages or headings.

After taking much testimony—2,500 pages—the commission made a brief and rather vague report of 2 pages, containing findings and conclusions based on the second contract with dealers and without direct reference to the earlier one. The substance of the report follows:

Paragraph 1. Respondent, a Pennsylvania corporation with principal place of business at Philadelphia, is engaged in publishing, selling and distributing weekly and monthly periodicals among the states.

Paragraph 2. "That in the course of such commerce, the respondent has entered into contracts with certain persons, partnerships, or corporations to sell or distribute its magazines by the terms of which contracts, such persons, partnerships, or corporations, have agreed, among other things, *not to 'act as agent for or supply at wholesale rates, any periodicals other than those published by the publisher's—the respondent herein—without the written consent of*

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such publisher, that of such persons, partnerships, or corporations, approximately, four hundred forty-seven (447), hereinafter referred to as 'dealers,' are and previous to entering into such contracts with respondent were regularly engaged in the business of wholesale dealers in newspapers or magazines, or both and as such are as aforesaid engaged in the sale or distribution of magazines, or newspapers, or both, of other publishers; that many of said four hundred forty-seven (447) dealers, and many others who have become such wholesale dealers since entering into such contracts, bound by said contract provisions as aforesaid, have requested respondent's permission to engage also in the sale or distribution of certain publications competing in the course of said commerce, with those of respondent, which permission as to said*

competing publications has been uniformly denied by respondent; that in enforcing said contract provision as to said dealers, and in denying them said permission, respondent has prevented and now prevents certain of its competitors from utilizing established channels for the general distribution or sale of magazines or newspapers, or both, of different and sundry publishers; that such established channels are in most instances the principal and most efficient, and in numerous cases, the only medium for the distribution of such publications in the various localities of the United States; that such method of competition so employed by respondent in the course of such commerce, as aforesaid, has proved and is unfair."

Paragraph 3. "That in the course of such commerce, the respondent has made sales of its magazines to, or entered into contracts for the sale of the same with certain persons, partnerships, or corporations, by the terms of which sales or contracts for such sales, such persons, partnerships, or corporations have agreed, among other things:" [here follow, without material change, the words of paragraph 2 printed supra in italics.] That the effect of said contract

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provision has been, and is, to substantially lessen competition with respondent's magazines and tends to create for the respondent a monopoly in the business of publishing magazines of the character of those published by respondent."

The commission concluded that the method of competition described in paragraph two of the report violates section 5, Act of September 26, 1914, and that the acts and conduct specified in the third paragraph violate section 3, Act of October 15, 1914. And it thereupon ordered; That the respondent cease and desist, while engaged in interstate commerce, from entering into any contracts, agreements or understandings which forbid persons, partnerships or corporations already engaged in the sale or distribution of magazines or newspapers, or both, of other publishers from acting as agents for, selling or supplying to others at wholesale rates periodicals other than respondent's without its consent; from contracting with those already engaged in the sale or distribution of magazines or newspapers, or both, of other publishers, forbidding them from selling or distributing or continuing to sell or distribute the same; and from enforcing any provision of an outstanding contract whereby one now engaged in the sale or distribution of magazines or newspapers, or both, of other publishers is forbidden to sell or distribute the same without respondent's permission.

The statute provides (section 5) that when the commission's order is duly challenged it shall file a transcript of the record, and thereupon the court shall have jurisdiction of the proceedings and the question determined therein and shall have power to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside the order; but the commission's findings as to the facts, if supported by evi-

* These words are quoted from the second contract.

dence, shall be conclusive. The court is also empowered to order the taking of additional evidence for its consideration.

[1] We have heretofore pointed out that the ultimate determination of what consti-

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tutes unfair competition is for *the court, not the commission; and the same rule must apply when the charge is that leases, sales, agreements or understandings substantially lessen competition or tend to create monopoly. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427, 40 Sup. Ct. 572, 64 L. Ed. 993.

[2] Manifestly, the court must inquire whether the commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears, that in the interest of justice the controversy should be decided without further delay, the court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the *Interstate Commerce Act* (24 Stat. 379). *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U. S. 648, 675, 676, 20 Sup. Ct. 209, 44 L. Ed. 309, *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29, 32, 21 Sup. Ct. 512, 45 L. Ed. 729, and *Interstate Commerce Commission v. Chicago, Burlington & Quincy Railroad Co.*, 186 U. S. 320, 340, 22 Sup. Ct. 824, 46 L. Ed. 1182, while helpful as to proper practice, do not determine the present problem.

Here we find a vague general complaint charging unfair methods of competition and also sales and contracts for sales on condition that the purchaser shall not deal in other publications. This is followed by an answer setting out the original agreement with dealers and also the substituted form.

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The findings of fact make no reference whatever to the first agreement, but do show that respondent had entered into the second (quoting its language) with "certain" (no number is given, but there were 1,535) persons, partnerships and corporations, approximately 447 of whom before making such contracts were wholesale dealers in newspapers and magazines. Further, that many of this 447, as well as other parties to such contracts, have been denied permission to distribute the pe-

riodicals of other publishers. And that in these ways the most efficient established channels of distribution have been closed to competitors, competition lessened and a tendency to monopoly established.

The present record clearly discloses the development of respondent's business, how it originated the plan of selling through school-boys, the necessity for exclusive agents to train and superintend these boys and to devote their time and attention to promoting sales, and also contracts with 1,535 such agents. The commission's report suggests no objection as to 1,088 of these representatives who, prior to their contracts, had not been engaged in selling and distributing newspapers or periodicals for other publishers. There is no sufficient evidence to show that respondent intended to practice unfair methods, or unduly to suppress competition, or to acquire monopoly, unless this reasonably may be inferred from making and enforcing the second or substituted agreement with many important wholesale dealers throughout the country.

[3] Judged by its terms, we think this contract is one of agency, not of sale upon condition, and the record reveals no surrounding circumstances sufficient to give it a different character. This, of course, disposes of the charges under the *Clayton Act*.

[4] The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the

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exclusion of all others, where nothing else appears, has long been recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow, because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute.

In the present cause the Commission has not found all the material facts, but considering those which it has found and the necessary effect of the evidence, the order to desist

is clearly wrong and should be set aside without further delay.

Affirmed.

Mr. Chief Justice TAFT, doubting.

The sentence in the majority opinion, which makes me express doubt, is that discussing the duty of the court in reviewing the action of the Federal Trade Commission when it finds that there are material facts not reported by the commission. The opinion says:

"If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and

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ordinarily we think, should *be remanded to the commission—the primary fact-finding body—with directions to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without delay, the court has full power under the statute so to do."

If this means that, where it clearly appears that there is no substantial evidence to support additional findings necessary to justify

the order of the commission complained of, the court need not remand the case for further findings, I concur in it. It is because it may bear the construction that the court has discretion to sum up the evidence pro and con on issues undecided by the commission, and make itself the fact-finding body, that I venture with deference to question its wisdom and correctness. I agree that, in the further discussion of the evidence, the reasoning of the opinion of the court would seem to justify the view that it does not find in the evidence sufficient to support additional findings by the commission justifying its order. I only register this doubt because I think it of high importance that we should scrupulously comply with the evident intention of Congress that the Federal Commission be made the fact-finding body and that the court should in its rulings preserve the board's character as such, and not interject its views of the facts where there is any conflict in the evidence.

I am authorized to say that Mr. Justice BRANDEIS concurs with me in this.

(260 U. S. 596)

**SNAKE CREEK MINING & TUNNEL CO.
v. MIDWAY IRR. CO. et al.**

(Argued Oct. 17, 1922. Decided Jan. 15, 1923.)

No. 68.

Waters and water courses  **140—Prior appropriator from stream has right to percolating waters forming source of supply.**

Under Laws Utah 1880, c. 20, § 6, recognizing the right to appropriate water from any natural source of supply, which right was confirmed by Const. Utah, art. 17, § 1, and was assented to by Congress, so far as the public lands were concerned, by Act July 26, 1866, c. 262, § 9 (Comp. St. § 4647), Act July 9, 1870, c. 235, § 17 (Comp. St. § 4648), and Act March 3, 1877, c. 107 (Comp. St. § 4674), the common-law rule that the owner of land has the right to all percolating waters therein not flowing in any defined channel is not recognized, and appropriators of the waters of a stream for irrigation purposes are entitled to percolating waters discharged from a mining tunnel located after the appropriation, where those waters would otherwise eventually reach the stream and form an important source of its supply.

On writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Snake Creek Mining & Tunnel Company against the Midway Irrigation Company and others to quiet title to water rights. A decree for the plaintiff was reversed by the Circuit Court of Appeals, and decree directed for the defendants (271 Fed. 157), and plaintiff brings certiorari. Affirmed.

Mr. H. R. Macmillan, of Salt Lake City, Utah, for petitioner.

Messrs. A. B. Irvine and Wm. H. Folland, both of Salt Lake City, Utah, for respondents.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

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*This is a suit to determine conflicting claims to underground waters collected and brought to the surface by a mining tunnel in Utah. The plaintiff (petitioner here) is a mining company incorporated in Delaware and the defendant an irrigation company incorporated in Utah. Each seeks to have the right to use the waters quieted in itself as against the other. The District Court, with some hesitation, gave a decree for the mining company, which the Circuit Court of Appeals reversed, with a direction that one for the irrigation company be given. Midway Irr. Co. v. Snake Creek Mining & Tunnel Co., 271 Fed. 157. A writ of certiorari brings the case here. 256 U. S. 687, 41 Sup. Ct. 536, 65 L. Ed. 1172.

The mining company owns and operates

a mine in a mountain along a tributary of the Provo river and, in furtherance of its mining operations, has driven a tunnel 14,500 feet into the mountain from a portal near the stream. The tunnel intercepts and collects waters percolating through the bosom of the mountain and conveys them to the portal, whence they now flow into the stream. The tunnel was begun in 1910, and these waters are intercepted and collected along its course after it gets well into the mountain. The mining company owns a tract of land surrounding the portal, and we assume it has a right of way for the tunnel beyond that tract, although this does not appear. It has not used and does not now use any of the waters in connection with its tunnel or mine, but asserts an exclusive right to them, and has arranged, and is intending, to sell to others the right to use them for irrigating distant lands.

The irrigation company is a corporate agency of a community of farmers, and holds, controls, and administers for their mutual advantage the water rights which enable them to irrigate and cultivate their lands, all of which are naturally arid. Long prior to the driving of the tunnel, and while the lands through which it extends

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were *public lands of the United States, the irrigation company or its stockholders appropriated all the waters of the stream for irrigation and other beneficial uses; and under that appropriation these waters long have been applied and devoted to such uses on the lands of the stockholders some distance down stream from the portal of the tunnel.

The waters intercepted and collected by the tunnel are percolating waters, which before it was driven found their way naturally, but not in a defined channel, through the rocks, gravel, and soil of the mountain into open springs near the stream, and thence by surface channels into the stream. At all seasons this was one of the stream's sources of supply, and in the late summer and early fall one of its most dependable sources. The amount of water so naturally finding its way underground into the springs, and thence into the stream, has been materially diminished by the tunnel; the diminution conforming substantially to the discharge at the portal. All the natural flow of the stream as it was before the tunnel was driven is required to satisfy the prior appropriation of the irrigation company or its stockholders, and to irrigate the lands of the latter, to which it long has been applied, and, unless the waters so intercepted and collected by the tunnel be permitted to flow from its portal into the stream in such way that they can be used under the prior appropriation, a material part of the lands heretofore reclaimed and

irrigated thereunder will be without water, and their cultivation must be discontinued.

Several questions were presented to and decided by the Circuit Court of Appeals, but only one merits discussion here. It is whether under the law of Utah the waters which the tunnel intercepts, collects, and conveys to its portal belong to the mining company or are within the appropriation

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made by the irrigation company or its *stockholders before the lands through which the tunnel extends became private lands.

The parties, while agreeing that the Utah law is controlling, differ as to what that law is. On the part of the mining company it is contended that, when the tunnel site was acquired and the tunnel driven, Utah had adopted and was applying the common-law rule respecting underground waters; that by that rule such waters, where not moving in a known and defined channel, are part of the land in which they are found and belong absolutely to its owner; and that, if the law of Utah in this regard has since been changed, rights vested before the change are not affected by it. On the part of the irrigation company it is insisted that the common law rule never was adopted or in force in Utah; that her law always has regarded waters percolating underground, where within the public lands, as open to appropriation for irrigation or other beneficial uses, subject only to a reasonable use of them in connection with the land in which they exist by whoever may come to own it; and that her law likewise has regarded an appropriation of the natural flow of a surface stream as reaching and including its underground sources of supply within the public lands, subject only to the qualification just indicated.

Both courts below experienced some embarrassment in solving this question of Utah law; the District Court observing that the Supreme Court of the state, although having the question before it a number of times, "has never definitely announced its adherence" to either view, and the Circuit Court of Appeals that the early decisions, although "not always harmonious," "seem to have favored the English rule," while the later decisions have given effect to the other view. That there was some basis for the embarrassment is plain. Particularly was this true when the District Court made its ruling. Thereafter, and before the ruling by

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the Circuit Court of Appeals, the *situation was partly clarified by two decisions in the state court,¹ and it now has been further clarified by two still later decisions in that court.²

¹ Stookey v. Green, 53 Utah, 311, 173 Pac. 586; Rasmussen v. Moroni Irrigation Co., 56 Utah, 140, 183 Pac. 572.

² Peterson v. Lund, 57 Utah, 162, 193 Pac. 1987; Horne v. Utah Oil Refining Co. (Utah) 202 Pac. 815.

Utah is within the semiarid region of the West, where irrigation has been practiced from the time of the earliest settlements and is indispensable to the cultivation of the lands. She was made a territory in 1850 and became a state January 4, 1896. While she was a territory and most of the lands within her borders were part of the public domain, Congress passed three acts which require notice.

The Act of July 26, 1866, c. 262, 14 Stat. 251 (Comp. St. § 4647), provided, in its ninth section:

"Wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

The Act of July 9, 1870, c. 235, 16 Stat. 217, declared, in its seventeenth section (Comp. St. § 4648), that "all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights" recognized by the provision of 1866. And the Act of March 3, 1877, c. 107, 19 Stat. 377 (Comp. St. § 4674), after providing for the sale of desert lands in small tracts to persons effecting the reclamation thereof by an actual appropriation and use of water, declared that:

"All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for

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irrigation, mining and manufacturing *purposes subject to existing rights."

This court has said of these enactments that:

"The obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention of the common-law rule, which permitted the appropriation of the waters for legitimate industries."

By an Act of February 20, 1880, the legislative assembly of the territory declared (Laws 1880, c. 20, § 6):

"A right to the use of water for any useful purpose, such as * * * irrigating lands, * * * is hereby recognized and acknowledged to have vested and accrued, as a primary right, * * * under any of the following circumstances: First—Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake, or spring, or other natural source of supply. * * *"

It was in the presence of these enactments, congressional and territorial, and prior to any decision thereon in Utah, that the ir-

rigation company or its stockholders made the appropriation in question.

The first case in Utah involving rights asserted under an appropriation such as is described in these enactments was *Stowell v. Johnson*, 7 Utah, 215, 26 Pac. 290. The controversy was between one who relied on such an appropriation from a surface stream and another who owned lands along a lower section of the stream and was relying on the common-law doctrine of riparian rights. The Supreme Court of the territory sustained the appropriation and distinctly held that the common-law doctrine was not applicable to the conditions in the territory and never was in force there. On the latter point the court said (7 Utah, 225, 26 Pac. 291):

"Riparian rights have never been recognized in this territory, or in any state or territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian propri-

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torship. If that had been recognized and applied in this territory, it would still be a desert; for a man owning 10 acres of land on a stream of water capable of irrigating 1,000 acres of land or more, near its mouth, could prevent the settlement of all the land above him. For at common law the riparian proprietor is entitled to have the water flow in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation. The Legislature of this territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable, and have never regarded it."

This ruling has been reaffirmed but never recalled or qualified.

The next case was *Sullivan v. Northern Spy Mining Co.*, 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186. It involved an asserted appropriation of underground water, not in a known or defined channel. At the time of the appropriation the land where the water was found was public land. Afterwards the land was located and patented under the public land laws. The appropriator continued, as before, to take and use the water, and the owner of the land challenged the appropriation and sued to recover damages as for a trespass. In stating the question for decision, the territorial court said:

"The federal government, as proprietor of the public lands, early recognized the necessity of permitting persons in this arid region to acquire an interest in water sources on the public lands distinct from the lands themselves. It had always been the settled law that the owner of land was likewise the owner of all waters situate thereon or percolating therein. This may be said to have been the universal rule in the United States, prior to the settlement of California. Local decisions, arising from the necessities of the people, soon altered it there,

and in 1866 Congress passed an act," etc. "The question is, then, Is the right of defend-

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ant to use water, under the facts stated, *one that is recognized by the local customs and laws?"

The court reviewed the enactments we have set forth above, said they should not be narrowly construed, and held (11 Utah, 443, 40 Pac. 710, 30 L. R. A. 186):

"In our opinion, wherever the industry of the pioneer has appropriated a source of water, either on the surface of or under the public lands, he and his successors acquire an easement and right to take and use such water to the extent indicated by the original appropriation, and that a private owner who subsequently acquires the land takes it burdened with this easement, and we also hold that this easement carries with it such rights of ingress and egress as are necessary to its proper enjoyment."

But, notwithstanding this very definite pronouncement, the court, in concluding its opinion, added (11 Utah, 444, 40 Pac. 710, 30 L. R. A. 186):

"This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on his own premises although he should thereby dry up that of the first appropriator."

This addendum was inconsistent with the principal decision and, so far as appears, was not necessary to a full disposal of the case. With this comment it may be put out of view, for the court afterwards declared it dictum.³

Shortly after the decision in that case came the constitution of the state which says (article 17, § 1):

"All existing rights to the use of any of the waters in this state for any useful or beneficial purpose, are hereby recognized and confirmed."

The next case to engage the court's attention was *Crescent Mining Co. v. Silver King Mining Co.*, 17 Utah, 444, 54 Pac. 244, 70 Am. St. Rep. 810. It presented a controversy between two mining companies over percolating water intercepted and collected by a tunnel. One company had driven the tunnel into two patented mining claims of which it was the owner and had been permitting the water

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to flow from the portal into a *so-called lake. The water was not a natural source of supply for the lake, nor had it been in any way appropriated before the mining claims were patented and the tunnel driven. After it began flowing through the tunnel, and thence into the lake the other company attempted to appropriate it at the lake by diverting it therefrom and using it. The company owning the tunnel challenged that appropriation and proceeded to use the water for purposes which prevented it from flowing

³ *Stokey v. Green*, 53 Utah, 311, 317, 178 Pac. 536.

into the lake. The other company then brought the suit, claiming that by its appropriation it had acquired a right to have the water flow from the tunnel into the lake uninterruptedly and continuously. The court held that underground waters collected by a tunnel from the private lands of its owner were not open to subsequent appropriation by others, and that the company owning the land and tunnel and bringing the waters, theretofore unappropriated, to the surface had the better right to use them. This, without more, determined the controversy; but in the opinion much was said which, had it been essential to a decision of the case, might well be taken as committing the court to the common-law rule respecting underground waters. But it was not essential, and the court has since recognized that the read decision was as we have just stated.⁴

For several years after the ruling in that case the decisions were largely in a state of flux; the opinions disclosing pronounced differences among the judges and tending at times in favor of the common-law rule and at other times against it. A notable case of that period was before the court on two successive appeals. *Herriman Irrigation Co. v. Butterfield Mining Co.*, 19 Utah, 453, 57 Pac. 537, 51 L. R. A. 930; *Herriman Irrigation Co. v. Keel*, 25 Utah, 96, 69 Pac. 719. Like the present case, it involved a controversy be-

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tween an irrigation com*pany having an early appropriation of the natural flow of a surface stream and a mining company having a subsequent patent for adjacent lands pierced by a tunnel which encountered underground waters and conducted them to its portal whence they flowed into the stream. As here, the mining company had arranged to sell to others the right to use the waters elsewhere. Two matters were in dispute: First, whether the underground waters constituted one of the stream's natural sources of supply; and, secondly, if they did, whether the mining company was entitled to take and sell them as against the irrigation company which had appropriated the natural flow of the stream when the lands pierced by the tunnel were public lands. On the first appeal the judgment of the trial court was reversed and a new trial directed because of incomplete and erroneous findings

of fact; but the plain purport of the opinion, which had the approval of all the judges, was that if in fact the waters collected by the tunnel constituted one of the stream's natural sources of supply at the time its natural flow was appropriated by the irrigation company, which was when the lands were part of the public domain, that company had the better right to those waters. On the second appeal the decision turned chiefly on questions of fact; but the judges, in separate opinions, entered into an extended discussion of the question of law with which we here are concerned. One judge thought the common-law rule was in force, and another that it had been rejected and that the decision on the first appeal had proceeded on that view. The remaining judge left his attitude on the question in some uncertainty. The case settled no principle and is without force as a precedent. Other cases during the same period are cited by counsel and particular expressions in the opinions are relied on as making for one view or the other; but it suffices here to say of these cases that they do not show any settled rule of decision.

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*The later decisions have all tended in one direction and have resulted in establishing the rule for which the irrigation company contends, and which the Circuit Court of Appeals applied. These decisions frankly deal with the prior situation as we have described it, reaffirm the principles announced in the early cases of *Stowell v. Johnson* and *Sullivan v. Northern Spy Mining Co.*, point out the dicta and uncertainty in the opinions delivered in several cases, hold that the common-law rule is not applicable to the conditions in Utah, and show that it never was definitely adopted or followed there. *Mountain Lake Mining Co. v. Midway Irrigation Co.*, 47 Utah, 346, 149 Pac. 929; *Bastian v. Nebeker*, 49 Utah, 39, 163 Pac. 1092; *Peterson v. Eureka Hill Mining Co.*, 53 Utah, 70, 176 Pac. 729; *Stokey v. Green*, 53 Utah, 311, 178 Pac. 586; *Rasmussen v. Moroni Irrigation Co.*, 56 Utah, 140, 189 Pac. 572; *Peterson v. Lund*, 57 Utah, 162, 193 Pac. 1087; *Horne v. Utah Oil Refining Co.* (Utah) 202 Pac. 815.

We conclude, therefore, that the decree of the Circuit Court of Appeals was right.

Decree affirmed.

Mr. Justice SUTHERLAND did not take part in the consideration or decision of this case.

⁴ *Stokey v. Green*, 53 Utah, 311, 318, 178 Pac. 586; *Horne v. Utah Oil Refining Co.* (Utah) 202 Pac. 815, 819.

(260 U. S. 592)

HILL et al. v. SMITH.

(Argued Jan. 3, 1923. Decided Jan. 15, 1923.)

No. 164.

1. Courts ⚡396(5) — **Federal question not raised by trial, but considered in upper court, can be reviewed.**

The effect of the Bankruptcy Act (Comp. St. §§ 9585-9656) on the burden of proof, where the discharge was pleaded as a bar to recovery on a judgment, can be reviewed, even though it was not raised at the trial, where the highest court of the state treated the question as open and decided it.

2. Courts ⚡394(25) — **Question as to burden of proof connected with substantive rights can be reviewed.**

Where the discharge in bankruptcy was pleaded as a bar to recovery on plaintiff's judgment, the question of the burden of proving knowledge of the bankruptcy proceeding by a judgment creditor whose judgment was not scheduled is so connected with the substantive rights given to the respective parties by the statute, and so flows from the words of the statute, that the ruling thereon may be reviewed by the United States Supreme Court.

3. Bankruptcy ⚡436(1) — **Debtor has burden of proving creditor whose debt was not scheduled because of bankruptcy.**

Under Bankruptcy Act July 1, 1898, § 17a (3), as amended by Act Feb. 5, 1903, § 5 (Comp. St. § 9601) providing that a discharge shall release the bankrupt from all his provable debts, except such as have not been duly scheduled, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceeding in bankruptcy, the burden is on the creditor to prove his debt was not scheduled; but, having brought himself within the exception, the burden is on the debtor to prove the creditor had knowledge of the bankruptcy proceeding, so as to be within the exception to the exception.

4. Bankruptcy ⚡436(3) — **Judge can infer bankrupt knew name of judgment creditor living near.**

The trial judge, in an action in which a discharge in bankruptcy was pleaded against an unscheduled judgment, was warranted in inferring that, since the judgment on the debt was recovered against the bankrupt where he lived by a man who lived near, the bankrupt knew the name of the judgment creditor.

5. Courts ⚡399(1) — **Review limited to question decided by highest court.**

Where the highest court of the state stated that the questions presented related wholly to the burden of proof, which was not denied by the parties, that is the only question before the Supreme Court on writ of certiorari.

On Writ of Certiorari to the Superior Court of the State of Massachusetts.

Suit on a judgment by Charles S. Smith against Warren M. Hill, in which Donald M. Hill and others, as executors of the will of

Warren M. Hill, were substituted as defendants after the death of the original defendant. Exceptions by defendants to rulings in favor of plaintiff were overruled by the Supreme Judicial Court of Massachusetts, and judgment entered for plaintiff (232 Mass. 188, 122 N. E. 310, 2 A. L. R. 1667), and defendants bring certiorari. Affirmed.

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*Messrs. Geo. S. Fuller and Edward E. Blodgett, both of Boston, Mass., for petitioners.

Mr. Edward F. McClennen, of Boston, Mass., for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit upon a judgment. The defendant, Warren H. Hill, pleaded a discharge in bankruptcy. Subsequently he died and his executors, the petitioners, took his place. There was a trial before a judge without a jury. The plaintiff introduced proof that the judgment was unsatisfied and rested. The defendants proved the discharge and rested. In rebuttal the plaintiff introduced the schedules of creditors in bankruptcy of Hill in which schedules the plaintiff's name did not appear. The defendants asked for rulings that the burden was upon the plaintiff to show that he was not notified of the defendant's bankruptcy and that he had no

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knowledge of it. *These were refused subject to exceptions and the Court found for the plaintiff. The exceptions were overruled by the Supreme Judicial Court and judgment was entered upon the finding. *Smith v. Hill*, 232 Mass. 188, 122 N. E. 310, 2 A. L. R. 1667. A writ of certiorari was allowed by this Court.

[1, 2] It is argued for the respondent that there is no jurisdiction in this Court because the attention of the trial judge was not called specifically to the Bankruptcy Act (Comp. St. §§ 9585-9656) as a ground for the rulings asked, and because, even if it had been, it is said, the burden of proof is to be determined by the practice of the State. As we are of opinion that the judgment was right we shall not discuss these objections at length. We deem it enough to say, as to the first, that the appellate court treated the question as open and decided it; and as to the second that here as in *Central Vermont Railway Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252, though perhaps in a somewhat less intimate and obvious way, the burden of proof is so connected with the substantive rights given to the respective parties by the statute—indeed so flows from the words of the statute—that the ruling upon it may be reviewed here.

[3] The merits were fully and adequately discussed by the Supreme Judicial Court.

In order to dispose of them it will not be necessary to repeat the distinction, familiar in Massachusetts since the time of Chief Justice Shaw, *Powers v. Russell*, 13 Pick. 69, and elaborated in the opinion below, between the burden of proof and the necessity of producing evidence to meet that already produced. The distinction is now very generally accepted, although often blurred by careless speech. Thayer, *Preliminary Treatise on Evidence*, c. 9. The Bankruptcy Act of July 1, 1898, c. 541, § 17a(3), 30 Stat. 550, amended by Act of February 5, 1903, c. 487, § 5, 32 Stat. 798 (Comp. St. § 9601), provides that a discharge "shall release a bankrupt from all of his provable debts, except such as * * * (3) have not been duly scheduled in time for

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proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." (The Amendment of March 2, 1917, c. 153, 39 Stat. 999 [Comp. St. § 9601], does not change this language, and was adopted after the discharge.) By the very form of the law the debtor is discharged subject to an exception, and one who would bring himself within the exception must offer evidence to do so. *Kreitlein v. Ferger*, 238 U. S. 21, 26, 35 Sup. Ct. 685, 59 L. Ed. 1184; *McKelvey v. United States*, 260 U. S. 353, 43 Sup. Ct. 132, 67 L. Ed. —, Dec. 4, 1922. But there is an exception to the exception, "unless the creditor

had notice," etc., and, by the same principle if the debtor would get the benefit of that he must offer evidence to show his right. We agree with the Court below that justice and the purpose of the section justify the technical rule that if the debtor would avoid the effect of his omission of a creditor's name from his schedules he must prove the facts upon which he relies.

[4] The petitioners urge two further objections. They say that it did not appear that the debtor knew the name of his creditor. The trial judge was warranted in inferring that when a judgment had been recovered against him in Boston, where he lived, he knew the name of the man who recovered it and who lived hard by. Again, they say that the debt may have been scheduled under some other name. The judge had the schedule before him and for all that appears well may have inferred that it was not.

[5] But we cannot treat these questions as open. The Supreme Judicial Court stated that the questions presented related wholly to the burden of proof and it was said at the argument and not denied that in their brief before that Court the petitioners asserted that the sole issue was on the refusal to give the requests stated above. That is all that is before us now, although we have been unwilling to let the petitioners suppose that were it otherwise they would be better off.

Judgment affirmed.

(260 U. S. 606)

STATE OF OKLAHOMA v. STATE OF
TEXAS (UNITED STATES,
Intervener).

(Argued April 25, 26, 27, 1922. Decided Jan.
15, 1923.)

No. 18.

1. States $\Leftrightarrow$ 12(2)—South bank of Red river
held the boundary between Oklahoma and
Texas.

Under the treaty with Spain of 1819, describing the boundary line between the United States and the Spanish possessions as following the western bank of the Sabine river to a certain point, thence running north to the Red river, and then following the course of such river to a certain point, and then crossing the Red river and running due north to the Arkansas, and following the course of its bank, and providing that the use of the waters of such rivers throughout the extent of the boundary on their respective banks should be common to the inhabitants of both nations, the south bank of the Red river constitutes the boundary between Oklahoma and Texas, though the treaty did not mention the bank of that river as in the case of the other two.

2. States $\Leftrightarrow$ 12(2)—“Bank” of boundary river
defined; “bed.”

The southern “bank” of the Red river, constituting the boundary between Oklahoma and Texas under the Spanish treaty of 1819, is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river, and the boundary intended is on and along such bank at the average or mean level attained by the waters in periods when they reach and wash the bank without overflowing it, while the “bed” includes all the area kept practically bare of vegetation by the wash of the waters from year to year, though parts are left dry for months at a time, but not lateral valleys having the characteristics of relatively fast land, and usually covered by upland grasses and vegetation, though temporarily overflowed in exceptional instances, when the river is at flood.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bank (of Stream); Bed.]

3. States $\Leftrightarrow$ 12(2)—Cut bank ordinarily con-
fining water, and not bluffs or low shifting
elevations in sand bed, constitutes boundary.

The bank of the Red river constituting the boundary between Oklahoma and Texas under the Spanish treaty of 1819 is the so-called “cut bank,” effectively confining the water to the sand bed, save in exceptional instances, when the river is at flood and overflows, and not the ranges of bluffs marking the exterior limits of the valley through which the river flows, or the low shifting elevations within the sand bed, especially as lands on each side have been surveyed and disposed of on that theory.

4. States $\Leftrightarrow$ 12(2) — Boundary to be estab-
lished as it was when bank of stream was
adopted subject to changes by erosion, ac-
cretion, and avulsion.

The boundary between the United States and the Spanish possessions as it was in 1821, when the treaty of 1819, fixing the south bank of the Red river as the boundary, became effective, constitutes the boundary between Oklahoma and Texas, subject to the right application of the doctrines of erosion, accretion, and avulsion to any intervening changes.

5. States $\Leftrightarrow$ 12(2)—Doctrine of erosion and
accretion held applicable to Red river, not-
withstanding habits of the river.

The doctrine of erosion and accretion is applicable to the Red river, the bank of which constitutes the boundary between Oklahoma and Texas, notwithstanding the habit of the river to make rapid and material changes during rises in the river.

6. States $\Leftrightarrow$ 13—Party asserting changes in
river since boundary established has burden
of proving them.

The party asserting material changes in the Red river since 1821, when its bank was adopted as the boundary between United States and the Spanish possessions, must carry the burden of proving them, whether recent or old, and they cannot be merely conjectured.

7. States $\Leftrightarrow$ 13—Evidence held insufficient to
show boundary river ever ran on other side
of disputed tract.

In a suit involving a boundary dispute between Oklahoma and Texas, evidence held insufficient to show that the Red river ever ran south of the so-called Big Bend area, which is south of the present channel of the river.

8. States $\Leftrightarrow$ 12(2)—Land cut off by avulsion
remains part of state from which cut off.

Where land on the south side of a river, whose south bank constituted a state boundary, was severed from the land on the south side by avulsion, the boundary follows the north bank of the island thereby created; and where the river has in time of flood left its former channel, and cut a new one through a neck of land, the boundary is not thereby changed.

Mr. Justice McReynolds, dissenting.

Suit by the State of Oklahoma against the State of Texas, in which the United States intervened. On hearing on evidence as to location of boundary. Case referred to commissioners.

See, also, 42 Sup. Ct. 587.

Mr. S. P. Freeling, of Oklahoma City, Okl., for State of Oklahoma.

Messrs. Thos. W. Gregory, of Washington, D. C., W. A. Keeling, of Mexia, Tex., C. W. Taylor, of Corsicana, Tex., R. H. Ward, of Houston, Tex., and C. M. Cureton, of Austin, Tex., for State of Texas.

Mr. W. W. Dyar, of Washington, D. C., for intervenor.

Messrs. Joseph W. Bailey, of Dallas, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for Texas patented land owners.

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*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

A principal object of this suit, originally brought in this court, is to settle a controversy over that part of the boundary between the states of Texas and Oklahoma which follows the course of the Red river from the 100th degree of west longitude to the easterly limit of Oklahoma. This boundary is part of an old one between the territory of the United States and the Spanish possessions to the southwest which was agreed on and defined in the third article of the treaty of 1819. 8 Stat. 252. As to the line in question that definition is still controlling; it has been reaffirmed on several occasions, but never changed. The controversy arises chiefly out of diverging views of what the definition means and how it is to be applied. The full treaty provision reads as follows:

"Article 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or Red river; then following the course of the Rio Roxo westward, to the degree of longitude, 100 west from London and 23 from Washington; then, crossing the said Red river, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But, if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it

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meets the *said parallel of latitude 42, and thence, along the said parallel, to the South Sea: All the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

"The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions, to the territories described by the said line; that is to say: The United States hereby cede to his Catholic Majesty, and renounce forever, all their rights, claims, and pretensions, to the territories lying west and south of the above-described line; and in like manner, his Catholic Majesty cedes to the said United States, all his rights, claims, and

pretensions, to any territories east and north of the said line; and for himself, his heirs, and successors, renounces all claim to the said territories forever."

In the early stages of the suit the chief point of difference between the parties was that Oklahoma and the United States were claiming the south bank of the river as the boundary, while Texas was contending for the thread or middle of the stream. That difference was disposed of in an opinion delivered April 11, 1921, wherein this court recognized that in the earlier case of *United States v. Texas*, 162 U. S. 1, 16 Sup. Ct. 725, 40 L. Ed. 867, it had been adjudged that the boundary, as fixed by the treaty, is along the south bank. 256 U. S. 70, 41 Sup. Ct. 420, 65 L. Ed. 831. The purport of that opinion was embodied in an interlocutory decree of June 1, 1921, which also made provision for taking additional evidence and for a further hearing to determine what constitutes the south bank, where along that bank the boundary is, and the proper mode of locating it on the ground—these being matters on which the

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parties were unable to agree. 256 *U. S. 608, 41 Sup. Ct. 539, 65 L. Ed. 1114. Additional evidence filling several printed volumes was afterwards taken, and the further hearing was had near the close of the last term.

On the questions of what constitutes the south bank, and where along the same the boundary is, the parties are still far apart. Oklahoma and the United States contend that the bank and boundary are at the foot of a range of hills or bluffs which fringes the south side of the valley through which the river runs, while Texas insists that they are "at low-water mark" on that side of the river—meaning, as is said in the brief "the edge of the water at that usual and ordinary stage in which it is found during most of the year." This is now the principal issue and to it the evidence and arguments are largely directed. Its solution involves a consideration of what was intended by the treaty provision and of the physical situation to which the provision is to be applied.

[1] The treaty provision names three rivers—the Sabine, the Red, and the Arkansas. It expressly locates the boundary along the "western bank" of the Sabine and the "southern bank" of the Arkansas, and describes the intermediate section as leaving the Sabine at a designated point and running due north until it "strikes" the Red, then "following the course" of the Red westward to the 100th meridian, then "crossing" the Red and running due north to the Arkansas. Thus, while the boundary is in exact words fixed along a designated bank of the Sabine and the Arkansas, it is not expressly so fixed as respects the Red. This difference in terms, if not otherwise overcome, might well be taken as signifying a difference in purpose. But that it has no such signification is otherwise made

plain. We say this, first, because the direction for "crossing" the Red at the 100th meridian on a line running north strongly implies that the preceding course is somewhere on the southerly side of the river; secondly, because the declaration that "the use of the waters,

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and *the navigation of the Sabine to the sea, and of the said rivers Roxo [Red] and Arkansas, throughout the extent of the said boundary, on their respective banks," shall be common to the respective inhabitants of both nations, distinctly shows that a bank boundary is intended along the Red just as along the Sabine and the Arkansas; and, thirdly, because available historical data relating to the negotiations which culminated in the treaty show indubitably that those who framed and signed it on behalf of the United States and Spain intended to establish, and understood they were establishing, a bank boundary along all three rivers. 4 American State Papers, Foreign Relations, pp. 621, 622; 4 Memoirs of John Quincy Adams, pp. 255, 256, 260, 261, 266-270; United States v. Texas, 162 U. S. 1, 27, 16 Sup. Ct. 725, 40 L. Ed. 867. The words "throughout the extent of the said boundary, on their respective banks," are the last by which the treaty provision denotes the relation of the boundary to the rivers, and, as those words are otherwise supported, they point with controlling force to what was in the minds of the high contracting parties. It follows from these considerations that the meaning of the treaty provision is just what it would be if the Red river section of the boundary were expressly described as along the south bank.

We therefore are concerned with an instance in which the bank of a river, and not the river itself, has been made the boundary between two nations—now between two states of the Union.

In many jurisdictions it is settled that there is a material difference between taking the bank of a river as a boundary and taking the river itself, and this rule has been recognized and applied by this court from an early time in the adjudication of controversies over state boundaries.

During the Revolutionary period Virginia ceded to the United States all her "territory

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northwest of the river *Ohio." Afterwards Kentucky and Indiana were admitted into the Union as states, with the southerly or initial line of that cession as the boundary between them. A controversy over that boundary was brought before this court in *Handly's Lessee v. Anthony*, 5 Wheat. 374, 5 L. Ed. 113. The question presented was whether the boundary was along low-water mark or at the line reached by the river when at medium height. In an opinion delivered by Chief Justice Marshall the court held the boundary was along low water mark, but was careful to say:

"In pursuing this inquiry, we must recollect that it is not the bank of the river, but the river itself, at which the cession of Virginia commences."

Mr. Justice Story participated in the decision of that case and concurred in the opinion. Subsequently, when holding the Circuit Court for the District of Maine, he had occasion to interpret two conveyances of land adjacent to a stream in that state. One tract was described as bounded by the stream from one point to another, and the other as bounded by the bank of the stream from one point to another. The learned Justice was of opinion that the two bounding lines were essentially unlike, and he held as to the first tract that the conveyance included the flats below the bank at least to low-water mark, and as to the second that the conveyance limited the grant to the bank, and excluded the flats below. *Thomas v. Hatch*, 3 Sumn. 170, Fed. Cas. No. 13,899.

A controversy over the boundary between Georgia and Alabama was before this court in *Howard v. Ingersoll*, 13 How. 381, 14 L. Ed. 189. The boundary had been defined in a cession by Georgia to the United States as beginning on the western bank of the Chattahoochee river where it crosses a stated line and running thence up the river "along the western bank thereof" to the great bend. See 1 American State Papers, Public Lands, pp. 113-114. The nature of the controversy was such that it called for an interpretation

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and application of the words just quoted. *At the locus there was an abrupt and high bank on the western, or Alabama, side which was washed by the river in periods of ordinary high water. In periods of low water, which comprised two-thirds of the year, a sloping strip of from 30 to 60 yards of dry land lay between the abrupt bank and the water. The flowing stream was about 200 yards wide in periods of ordinary high water and about 30 yards in periods of low water. At that point the water never reached the top of the abrupt bank, but at other points, where the bank was lower, the water in exceptional times of flood overflowed the bank and temporarily submerged adjacent lands. The case was tried in an Alabama court, which ruled that the boundary was at the line of ordinary low water. That ruling was sustained by the Supreme Court of the state (17 Ala. 780), and the case was brought here on writ of error. Another case involving the same questions, and brought here from the Circuit Court for the District of Georgia, was heard at the same time, but a description of the first suffices for present purposes. This court, upon much consideration, held that the boundary was not at the line of ordinary low water, but along the water-washed bank or elevation which bounds the river bed and confines the water within definite outer limits,

save in the exceptional instances when it is so far at flood that it overflows its restraining banks and spreads over adjacent lands. The ruling and the grounds on which it was put are indicated in the following excerpts from the opinion:

13 How. 415, 14 L. Ed. 189: "When the commissioners used the words 'bank' and 'river,' they did so in the popular sense of both. When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow, and in that condition they make what is called the bed of the river. They knew that rivers have banks, shores, water, and a bed, and that the outer line on the bed of a river, on either side of

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it, may be distinguished upon every stage of its water, high or low; at its highest or lowest current. It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is or is not a growth upon them, not forming a part of that land which, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. Such a line may be found upon every river, from its source to its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water. With such an understanding of what a river is, as a whole, from its parts, there is no difficulty in fixing the boundary line in question."

13 How. 417, 14 L. Ed. 189: "The call is for the bank, the fast land which confines the water of the river in its channel or bed in its whole width, that is to be the line. The bank or the slope from the bluff or perpendicular of the bank may not be reached by the water for two-thirds of the year, still the water line impressed upon the bank above the slope is the line required by the commissioners, and the shore of the river, though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line. Wherever it may be found, it is a part of the state of Georgia, and not a part of Alabama. Both bank and bed are to be ascertained by inspection, and the line is where the action of the water has permanently marked itself upon the soil."

13 How. 418, 14 L. Ed. 189: "Our interpretation * * * is that the western line of

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Georgia * * * is a line to run up the river on and along its western bank, and that the jurisdiction of Georgia in the soil extends over to the line which is washed by the water, wherever it covers the bed of the river within its banks. The permanent fast land bank is referred to as governing the line."

The members of the court all agreed that the call "along the western bank" distinguished the case from that of *Handly's Lessee v. Anthony*, and that the Alabama court had erred in treating the ordinary low wa-

ter as the boundary intended; but three members, while concurring in the judgment of reversal to that extent, differed from the court's reasoning and conclusion in other respects.

That was a private litigation, and seven years later the same questions—this time covering the full length of the boundary—were presented to this court by the two states. *Alabama v. Georgia*, 23 How. 505, 16 L. Ed. 556. Alabama claimed the "usual or common low-water mark" as the boundary, and Georgia contended for "the western bank at high-water mark, using 'highwater mark' in the sense of the highest water line of the river's bed, or, in other words, the highest water line of that bed, where the passage of water is sufficiently frequent to be marked by a difference in soil and vegetable growth." Alabama asserted and Georgia admitted that the banks of the river, though abrupt and high at some places, were low and relatively flat at others, and that at the latter, when the river was high, the water overflowed the outer limits of its bed and spread over adjacent lands—at some places as much as a half mile. The controversy thus presented was disposed of in an opinion having the approval of the entire court. The court said:

23 How. 511, 16 L. Ed. 559: "In making such construction, it is necessary to keep in mind that there was by the contract of cession a mutual relinquishment of claims by the contracting parties, the United States ceding

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to Georgia all its right, title, etc., to the territory lying east of that line, and Georgia ceding to the United States all its right and title to the territory west of it."

23 How. 514, 16 L. Ed. 560: "With these authorities and the pleadings of this suit in view, all of us reject the low-water mark claimed by Alabama as the line that was intended by the contract of cession between the United States and Georgia. And all of us concur in this conclusion, that by the contract of cession, Georgia ceded to the United States all of her lands west of a line beginning on the western bank of the Chattahoochee river where the same crosses the boundary line between the United States and Spain, running up the said Chattahoochee river and along the western bank thereof.

"We also agree and decide that this language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.

"The western line of the cession on the Chattahoochee river must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined, and in such places on the river where the western bank is not defined, it must be continued up the

river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the preceding paragraph of this opinion."

[2] Upon the authority of these cases, and upon principle as well, we hold that the bank intended by the treaty provision is the water-washed and relatively permanent elevation or acclivity at the outer line of the

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river bed which *separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river, and that the boundary intended is on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it. When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys, which have the characteristics of relatively fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood.

The conclusion that the boundary intended is on and along the bank and not at low-water mark or any other point within the river bed has full confirmation in available historical data respecting the negotiations which attended the framing and signing of the treaty. 4 American State Papers, Foreign Relations, pp. 621, 622; 4 Memoirs of John Quincy Adams, pp. 255, 256, 260, 261, 266-270.

Texas places some reliance on the concluding words of the treaty provision, "but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo [Red] and Arkansas, throughout the extent of the said boundary, on their respective banks shall be common to the respective inhabitants of both nations." As already observed, these words show that the boundary intended is "on" the bank. No doubt they reserve and secure a right of access to the water, at all stages, adequate to the enjoyment of the permitted use; but they afford no basis for regarding the boundary as below the bank or within the river bed. *Dunlap v. Stetson*, 4 Mason, 349, 366, Fed. Cas. No. 4,164. This part of the treaty provision is quite unlike the old compact considered in *Maryland v. West Virginia*, 217

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*U. S. 577, 30 Sup. Ct. 630, 54 L. Ed. 888, which gave to the citizens of Virginia full property in the *shore* of the Potomac, and so carried the jurisdiction and title to the water's edge. See *Handly's Lessee v. Anthony*, 5 Wheat. 374, 385, 5 L. Ed. 113. In an earlier opinion disposing of other phases of this suit it was determined that the section

of the Red river adjacent to this boundary is not navigable. 258 U. S. 574, 42 Sup. Ct. 406, 66 L. Ed. 771.

Texas refers to the proceedings in 1840 and 1841 whereby the United States and the Republic of Texas jointly traced and marked so much of the treaty boundary as lies along the western bank of the Sabine, and claims that what was done makes for a view different from that here expressed. We do not so understand the proceedings. Gen. Hunt, who represented the Republic of Texas in that undertaking, took the position that portions of the river bed often immersed could be treated as the bank and that low-water mark should be regarded as the boundary. Mr. Overton, who represented the United States, dissented and said:

"The term 'bank' does not imply, I conceive, a line of the character proposed by you, but it rather means that natural barrier which confines the waters, and compels them to flow within a well-defined channel, although the surface of the river may fluctuate in elevation between its banks at various seasons of the year. The same conception of the meaning of this term precludes on my part the idea that it would be just to claim the western margin of any inundations caused by the river overflowing its banks, because in such cases the usual well-defined barrier is temporarily surmounted."

Mr. Overton's view prevailed and, as nearly as can be told now, the work proceeded on the view that the boundary was along the mean water line on what he defined as the bank. H. R. Ex. Doc. 51.

With what was intended by the treaty provision in mind, we turn to the physical situation to which the provision is to be applied.

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[3] *This section of the Red river flows eastward in a serpentine course through a valley bordered on either side by a range of bluffs or hills. The distance along the river is 539 miles, and on a direct line 321 miles. The valley widens irregularly from about 2 miles on the west to 15 or more on the east. The bed over which the water flows is composed of light, loose sand, and is of varying breadth, the maximum being $1\frac{1}{4}$ miles and the average one-third of a mile. On either side are stretches of valley land which vary in both width and length by reason of the winding of the river and the irregularities in the face of the bluffs. This land is fairly covered with grasses and other upland growth, and often is studded with trees. Many of the trees are old, and among them are elm, pecan, and other kinds of hard wood. A slight depression or a succession of depressions usually lies along the foot of the bluffs. The river or a channel may have been there in years that are gone, but, if so, no one knows when. Almost uniformly the valley land is separated from the sand bed of the river by a clearly defined water-

worn bank, designated by witnesses and counsel as a cut bank. This bank ranges in height from 2 to 10 or more feet, the height generally increasing from west to east and the lower parts usually being where the bed is wide. On the valley side of the bank is vegetation and on the river side bare sand. The cut banks effectively confine the water to the sand bed, save in exceptional instances, when the river is at flood and overflows adjacent lands for a few days. There is some overflowing almost every year and in one year out of 12 or 15 the overflow reaches back to the bluffs in many places.

When the water is in substantial volume, it flows over the whole of the sand bed and washes both banks; but when the volume is relatively low, much of the bed is dry. The latter is the prevailing condition, and this because the source and upper reaches

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of the river are within a *region where the rainfall is light, seasonal only, and quickly carried into the stream. Along the western part of the boundary the bed is entirely dry in long stretches for weeks at a time; and when the water is flowing, but low, it is found in shallow channels, which divide and shift about over the bed. Witnesses accustomed to crossing there speak of finding the flowing channel near one side of the bed in the morning and in the middle or near the other side in the evening. Only in pronounced bends are the channels relatively stable. Along the eastern part of the boundary the volume of water always is substantial, but there again it is inclined to divide into separate channels and to cross and recross the bed frequently. Along both parts, when the water is low, as is the rule, the channels in which it moves have low marginal elevations, but these are composed of mere sand, have no permanency, and yield readily to the action of the water and the winds. Material changes in them are habitual, not exceptional.

This survey of the physical situation demonstrates that the banks of the river are neither the ranges of bluffs which mark the exterior limits of the valley, nor the low shifting elevations within the sand bed. And that this is the natural and reasonable view of the situation is illustrated by a long course of public and private action.

The valley land always has been dealt with as upland. The United States surveyed and disposed of that on the north side under its public land and Indian laws, and Texas surveyed and disposed of that on the south side under her land laws. Both treated the cut banks as the river banks and carried their surveys to those banks, but not beyond. Patents were issued for practically all the land. Individuals freely sought and dealt with it as upland. Much of that on the south side was disposed of by Texas 50 years ago, some of it 70. Thousands of acres on that side were improved, occupied, and cul-

tivated under these disposals, and a larger

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acreage was occupied *and used under them for pastures. Through the long period covered by this course of action there never was any suggestion that this valley land was part of the river bed, nor that the shifting elevations of sand within the sand bed were the river's banks, nor that the land on the south side belonged to the United States. Not until some land on the south side and part of the river bed were discovered to be valuable for oil was this unbroken course of action and opinion drawn in question. However much the oil discovery may affect values, it has no bearing on the questions of boundary and title.

Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the south bank of the river, and that the boundary is on and along that bank at the mean level of the water, when it washes the bank without overflowing it.

[4] The boundary as it was in 1821, when the treaty became effective, is the boundary of to-day, subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes. Of those doctrines this Court recently said:

"It is settled beyond the possibility of dispute that, where running streams are the boundaries between states, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel." *Arkansas v. Tennessee*, 246 U. S. 158, 173, 38 Sup. Ct. 301, 304 (62 L. Ed. 638, L. R. A. 1918D, 258).

[5] Oklahoma and the United States question the applicability of the doctrine of erosion and accretion to this river, particularly

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the part in western Oklahoma, and *this because of the rapid and material changes effected during rises in the river. But we think the habit of this river is so like that of the Missouri in this regard that the ruling relating to the latter in *Nebraska v. Iowa*, 143 U. S. 359, 368, 12 Sup. Ct. 396, 399 (36 L. Ed. 186) is controlling. It was there said:

"The Missouri river is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. * * * The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where

above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. * * * No engineering skill is sufficient to say where the earth in the bank, washed away and disintegrating into the river, finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or 50 miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.

"Our conclusions are that, notwithstanding the rapidity of the changes in the course of

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the channel, and the *washing from the one side and on to the other, the law of accretion controls on the Missouri river, as elsewhere, and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between states."

[6] Common experience suggests that there probably have been changes in this stretch of the Red river since 1821, but they cannot be merely conjectured. The party asserting material changes should carry the burden of proving them, whether they be recent or old. Some changes are shown here and conceded. Others are asserted on one side and denied on the other.

[7] A controverted one is ascribed to the so-called Big Bend area, which is within the oil field. That area is now on the south side of the river and connected with the bluffs on that side. Oklahoma and the United States assert that in 1821 a channel of the river ran between it and the bluffs, and that the river has since abandoned that channel. Texas denies this, and insists that the situation in 1821 was practically as now. Stimulated by the large values involved, the parties have exhausted the avenues of research and speculation in presenting testimony thought to bear on this question. The testimony, particularly of the experts, is conflicting. It is so voluminous that it does not admit of extended statement or discussion here. We can only refer to important features and give our conclusions.

There are no surveys or records depicting the situation in 1821; nor are there any human witnesses who knew this part of the river then. But there are inanimate witnesses, such as old trees, which tell a good deal. At that place the river makes a pronounced, but gradual, bend to the north and back to the south. The area in question is on the inner side of the bend. It is larger

now than 60 years ago, but how much is uncertain. The enlargement is the result of

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intervening accretions. The *habit of the river is to erode the outer bank of a bend and to accrete to the opposite bank. Three surveys executed by Texas in 1856, and covering less than the whole area, disclose the presence at that time of over 1,700 acres. On the outer part are physical evidences of the formation being comparatively recent. On the inner part are like evidences of the formation being old, among them being the presence of living trees more than a century old. One of the trees, a pecan, attained an age of 170 years. A part of the area was cultivated, and the remainder used for pasturage, as early as 1877. At that time there were more trees than now. Many were taken by early settlers for firewood, fencing posts, and building logs; some logs being over 3 feet through. To overcome the inference arising from the presence of the old trees, which were well scattered, testimony was presented to show that in 1821 these trees were all on islands, which afterwards were consolidated amongst themselves and with the land on the south side. We think this testimony is essentially speculative, and not a proper basis for judgment. In this area, as elsewhere in the valley, a succession of depressions is found at the foot of the bluffs, and some testimony was produced to show that in 1821 the river, or a part of it, flowed there. It may be that the river was there long ago, but the testimony that it was there in 1821 is far from convincing. Texas has been exercising jurisdiction over the area and asserting proprietorship of the soil for more than half a century, and has surveyed and disposed of it all; the earliest disposals being in 1856. Some of the later surveys seem to conflict with those first made, but all name the river bank as a boundary. In those of 1856, and possibly others, it was the controlling call. See *Schnackenberg v. State* (Tex. Civ. App.) 229 S. W. 934; *Cordell Petroleum Co. v. Michna* (C. C. A.) 276 Fed. 483. The jurisdiction and title of Texas stood unchallenged until shortly before this suit. Our conclu-

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sion is *that the claim that the river, or any part of it, ran south of this area in 1821, is not sustained. So the boundary follows the cut bank around the northerly limit of the area.

Burke Bet Island and Goat Island, both near the Big Bend area, are claimed by Texas on the theory that in 1821 they were part of the land on the south side. We think the evidence, all considered, falls short of establishing the claim, and tends rather to show that neither island was ever part of the permanent fast land on that side. The claim is accordingly rejected.

[8] What now appears to be an island opposite mile post 575 and near the line between Hardeman and Wilbarger counties, in

Texas, is claimed by that state to have been part of the land on the south side up to 1902 and then severed from it by avulsive action in time of flood. The evidence sustains the claim. So the boundary follows the north bank of the island.

There are instances in which the river since 1821 has in time of flood left its former channel and cut a new one through a neck of land, thereby causing land theretofore on one side of the river to be on the other. Such avulsive action does not carry the boundary with it, but leaves it where it was before. There is no controversy about these cut-offs, and the evidence indicates that they readily can be recognized.

The matter of running, locating, and marking the boundary upon the ground in accordance with the principles stated herein will be referred to three commissioners to be appointed by the court, their action to be subject to its approval.

The parties may submit within 30 days a form of decree to carry these conclusions into effect.

Mr. Justice McREYNOLDS, dissenting.

The parties to the compact of 1819 (ratified 1821) distinctly avowed the purpose "to settle

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and terminate all *their differences and pretensions by a treaty which shall designate with precision the limits of their respective bordering territories in North America." And when all of its provisions are given proper weight, I think that instrument fixes the international boundary with reasonable precision at low-water mark on the south side of the Red river—not at the margin of the "cut bank."

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Geofroy v. Riggs*, 133 U. S. 258, 271, 10 Sup. Ct. 295, 298 (33 L. Ed. 642).

Under *United States v. Texas*, 162 U. S. 1, 16 Sup. Ct. 725, 40 L. Ed. 867, and *Oklahoma v. Texas*, 256 U. S. 70, 41 Sup. Ct. 420, 65 L. Ed. 831, we must interpolate "southern bank" into the description of the contested boundary and treat this as though it read, "then following the course of the [southern bank of the] Rio Roxo westward, to the degree of longitude 100 west from London," etc. Thus amended, we should now interpret the compact with a view to effectuate the intention of the parties.

A bank is the rising ground, or area, bordering a stream. To describe a boundary merely as following the course of the river bank gives it no definite location. Something more must be known before it can be laid down on the ground, e. g., that it runs with the low, ordinary, or high water mark. To ascertain this something more, when the application of a treaty is involved, the purpose and all provisions of the compact, the character of the country, and any other facts indicative of intention may be considered.

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*The treaty of 1819 declares:

"The use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks,¹ shall be common to the respective inhabitants of both nations."

Parts of these rivers are navigable. For hundreds of miles the Red river passes over a sandy waste, between irregular "cut banks," sometimes a mile apart (one-third mile on the average), and the waters are mainly useful for domestic purposes, for live stock, and for irrigation. During most of the year the stream is only a few yards wide and flows along shallow channels, commonly at some distance from the southern "cut bank." Manifestly, if the boundary is on the margin of that bank, the Spanish inhabitants were generally cut off from the stream, and could not use the waters without crossing or occupying territory of the United States. By its express terms the treaty reserved to those people the right to use and navigate the waters, and I cannot think that by mere implication it imposed a very serious barrier thereto.

Again, if the boundary runs with the southern "cut bank" of the Red river, of what effect are the words, "all the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States"? That boundary being admitted, all islands would necessarily lie within the United States, and their reservation was unnecessary. But, if low water marks the boundary, then the reservation becomes important. Without it grave disputes might arise as to the true line where islands lie south of the main stream. See *Georgia v. South Carolina*, 257 U. S. 516, 42 Sup. Ct. 173, 66 L. Ed. 347.

With the boundary fixed at low-water mark, the Spanish inhabitants obtained free

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access to the stream at *all seasons and could use its waters as their welfare required; the reservation of the islands to the United States is important; the parties obtained full reciprocal rights; and the unfortunate

¹ The boundary follows only a portion of each river—the upper reaches of the Arkansas, the middle part of the Red, and the lower section of the Sabine. No rights were given to Spanish subjects in respect of the waters of these rivers, except along the boundary.

consequences incident to ownership by the United States of a long, narrow, barren strip between a foreign country and the stream are avoided.

"Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark." Chief Justice Marshall in *Handly's Lessee v. Anthony et al.* (1820) 5 Wheat. 374, 380, 381 (5 L. Ed. 113).

Note that this cause was decided before ratification of the treaty in 1821.

The point for decision in *Howard v. Ingersoll* (1851) 13 How. 381, 397, 411, 412, 413, 14 L. Ed. 189, concerned the boundary between Georgia and Alabama, along the Chattahoochee river:

"Its determination [13 How. 397, 14 L. Ed. 189] depends upon what were the limits of Georgia and her ownership of the whole country within them, when that state, in compliance with the obligation imposed upon it by the Revolutionary War, conveyed to the United States her unsettled territory, and upon the terms used to define the boundaries of that cession."

The pertinent article of the cession is copied below.² The court also said (13 How. 411, 412, 14 L. Ed. 189):

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"We further learn that the adjustment with South Carolina left in Georgia the Chattahoochee river from its source to the thirty-first degree of north latitude, as Georgia had claimed her limits to be, since the king's patent to Sir James Wright, in 1764.

"In other words, that the Chattahoochee, from its source to that point, was at all times after that patent within Georgia, with the right of soil and jurisdiction, when its unsettled territory was ceded to the United States. This fact being so, it gives us a key from the laws of nations to aid us in the interpretation of its cession as to the boundary between Georgia

and Alabama, which must prevail, as it would in all other cases, where there may be a transfer by one nation of a part of its territory to another, with a river for its boundary, without an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river.

"The rule *jure gentium*, to which we refer, is not now for the first time under the consideration of this court. We are relieved, then, from its discussion, by citations from Vattel and other writers upon the laws of nations, to show what it is; but it will be found in the 22d chapter of Vattel. Among the writers after him it is not controverted by any one of them. Besides, it is according to what had been anciently the practice of nations, substantiated by an adherence to it down to our own times. In *Handly's Lessee v. Anthony*, 5

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Wheat. 379, this court said, *by its organ, Chief Justice Marshall, 'When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants territory on the one side only, it retains the river within its domain, and the newly created state extends to the river only.' The river, however, is its boundary.

"Georgia was certainly the original proprietor of the river Chattahoochee to 31 degrees north, when her territory west of it was ceded to the United States, and that cession must be understood to have been made under the rule, unless by terms in her grant to the United States it was taken out of it, with the view to give to the new state which was to be formed out of the cession, a coequality of soil and jurisdiction in the river which was to separate them."

And applying what it deemed the applicable rule, the court held: The boundary in question is:

"A line to run up the [Chattahoochee] river on and along its western bank, and that the jurisdiction of Georgia in the soil extends over to the line which is washed by the water, wherever it covers the bed of the river within its banks. The permanent fast land bank is referred to as governing the line. From the lower edge of that bank, the bed of the river commences, and Georgia retained the bed of the river from the lower edge of the bank on the west side. And where the bank is fairly marked by the water, that water level will show at all places where the line is."

The well-established rule, approved and attempted to be applied in *Howard v. Ingersoll*, has no application to the present controversy where independent nations undertook to settle a long standing boundary dispute. Moreover, the treaty contains im-

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portant and, I think, controlling provisions not found in the Georgia grant. Although much relied on, that case does not decide the point here presented—it arose out of wholly different circumstances and the opinion rests upon a rule of interpretation declared to be generally inapplicable to compacts of settlement between independent nations.

²"The state of Georgia cedes to the United States all the right, title, and claim, which the said state has to the jurisdiction and soil of all the lands situated within the boundaries of the United States, south of the state of Tennessee, and west of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary line between the United States and Spain, running thence, up the said river Chattahoochee and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called Uchee (being the first considerable stream on the western side above the Cussetas and Coweta towns), empties into the said Chattahoochee river; thence in a direct line to Nicajack, on the Tennessee river; thence crossing the said last-mentioned river, and thence running up the said Tennessee river, and along the western bank thereof to the southern boundary line of the state of Tennessee."

In *Handly's Lessee v. Anthony* (1820), *supra*, the court ruled that, under the grant by Virginia of all her right to the territory "situate, lying, and being to the northwest of the river Ohio," the boundary was at low water on the north side. The considerations which led to that conclusion, I think, are sufficient to require a like result here. Moreover, the treaty of 1819 contains provisions not found in the cession of the Northwest Territory which point to the low-water mark of the Red river.

That the Spanish government wittingly assented to a boundary by which a narrow strip of foreign territory was interposed between its citizens and waters essential to their welfare seems highly improbable. The convenience of the population must have been in contemplation. Nor do I find adequate reason for thinking that the United States desired this strip of barren land—then without value to their citizens—with the consequent obligations and serious difficulties. In 1819 troublesome problems incident to marking the boundary between this country and Canada were pending. Considering them, it is easy to understand why the United States desired to fix the boundary at the low-water mark of Red river, reserving the islands to themselves. But, obviously, ownership of the barren strip south of that line would entail unfortunate consequences to them and interfere with the orderly development of Spanish territory. Surely, neither government expected such a result.

"In case of doubt," says Vattel, "every country, lying upon a river, is presumed to have no other limits but the river itself; because

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nothing is more natural, than to take *a river for boundary, when a state is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable." *Handly's Lessee v. Anthony*, *supra*, 5 Wheat. 379, 380 (5 L. Ed. 113).

(260 U. S. 653)

LEE v. CHESAPEAKE & O. RY. CO.

(Argued Jan. 5, 1923. Decided Jan. 22, 1923.)

No. 422.

I. Courts ⇨276—Statute as to venue does not limit jurisdiction, but merely confers privilege which is waived by appearance without claiming it.

Jud. Code, § 51 (Comp. St. § 1033), providing that no civil suit shall be brought against any person by original process or proceeding in any other district than that whereof he is an inhabitant, does not limit the general jurisdiction of the district courts or withdraw any suit therefrom, but merely confers a personal privilege which defendant may assert or waive at his election, and which he does waive when sued in some other district if he enters an appearance without claiming his privilege.

2. Removal of causes ⇨14—District in which suit pending is "proper district" for purposes of removal.

The district court for the "proper district" to which a suit is removable under Jud. Code, § 28 (Comp. St. § 1010), is shown by sections 29 and 53 to be the district within which the suit is pending.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Proper District.]

3. Removal of causes ⇨14—Plaintiff's assent not essential to exercise of right, and plaintiff cannot ask removal to some other district.

Whether a suit arises under the Constitution, laws, or treaties of the United States or is between citizens of different states, plaintiff's assent is not essential in any sense to the exercise of the right of removal under Jud. Code, § 28 (Comp. St. § 1010), and plaintiff has no right to urge that the removal be into the district court for some other district.

4. Removal of causes ⇨14—Suit between citizens of states other than that in which suit brought removable to district court of district where suit pending.

Under Const. art. 3, § 2, and Jud. Code, §§ 24 and 28 (Comp. St. §§ 991, 1010), an action brought in B. county, Ky., by a citizen and resident of Texas against a corporate citizen and resident of Virginia, was removable to the district court for the district of Kentucky which included B. county.

In Error to the District Court of the United States for the Eastern District of Kentucky.

Action by J. W. Lee against the Chesapeake & Ohio Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Mr. Allan D. Cole, of Maysville, Ky., for plaintiff in error.

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*Mr. E. L. Worthington, of Maysville, Ky., for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was an action to recover damages in the sum of \$10,000 for personal injuries alleged to have been sustained by the plaintiff while entering one of the defendant's passenger trains in Kentucky for an intrastate trip. The plaintiff was a citizen and resident of Texas and the defendant a corporate citizen and resident of Virginia. The action was begun in a state court in Bracken county, Ky., and, because of the diverse citizenship of the parties, was removed, at the defendant's instance, into the District Court of the United States for the Eastern District of Kentucky, which includes Bracken county. When the transcript reached the District Court, the plaintiff moved that the cause be remanded to the state court on the ground that the District Court was without jurisdiction in that neither party was a resident of that district. The motion

was overruled, the plaintiff elected to stand on the motion, and judgment was given for the defendant. The plaintiff then brought the case here on a direct writ of error (Judicial Code, § 238 [Comp. St. § 1215]), to obtain a review of the ruling on his motion to remand.

Under the Constitution, art. 3, § 2, the judicial power extends, among other cases, to such as arise under the Constitution, laws, and treaties of the United States, and to such as are between citizens of different states.

Section 24 of the Judicial Code (Comp. St. § 991) defines the general jurisdiction of the District Courts, the pertinent provision being as follows:

"The District Courts shall have original jurisdiction * * * of all suits of a civil nature, at common law or in equity, * * * where

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the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states. * * *

This grant of jurisdiction covers two distinct classes of suits. In one the citizenship of the parties is not an element, while in the other it is the distinctive feature. As to the suit before us it is very clear that the diverse citizenship of the parties and the sum involved bring it within the latter class, and therefore within the general jurisdiction of the District Courts.

Section 51 of the Code (Comp. St. § 1033) relates to the venue of suits originally begun in those courts, and provides, subject to exceptions not material here, that—

"* * * No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

[1] It is a necessary conclusion from repeated decisions, going back to the original Judiciary Act of 1789 (1 Stat. 73) that this provision does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters an appearance without claiming his privilege. *Gracie v. Palmer*, 8 Wheat. 699, 5 L. Ed. 719; *Toland v. Sprague*, 12 Pet. 300, 330, 9 L. Ed. 1093; *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98; *Interior Construction Co. v. Gibney*, 160 U. S.

217, 16 Sup. Ct. 272, 40 L. Ed. 401; *United States v. Hvoslef*, 237 U. S. 1, 12, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; *Camp v. Gress*, 250 U. S. 308, 311, 39 Sup. Ct. 478, 63 L. Ed. 997; *General Investment*

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*Co. v. Lake Shore & Michigan South*ern Ry. Co.* (November 27, 1922) 260 U. S. 261, 43 Sup. Ct. 106, 67 L. Ed. —. The following excerpt from *Interior Construction Co. v. Gibney*, at page 219 of 160 U. S., at page 273 of 16 Sup. Ct. (40 L. Ed. 401), is particularly apposite:

"The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

[2] Section 28 of the Code (Comp. St. § 1010) deals with the jurisdiction of the District Courts on removals from the state courts, saying, so far as is material here:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court,

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may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

Section 29 (section 1011) deals, among other things, with the venue on removals and shows that in every instance the removal must be into the District Court "in the district where such suit is pending"; and this requirement is emphasized by section 53, which directs that, where the district is composed of two or more distinct divisions, the removal shall be into the District Court "in the division in which the county is situated from which the removal is made." Thus the words "for the proper district," in section 28, find exact definition in sec-

tions 29 and 53; and that definition conforms to what has appeared in all removal statutes beginning with the original Judiciary Act of 1789.¹

The several provisions of the Code before quoted were considered in the recent case of *General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, supra, where their meaning and their relation one to another were summed up as follows:

"Section 24 contains a typical grant of original jurisdiction to the District Courts in general of 'all suits' in the classes falling within its descriptive terms, save certain suits by assignees of particular choses in action. Section 51 does not withdraw any suit from that grant, but merely regulates the place of suit, its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found. Like similar state statutes, it accords to defendants a privilege which they may, and not infrequently do, waive.

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"Coming to the removal section (28), it is apparent that the clause, 'of which the District Courts of the United States are given original jurisdiction,' refers to the jurisdiction conferred on the District Courts in general, for it speaks of them in the plural. That it does not refer to the venue provision in section 51 is apparent, first, because that provision does not except or take any suit from the general jurisdiction conferred by section 24; next, because there could be no purpose in extending to removals the personal privilege accorded to defendants by section 51, since removals are had only at the instance of defendants; and, lastly, because the venue on removal is specially dealt with and fixed by section 29."

[3] It will be perceived that the right of removal under section 28 arises whenever a suit within the general jurisdiction of the District Courts is begun in "any" state court, and also that the party to whom the right is given is designated in direct and unequivocal terms. Where the suit arises under the Constitution, or a law or treaty, of the United States, the right is given to "the defendant or defendants" without any qualification; and as to "any other suit" it is given to "the defendant or defendants," if he or they be "nonresidents of that state." In neither instance is the plaintiff's assent essential in any sense to the exercise of the right. Nor is it admissible for him to urge that the removal be into the District Court for some other district, for it is his act in bringing the suit in a state court within the particular district which fixes the venue on removal.

¹ Acts September 24, 1789, c. 20, § 12, 1 Stat. 79; February 13, 1801, c. 4, § 13, 2 Stat. 92; February 4, 1815, c. 31, § 8, 3 Stat. 198; March 3, 1815, c. 94, § 6, 3 Stat. 233; March 3, 1863, c. 81, § 5, 12 Stat. 756; March 2, 1867, c. 196, 14 Stat. 558; March 3, 1875, c. 137, § 3, 18 Stat. 471; March 3, 1887, c. 373, 24 Stat. 552; August 13, 1888, c. 866, 25 Stat. 433; Judicial Code, §§ 30, 31, 33 (Comp. St. §§ 1012, 1013, 1015).

[4] Applying these views to the present case, we hold that it was removable, that it was duly removed into the District Court for the proper district, and that the motion to remand was rightly denied—in short, that the District Court had jurisdiction to proceed to a determination of the cause.

The plaintiff's contention to the contrary is predicated largely on a decision by this

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court in *Ex parte Wisner*, *203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, which, it must be conceded, is not in accord with the views expressed in this opinion. In that case the facts were like those here and the same statutory provisions were involved. These provisions were then part of the Act of August 13, 1888, c. 866, 25 Stat. 433, but, as respects the matter now under consideration, their meaning has not been changed by their inclusion in the Judicial Code. In that case it was ruled that the provision, now embodied in section 51, respecting the venue of actions originally begun in the Circuit (now District) Courts was strictly jurisdictional, could not be overcome even by the consent of both parties, and affected removals accordingly. The ruling proceeded on the theory that this was a right, if not a necessary, conclusion, inasmuch as the general purpose of Congress in adopting the act of 1888 was to contract the jurisdiction of the Circuit Courts. The decision was given in 1906 and was a departure from what had been said of the same provisions in prior cases, notably *Mexican National R. R. Co. v. Davidson*, 157 U. S. 201, 208, 15 Sup. Ct. 563, 39 L. Ed. 672, and *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 259, 26 Sup. Ct. 55, 50 L. Ed. 178. Much that was said in the opinion was soon disapproved in *Re Moore*, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, where the court returned to its former rulings respecting the essential distinction between the provision defining the general jurisdiction of the Circuit Courts and the one relating to the venue of suits originally begun in those courts. But as the decision was not fully and expressly overruled, it has been a source of embarrassment and confusion in other courts.² We had occasion to criticize it in *General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, supra, and now on further consideration we feel constrained to pronounce it essentially unsound and definitely to overrule it.

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In this connection it should be observed

² See *Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.* (D.C.) 218 Fed. 81; *Doherty v. Smith* (D. C.) 233 Fed. 132; *Guaranty Trust Co. v. McCabe*, 250 Fed. 699, 163 C. C. A. 31; *James v. Amarillo City Light & Water Co.* (D. C.) 251 Fed. 337; *Matarazzo v. Hustis* (D. C.) 256 Fed. 882; *Boise Commercial Club v. Oregon Short Line R. Co.*, 260 Fed. 769, 171 C. C. A. 495; *Sanders v. Western Union Telegraph Co.* (D. C.) 261 Fed. 697; *Earles v. Germain Co.* (D. C.) 265 Fed. 715.

that the opinion in *Re Moore* is open to the criticism that it seemingly assumes that, where neither party is a resident of the district, the removal, to be effective, needs the plaintiff's assent. We find no support for such an assumption in the provisions we are considering. Under them, as before indicated, the exercise of the right of removal rests entirely with the defendant and is in no sense dependent on the will or acquiescence of the plaintiff. The opinion in *Re Moore* is qualified accordingly.

We recognize that one purpose of the act of 1888 was to contract the jurisdiction of the Circuit Courts and that due regard should be had for this in interpreting indefinite or ambiguous provisions; but we think it affords no basis for subtracting anything from provisions which are definite and free from ambiguity. A comparison of the removal provisions in the act of 1888 with those in the act of March 3, 1875, c. 137, 18 Stat. 470, which it displaced, will bring out very clearly the changes intended. The act of 1875 not only permitted the removal of all suits between citizens of different states where the amount in controversy exceeded \$500, but declared without qualification that the removal might be by "either party." The act of 1888 confined the removal of such suits to instances where the amount in controversy exceeded \$2,000, withheld the right of removal from the plaintiff, who always has a choice of forums, and gave the right to the defendant only where he was a nonresident of the state in which the suit was brought. Thus, while the comparison shows that Congress intended to contract materially the jurisdiction on removal, it also shows how the contraction was to be

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*effected. Certainly there is nothing in this which suggests that the plain terms in the act of 1888—by which it declared that any suit "between citizens of different states," brought in any state court and involving the requisite amount, "may be removed by the defendant or defendants" where they are "nonresidents of that state"—should be taken otherwise than according to their natural or ordinary signification.

That provision, although much narrower than the provision in the act of 1875, is obviously broader than the one in the original Judiciary Act of 1789, which permitted any suit brought in any state court by a citizen of that state against a citizen of another state, and involving a stated amount, to be removed by the defendant into the Circuit Court of the United States for that district. This early provision remained in force for a long period, and there can be no doubt that to return to it now would materially relieve the overburdened dockets of the District Court and at the

same time maintain the constitutional principle involved; but of course a return can be effected only through legislative channels.

Judgment affirmed.

(260 U. S. 647)

BANKERS' TRUST CO. et al. v. BLODGETT, State Tax Com'r.

(Argued Jan. 3, 1923. Decided Jan. 22, 1923.)

No. 169.

1. Executors and administrators §271—Representatives hold property subject to debts, including tax and penalty.

Executors and administrators do not own the property committed to them for administration, but hold it subject to the liabilities and burdens on it, including the liability for a tax imposed by the state and the penalties for nonpayment of the tax, and whatever interest distributees or creditors may have therein is subject to the same liabilities and burdens.

2. Constitutional law §284(3)—Taxation §836—Connecticut statute, imposing penalty on decedent's estate for unpaid taxes, is valid.

Gen. St. Conn. 1918, § 1190, imposing on all taxable property of any estate on which no tax has been paid during the year preceding decedent's death a tax of 2 per cent. per annum for the five years preceding the date of the death, with deductions for taxes paid on any portion of the property shown to have been acquired within the five years, is in the nature of a penalty for an evasion of duty by decedent, which could be legally imposed on her estate, out of which it can only be discharged, and does not deprive the creditors and distributees of their property without due process of law.

3. Taxation §835—Amount of penalty is for Legislature.

The amount of the penalty to be imposed for nonpayment of a tax is a matter for the Legislature of the state to determine in its discretion.

4. Constitutional law §197—Statute imposing penalty for nonpayment of tax may be retrospective.

Gen. St. Conn. 1918, § 1190, imposing a penalty of 2 per cent. per annum for the five years preceding the death of a decedent on property on which no tax had been paid to the state, can be applied to a period beginning a year before the passage of the act, since it is not a penalty in punishment of a crime, to which only the constitutional prohibition against ex post facto laws applies.

In Error to the Superior Court of the State of Connecticut.

Application by the Bankers' Trust Company and another, as executors of the estate of Lena McMullen, deceased, against William H. Blodgett, as Tax Commissioner of the State of Connecticut, in the nature of an appeal from the statement of the Commissioner

as to the amount of taxes due from the estate of decedent. The superior court of Connecticut entered judgment dismissing the application, in conformity to the advice of the Supreme Court of Errors of that state on questions reserved for its decision (96 Conn. 361, 114 Atl. 104), and the applicants bring error. Affirmed.

Messrs. W. H. Comley and Daniel Davenport, both of Bridgeport, Conn., for plaintiffs in error.

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*Mr. Justice McKENNA delivered the opinion of the Court.

By section 1190 of a statute of the state of Connecticut passed in 1915 it is provided that:

"All taxable property of any estate upon which no town or city tax has been assessed * * * or upon which no tax has been paid to the state during the year preceding the date of the death of the decedent, shall be liable to a tax of two per centum per annum on the appraised inventory value of such property for the five years next preceding the date of the death of such decedent, provided, the executor or administrator of any estate may, by furnishing evidence to the satisfaction of the tax commissioner that a state, town or city tax has been paid on any of such property for a portion of said five years or that the ownership of such property has not been in the decedent for a portion of said period, obtain a proportionate deduction from the tax hereby imposed. * * *

It is further provided (section 1192) that:

"Any executor, administrator or representative of such an estate aggrieved by the action of the tax commissioner in determining such tax, if unable to agree with the tax commissioner upon the amount of such tax as provided in section 1190, may, within ninety days from the time of the filing by the tax commissioner of such statement or corrected statement with the judge of probate, make application in the nature of an appeal therefrom to the superior court of the county in which such probate court is located which shall be accompanied by a citation to said tax commissioner to appear before such court."

Lena McMullen died in 1919, and the information required by an act passed in that year, amendatory of an act concerning inventories of estates,¹ having been filed by plaintiffs in error as her executors, and sent,

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as required, *by the probate judge to the tax commissioner, that officer filed with the state treasurer a statement that there was due from the estate of the decedent to the state of Connecticut by virtue of its statutes, \$10,286.39, and made claim for such sum.

Plaintiffs in error, within the time provided in section 1192, made, to quote from the language of the section, "application in the nature of an appeal" from the claim to the superior court of the county in which the

probate court was located, in accordance with section 1192.

The tax commissioner, acting for the state, demurred "to the reasons of application and appeal," and the superior court, by consent of the parties, reserved the questions of law arising upon the demurrer "for the advice of the Supreme Court of Errors * * * as to what judgment should be entered" on the demurrer. In fulfillment of the "reservation" the Supreme Court of Errors took the case, adjudged the statute to be valid, and advised the superior court "to sustain the demurrer and to dismiss the application."

The superior court, in execution of that direction, sustained the demurrer and entered judgment dismissing the "application in the nature of an appeal." To review that judgment is the purpose of this writ of error. Manifestly, however, it is the views and reasoning of the Supreme Court of Errors that must engage our attention, as they constituted the foundation of the judgment of the superior court.

In description of the statute the Court of Errors said its purpose is "to compel estates to pay to the state a sum which shall approximately equal the taxes which the property of the estate has escaped paying while in the hands of the decedent," and "the single point raised by the demurrer," the court further said, "is that the statutes which authorize this action of the commissioner are unconstitutional."

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*The specifications of the ground of offense urged by plaintiffs in error against the Fourteenth Amendment (and with this we are only concerned) were said by the court to be that the statute deprived—

"creditors and distributees of this estate of their property without due process of law (a) by exacting a penalty from them for the failure of the decedent to list his property for taxation; and (b) by creating against them a presumption of guilt for such omission."

The comment of the court upon the specifications was that both—

"rest on the unfounded premise that the property of this estate upon the decease of the owner passed to the distributees subject to the payment of the just debts of the estate."

And the court further said:

"The right to dispose of one's property by will and the right to have it disposed of by law after decease is created by statute and therefore the state may impose such conditions upon the exercise of this right as it may determine. *Stone et al. Appeal*, 74 Conn. 301, 302, 50 Atl. 734; *Hatheway v. Smith*, 79 Conn. 506, 65 Atl. 1058, 9 L. R. A. (N. S.) 310, 9 Ann. Cas. 99."

See also *Plumber v. Coler*, 178 U. S. 115, 134, 20 Sup. Ct. 829, 44 L. Ed. 998; *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969.

[1] The conclusion of the court is of such authoritative effect as not to need much com-

¹ Public Acts of Conn. 1919, chapter 50, page 2713.

ment. The attack upon it by plaintiffs in error is based upon a confusion of rights. As pointed out by the Supreme Court of Errors, executors and administrators do not own the property committed to them for administration. It goes to them subject to the liabilities and burdens upon it in the hands of its owner, and whatever interest distributees or creditors may have is subject to the same liabilities and burdens. Subject, we may say, as the court decided, to the tax which the state has imposed on its disposition or devolution, and the tax does not take on a different quality or incident because it is, or has the effect of a penalty. And the court, construing the statute, declared it was a provision for penalizing a delinquency—the

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delinquency *of the decedent, and made to survive "by statutory sanction." "In effect," the court said, "this statute is a penalty imposed upon the estate because of the delinquency of the decedent, and no less permissible than the penalty tax against the decedent kept alive by statutory sanction."

[2] Plaintiffs in error do not contest the principle expressed but deny its application by asserting: (1) There was no debt owed by decedent, (2) no action under the statute arose against her; (3) no penalty had been incurred by her because as long as she lived the statute was inapplicable to her; (4) it is not a tax for its primary object is punishment, not revenue.

The assertions are unjustified. There was an evasion of duty by decedent, and the obligation she incurred, and should have discharged, was imposed upon her estate, and legally imposed, for out of her estate it can only be discharged. The payment of taxes is an obvious and insistent duty, and its sanction is usually punitive. The Connecticut statute is not, therefore, in its penal effects, unique, nor are they out of relation or proportion to a decedent's delinquency.

[3] The Court of Errors recognized that the tax of the statute "may not represent what the decedent would have been required to pay, had" she "paid the state or local tax." And, as we have seen, the tax may be upon the appraised inventory value for the five years next preceding the death of the decedent, with a proportionate deduction if a

tax has been paid on any of the property for a portion of the five years, or that the ownership of the property has not been in the decedent for a portion of that period. The provision, however, is but a way of fixing a penalty for the delinquency, which it is competent for the state to do. We said in *Western Union Telegraph Co. v. Indiana*, 165 U. S. 304, 310, 17 Sup. Ct. 345, 41 L. Ed. 725, that the amount of a penalty is a matter for

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the Legislature of a state to determine in its discretion, and in accordance with the principle we sustained a penalty of 50 per cent. of the taxes assessed against the telegraph company and unpaid by it.

[4] Section 1190 was passed in 1915 and went into effect August 1st of that year. Decedent died in May, 1919, plaintiffs in error contend, therefore, that in one of the years (1914) of the five of omission to pay taxes "the only penalty provided by law therefor was the addition of 10 per cent. to the assessed valuation of the omitted property." Therefore, it is the further contention, the attempt of the section is "to reach into the past and provide 'greater punishment than the law did when the crime was committed,'" and hence incurs constitutional prohibition as an *ex post facto* law.

The contention is untenable. The penalty of the statute was not in punishment of a crime, and it is only to such that the constitutional prohibition applies. It has no relation to retrospective legislation of any other description. *Johannessen v. United States*, 225 U. S. 227, 242, 32 Sup. Ct. 613, 56 L. Ed. 1066.

The final contention of plaintiffs in error is that the statute can only be sustained on the assumption that "in the last analysis the property of deceased persons belongs to the state."

The contention is extreme. The power of taxation, with its accessorial sanctions, is a power of government, and all property is subject to it; and it is a proper exercise of it to satisfy out of his estate the delinquency of a property owner. It is so complete that it does not need the assumption of universal ownership by the state to justify it.

Affirmed.

(260 U. S. 662)

UNITED STATES v. LANE et al.

No. 160.

SAME v. GULF REFINING CO. OF LOUISIANA.

No. 163.

SAME v. SOUTHWESTERN GAS & ELECTRIC CO. et al.

No. 162.

SAME v. GULF REFINING CO. OF LOUISIANA.

No. 161.

SAME v. GREENE et al.

No. 192.

SAME v. LOUCKS et al.

No. 191.

(Argued Jan. 2 and 3, 1923. Decided Jan. 22, 1923.)

1. Navigable waters ⚡37(4)—Variance between meander lines and shore held not to prevent extension of grant to water line.

In suits by the United States to recover strips of land of varying shapes and widths between the meander lines stated in the patents and the shore of a navigable lake, where it appeared that the meander line, which corresponded with the shore of the lake as shown on the plat referred to in the patents, was evidently intended to follow the lake shore, but at places extended out into the water, and at other places was some distance back from the shore, the aggregate of the land outside the meander line being 70 acres, and of the water within the meander line being 44 acres, the ordinary rule applies, and the patents conveyed title to the shore of the lake.

2. Navigable waters ⚡37(4)—Crescent containing 97 acres between meander line and shore held covered by patents.

Where two patents granting public lands described them with reference to a plat showing a meander line, which purported to be the shore of a navigable lake, but a later accurate survey showed that between the meander line and the shore there was a strip of land, roughly in the shape of a crescent, which contained 97 acres, about one-third of the stated area of the fractional subdivisions granted, and which had an extreme width of 1,200 feet, the patents granted the land to the water's edge, in view of evidence as to the difficulty of making an exact survey of the shore line at the time the original survey was made.

Appeals from the United States Circuit Court of Appeals for the Fifth Circuit.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Six separate suits by the United States against C. W. Lane and others, against the Gulf Refining Company of Louisiana, against the Southwestern Gas & Electric Company and others, against the Gulf Refining Company of Louisiana, against Charles J.

Greene, Jr., and others, and against A. C. Loucks and others. Decrees for the plaintiff in each case were reversed by the Circuit Court of Appeals (274 Fed. 145, 290), and complainant appeals in each case, except the Loucks Case, in which it brings certiorari. Decrees of the Circuit Court of Appeals affirmed.

Mr. Assistant Attorney General Riter, for the United States.

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*Mr. S. L. Herold, of Shreveport, La., for appellees in Nos. 160, 161, 162, and 163, and respondents in No. 191.

Mr. Elias Goldstein, of Shreveport, La., for appellees in No. 192.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

These suits involve claims of title on the part of the United States, hereinafter called the plaintiff, to various parcels of land lying along the border of Ferry Lake, a navigable body of water in Caddo parish, La. Answering these claims, the defendants in the respective cases averred that plaintiff, long before the bringing of the suits, had conveyed by patents to private persons certain fractional subdivisions bordering on the lake; that these fractions were represented on the official plat of the government survey, made by one Warren in 1839 and duly approved and filed, as bounded on the lake side by the waters of the lake; that in each of the cases the land in controversy was a small tract, lying along the edge of the lake and constituting part of the particular fractional subdivision so conveyed; and that, consequently, plaintiff had divested itself of whatever title it originally had.

Certain alternative defenses, based upon the alleged ownership of the lands by the state of Louisiana, were pleaded, but, in view of the conclusions we have reached, it is not necessary to consider them. The District Court entered decrees for the plaintiff which the Circuit Court of Appeals reversed (274 Fed. 145, 290), and the cases are here upon appeal except the Loucks Case, which comes on certiorari. The foregoing averments of fact contained in the answers are established by the record.

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[1 *1916-1917, nearly 80 years after the Warren survey—the lands in the meantime having become valuable for their deposits of oil and gas—a new survey was made under the direction of the General Land Office. This survey shows that the line run by Warren, purporting to meander the shore of the lake, did not in all instances coincide precisely with the water's edge. In the four cases first named in the title, the parcels of land lying between the meander line and the lake are of small extent. The meander line throughout its length approximately

conforms to the sinuosities of the shore, sometimes, however, running for short distances inland, and sometimes for short distances into and through the water. In the first-mentioned suit the Warren survey indicates a fractional subdivision containing 26.80 acres; the new survey adds 5.67 acres. In the second suit the Warren survey indicates 23 acres; the new survey adds 12.72 acres. In the third suit the Warren survey indicates 155 acres; the new survey adds 27.87 acres. In the fourth suit the Warren survey indicates 114.80 acres; and the new survey adds 11.49 acres.

The lands in question are all in township 20, the first mentioned being in section 3, the second in section 10, the third in section 13, and the last in section 24. Following the meander line of the Warren survey the distance from the first of these tracts to the last is about five miles. Leaving out of consideration the large tract involved in *Producers' Oil Co. v. Hanzen*, 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330, and the large tract involved in *Jeems Bayou Fishing & Hunting Club v. United States* (decided January 2, 1923) 260 U. S. 561, 43 Sup. Ct. 205, 67 L. Ed. —, the aggregate of the various parcels lying outside the meander line is about 70 acres, and the aggregate of the various areas of water included within the meander line is about 44 acres. The facts bring the cases fairly within the rule announced by this court in *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442, and not within the exception which was

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followed in the *Jeems Bayou Case*. So far as the instant cases are concerned, there is nothing in the circumstances to suggest the conclusion that any fraud was committed or palpable mistake made by Warren. At the time of his survey the lands were of such little value, the locality so wild and remote, and the attendant difficulties so great that the expenditure of energy and money necessary to run the lines with minute regard to the sinuosities of the lake would have been quite out of proportion to the gain. We are of opinion that the survey of 1839, except as to the two large tracts just mentioned, is not open to challenge. The precisely accurate survey of 1916-1917 would probably never have been made, but for the greatly increased value of the lands due to the discovery of oil and gas therein. It is unnecessary to do more than quote the language of this court in *Mitchell v. Smale*, supra:

"The pretense for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and

all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they ex-

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tend to and are *bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

[2] While the facts are somewhat different and the extent of the omission somewhat greater, we think the general rule should, likewise, be applied in the remaining two cases. The Warren survey and plat here indicate an area of about 271 acres in the fractional subdivisions conveyed. The lands added by the new survey constitute a compact body of 97.64 acres—65.77 acres of which are involved in the *Greene Case* and 14.13 acres in the *Loucks Case*—having the outline of a long and rather irregular crescent, with the outer curve next to the water. The inner boundary, running between the two points of the crescent, is made up of a series of straight lines, with intervening angles conforming to the outlying curve only to a roughly approximate degree. The length of the tract is nearly 4,000 feet and the extreme width about 1,200 feet. Running back from the shore there are numerous ravines, creating, in and along the outer rim of the tract, a series of alternating points and indentations. The evidence justifies the conclusion that in 1839, and especially in time of high water reaching back into the ravines, the establishment of a line precisely coincident with the water's edge would have been a matter of expense and difficulty wholly disproportionate to the then value of the omitted acreage. As in the four cases first discussed, the Warren plat of the survey referred to in the patent represents the lake as the boundary. The survey, taken as a whole, with the exception of the two large tracts already mentioned, follows with a fair degree of accuracy the contour of the lake, and the evident purpose was to include in it all the land to the wa-

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ter's edge. Considering *the circumstances in respect to the character and value of the lands, the wildness and remoteness of the region, and the difficulties surrounding the work of the surveyors, the failure to run the lines with more particularity was not

unreasonable, and we are constrained to agree with the lower court in holding that the waters of the lake, and not the traverse line, constitute the boundary.

The decrees of the Circuit Court of Appeals in all the cases are therefore

Affirmed.

(260 U. S. 677)

CONLEY v. BARTON.

(Submitted Jan. 9, 1923. Decided Jan. 29, 1923.)

No. 193.

1. Constitutional law § 169—Modification of remedy does not impair obligation of contract, if efficacious remedy is left.

Though the remedy for enforcement of a contract may be so far a part of the contract as to be within the protection of Const. art. 1, § 10, prohibiting a state from impairing the obligation of a contract, it is not necessarily so, and the Legislature may modify or change existing remedies, or prescribe new modes of procedure, if a substantial or efficacious remedy remains or is given.

2. Constitutional law § 169—Mortgages § 321—Requiring mortgagee to file affidavit of taking possession, does not impair obligation of mortgage.

Rev. St. Me. c. 95, § 4, as amended by Pub. Laws Me. 1917, c. 192, § 1, requiring an affidavit of possession to be filed within three months after the expiration of one year from the taking of such possession, and recorded in the registry of deeds where the certificate of foreclosure is recorded, does not impair the obligation of a mortgage executed before the enactment of that statute, which contained a provision for foreclosure by taking possession for one year, in view of the construction of that statute by the state court as not postponing the time of foreclosure, if the affidavit is filed, as it may be, immediately on the expiration of the year.

In Error to the Supreme Judicial Court of the State of Maine.

Suit by Llewellyn Barton against Henry J. Conley to redeem a mortgage. A decree for plaintiff was affirmed by the Supreme Judicial Court of Maine (119 Me. 581, 112 Atl. 670), and defendant brings error. Affirmed.

Messrs. Harry A. Hegarty and James B. Flynn, both of Washington, D. C., for plaintiff in error.

Mr. Frank H. Haskell, of Portland, Me., for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Suit to redeem a mortgage which was executed by defendant in error to one George W. Towle to secure his *promissory note for the payment to Towle of the sum of \$2,000

and interest. The note and mortgage were dated October 14, 1905.

On February 20, 1919, a breach of the mortgage was committed and the holder of it, under the laws of the state, foreclosed it by taking possession of the mortgaged premises and duly recorded a certificate of the fact in the registry of deeds of the proper county.

The bill as originally drawn was based upon an alleged effort to redeem the mortgaged premises by payment of the amount due upon the note and mortgage before the time of redemption expired, in which effort plaintiff alleges he failed by the absence of Conley from his residence and place of business.

Plaintiff (defendant in error), however, amended his bill to read as follows:

"The plaintiff further alleges that more than three months have elapsed since the expiration of one year from the time when the legal representatives of the mortgagee of the mortgage described in the plaintiff's bill took possession of the mortgaged property for the purpose of foreclosing said mortgage, but neither the mortgagee nor the holder of record of said mortgage, nor the legal representative or legal representatives, of either the mortgagee or holder of record of said mortgage nor any other person, has signed and sworn to an affidavit as required in cases of foreclosure of mortgages of real estate by section 4 of chapter 95 of the Revised Statutes of Maine as amended by chapter 192 of the Public Laws of A. D. 1917, and no such affidavit has been recorded in the registry of deeds where the certificate of said foreclosure is recorded, as required by said statute, and these facts were not known to the plaintiff at the time of filing his said bill as said three months had not elapsed at the time of filing said bill."

Plaintiff in error, answering the amendment, alleges that chapter 192 of the Public

Laws of 1917 "has no application and no relevancy to the plaintiff's (plaintiff in error's) rights or cause of action herein," and that if it be claimed that such chapter grants any additional time beyond the one year as covenanted in the mortgage deed, the act "would be contrary to the provisions of section 10 [article 1] of the Constitution of the United States and to the covenant of the mortgage deed itself and, therefore, void and of no effect." An estoppel was also pleaded.

The mortgage contained a provision by which the mortgagor covenanted with the mortgagee that the right to redeem the mortgaged premises should be forever foreclosed in one year next after the commencement of foreclosure by any of the methods then provided by law, and one of the methods provided was entry into possession of the mortgaged premises and holding the same by consent in writing of the mortgagor, or the person holding under him.

It is, however, provided by chapter 192 of

the Public Laws of 1917, that possession so obtained (or by any other of the three modes provided) "and continued for one year" will "forever foreclose the right of redemption," provided, however, "that an affidavit signed and sworn to by the mortgagee or by the holder of record of the mortgage, or their legal representatives, is, written three months after the expiration of one year from the taking of such possession, recorded in the registry of deeds where the certificate of foreclosure is recorded. * * *" Section 1.

On February 20, 1919, a breach of the mortgage having been committed, the holder of the mortgage assigned it to the plaintiff in error, Conley, but two years before that time the act providing for the filing of the affidavit as above stated was passed, and its effect is the principal controversy in this case. Defendant in error urges it to sustain his right to redemption; plaintiff in error asserts that it is inapplicable, and contends that if held applicable, it is invalid as impairing the obligation of his contract, the mortgage.

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*The trial court decided that the provision was applicable and valid. These conclusions were affirmed by the Supreme Court. 119 Me. 581, 112 Atl. 670.

"There can be no doubt," the Supreme Court said, "that the amendment by its terms relates to all foreclosures begun after its passage including foreclosures of prior existing mortgages."

In reply to the contention that the statute impairs the obligation of the contract constituted by the mortgage "by extending the foreclosure period for three months after the expiration of the year," it was said:

"But the statute does not extend the foreclosure period. In effect it imposes a condition which the mortgagee must perform or be held to have waived his foreclosure. He may perform the condition at once on the expiration of the year or at his option at any time within three months. If the affidavit is seasonably recorded the foreclosure is complete at the end of the year. If not, it is invalidated."

By a rescript by one of the Justices the case is given a clearer definition. Chapter 192 of the Laws, it was decided, requires a mortgagee within 30 days after completion of foreclosure to record in the registry of deeds an affidavit setting forth the facts and that the affidavit is made the condition upon which the validity of the foreclosure depends, and further that it applied to mortgages dated before 1917 and which contain a one-year foreclosure covenant, which the court denominated "the familiar form." The conclusion was that such "foreclosure clause" was "not a contract contemplated and protected by the Constitution," and further that the act related to the remedy for the enforcement of rights and that while an act

may not so far affect the remedy as to impair the obligation of a contract, the test in such case "is whether the value of the contract is lessened and whether a substantial and efficacious remedy remains." It was decided that the act sustained the test.

[1] The basic principles that determine this case are elementary. The obligation of a

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contract cannot be im*paired by a law passed after the contract was entered into, and the remedy for enforcement of the contract may be so far a part of it as to be within the principle that protects it. But the remedy may not have that intimacy of relation and a regulation or change of it may not impair its efficiency or lessen the obligation of the contract.

It is recognized that the Legislature may modify or change existing remedies or prescribe new modes of procedure without impairing the obligation of contracts if a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract. *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 23 Sup. Ct. 234, 47 L. Ed. 249; *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93. These cases are complementary. In the first, an alteration of the remedy was sustained; in the second, the remedy was adjudged so intimate in its relation to the contract as to be within its obligation and immunity from change. The first is the reliance of defendant in error; the second, of plaintiff in error. Our inquiry, therefore, is: Which determines the case at bar?

[2] The statute, in execution of the purpose of the state, enjoins a duty upon the mortgagee, the effect of the nonperformance of which the mortgagor may avail of. In other words, the duty not performed, the attempt at foreclosure is null and void, and necessarily, therefore, it is no impediment to redemption of the mortgage by the mortgagor. It does not withhold possession of the premises for a single day, nor does it defeat the efficacy of possession as foreclosure. And we have seen the Supreme Court of the state, passing upon it, decided that compliance with it does not involve any delay. The mortgagee may perform the condition at once or at his option any time within 3 months. It therefore only imposes a condition, easily complied with, which the law, for its purposes, requires; and the condition was required, and its purpose declared long before plaintiff in error's attempt at foreclosure.

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*We think it would be extreme to hold that this is outside of the power of the state over remedies, and the law of the state has precedents of justification in *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. 854, 27 L. Ed. 808, and *Curtis v. Whitney*, 13 Wall. 68, 20 L. Ed. 513. Decree affirmed.

(260 U. S. 667)

FOLEY v. UNITED STATES.

(Argued Jan. 12, 1923. Decided Jan. 29, 1923.)

No. 203.

1. United States $\S$ 95—Agreement to use patents held conditioned on satisfactory experiments.

A written agreement by the Bureau of Ordnance of the Navy Department to test a patented apparatus, and, if it works satisfactorily to the bureau, to pay the inventor a royalty for powder dried by the apparatus, whether it be construed as creating a contract or as giving merely an option to the Bureau, was clearly conditioned on the apparatus satisfactorily meeting the test.

2. United States $\S$ 97—Inventor's silence held consent to the termination of use of patents.

Even if an agreement for the testing and use by the United States of a patented invention could be terminated only with the consent of the inventor, his silence for more than 10 years after receiving notice that the test was unsatisfactory was tantamount to acquiescence.

3. United States $\S$ 97—Government held not to have used patented invention, if patents were valid.

Where the essential difference between the patented process and method of drying powder and the previously existing method consisted in the use of a vaporous or vapor-laden atmosphere, the government cannot be charged with use of the invention, where the only vapor in the atmosphere employed during its process was that which resulted from the drying of the powder, since the patents, to have validity, must be construed as requiring vapor in addition to that.

Appeal from the Court of Claims.

Claim by Olga Gathmann Foley, as administratrix of the estate of Louis Gathmann, deceased, against the United States. From a judgment of the Court of Claims, disallowing the claim (56 Ct. Cl. 303), claimant appeals. Affirmed.

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*Messrs. Charles J. Pence, of Fredericksburg, Va., and L. T. Michener, of Washington, D. C., for appellant.

Mr. Melville D. Church, of Washington, D. C., for the United States.

Mr. Justice McKENNA delivered the opinion of the Court.

Appeal from judgment of the Court of Claims dismissing petition of appellant in which she prayed judgment against the United States for the sum of \$236,750.

A summary of the allegations of the petition is as follows:

The government was engaged in the manufacture of smokeless powder at its station at Indian Head, Md.

Gathmann had under consideration, with

a view to the application for patents, methods of drying the materials of the powder, and in consequence of conversations with the Chief of the Bureau of Ordnance of the Navy Department, he made to the bureau the following proposition:

"1839 Vernon Ave., N. W.,

"Washington, D. C., March 24, 1903.

"Sir: The undersigned has made an invention, 'method of drying materials,' for which patent has been filed Feb. 9, 1903, Series No. 142653.

"Now, in consideration of the Navy Department building an apparatus for testing this method, without expense to me, I hereby give the Navy Department the option of using my method of drying materials, if they find it to their advantage, by paying to me, my heirs,

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or my legal *representatives, \$0.01 (one cent) for each pound of material dried by my method.

"Very respectfully, Louis Gathmann.

"Admiral O'Neil,

"Chief of Bureau of Ordnance."

He delivered with the proposition a plan or drawing for an experimental apparatus.

To the proposition the Chief of the Bureau of Ordnance replied as follows:

"Address Bureau of Ordnance, Navy Department, and refer to No. 3585.

"Washington, D. C., March 26, 1903.

"Sir: Referring to your communication of March 24th, 1903, offering the Navy Department the option of using your method of drying materials, on payment of one cent per pound on materials so dried:

"The Bureau has to inform you that it accepts your proposition, and has ordered one experimental apparatus for drying smokeless powder, constructed in accordance with plan submitted by you. This apparatus will be tested without expense to you, and, if it works satisfactorily to the Bureau, the Bureau agrees to pay you, your heirs or legal representatives, one cent for each pound of smokeless powder dried by the method covered by your application or applications filed or to be filed with the U. S. Patent Office, provided a patent or patents is or are issued to you therefor.

"Respectfully,

Chas. O'Neil,

"Chief of Bureau of Ordnance.

"Mr. Louis Gathmann,

"1839 Vernon Avenue, Washington, D. C."

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*At the time of the conversation of Gathmann with the Chief of Ordnance, and his proposition and the reply to it, he, Gathmann, contemplated applying for patents for his methods, and on February 9, 1903, and subsequent dates, made applications for patents and patents were issued to him for his methods, and at various times from April, 1909, to April, 1915, the government made use of the processes and methods covered by the patents in the manufacture of smokeless powder to the amount of 23,675,061 pounds thereof and became indebted to the estate

of Gathmann in the sum of the petition, to wit, \$236,750.

A general traverse was filed to the claim. Upon the issues thus formed and upon considering the evidence taken, the Court of Claims made findings of fact, and from them deduced, as conclusion of law, that appellant was not entitled to recovery and dismissed her petition.

The court decided that the proposition made by Gathmann's communication and the reply thereto presented an option only, and not a contract, and that it was terminated by the Bureau by a letter addressed to Gathmann, October 14, 1904, which was as follows:

"Referring to your apparatus for drying powder, installed at the naval proving ground for trial: The Bureau forwards herewith a copy of the report made by the inspector of ordnance in charge of that station for your information. After carefully considering this report the Bureau is of opinion that this apparatus has failed to demonstrate anything that would warrant further experiment with it, and the Bureau has instructed the inspector of ordnance in charge of the naval proving ground that, when the drier can hold no more samples the whole amount be put in the dry house until dried to the proper volatiles."

The court decided, besides, that the government had not used Gathmann's methods.

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Appellant attacks both *rulings, but concentrates her attention upon the first. The existence of the second, she assumes, is demonstrated by the physical laws of nature, of which the court will take judicial notice.

The specifications of error against the first ruling are as follows:

"(1) The letters made an express contract of license for the full term of the patents; (2) the license could not be renounced or ended in any manner except by mutual consent or the fault of Mr. Gathmann; (3) he had the right after the receipt of the letter of October 14, 1904, to regard the license still in force and to sue for the unpaid royalties, the government having used the inventions thereafter; (4) what was said prior to the letters of March 26 and 28, 1903, should not be considered; (5) the Court of Claims should not have considered the development and state of the art prior to the issuance of the patents; (6) the licensee is estopped from denying the validity of the patents."

To estimate these contentions, the findings of the court must be considered. A summary of them, stated narratively, is as follows:

The material of smokeless powder in its first stages is in a plastic condition, containing about 40 per cent. of moisture due to the presence of ether and alcohol, called the "solvent." To make the powder ready for use, the solvent must be reduced to between 4 per cent. and 7 per cent. according to caliber. The process requires several months' time. The elements of the solvent were expensive, and it became an object to the gov-

ernment and its manufacture of the powder to save them for reuse.

As early as 1900 the government had used, along with other methods of drying, what was known as the closed-circuit method of drying and solvent recovery. In this method there is, generally speaking, a heating chamber, a powder chamber, and a condensing

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chamber, with the *necessary connecting pipes or conduits and means for effecting circulation of the air in the circuit, as by fan or by gravity. In operation the warm air from the heating chamber passes on to the powder chamber, where it absorbs solvent from the "green" powder, then passes on to the condensing chamber, where the solvent carried by it is condensed to liquid form, the air then passing on to the heating chamber again for reheating and repetition of the cycle.

When the powder is newly made, or "green," the solvent is given off rapidly; but as the percentage of the solvent in the mass is reduced, it volatilizes less rapidly and comes off less freely. When the solvent is reduced to about 10 per cent., this closed-circuit process is discontinued and the drying of the powder is completed in the ordinary drying houses.

The plans of the apparatus used by the government in 1900 were secured from the California Powder Works, of California, by whom the apparatus was understood to have originated. It illustrates "the closed-circuit method."

Louis Gathmann was an inventor and was interested in improving the method of expediting the manufacture of smokeless powder and had discussed the question with Admiral O'Neil. The government at times had two systems; one for merely drying by hot air, and the other for both drying and recovery of the solvent. Gathmann claimed a method that would do both in a very much shorter time and proposed that a test be made. The letters we have quoted grew out of the conferences between Gathmann and Admiral O'Neil, and Gathmann's representation furnished the chief inducement to the Admiral to enter into the agreement shown by the letters:

Pursuant to the agreement or option shown by the letters, the United States under the direction and supervision of Gathmann, at

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its own expense, constructed and *exhaustively tested at its Indian Head (Maryland) powder plant the experimental apparatus and method so proposed by Gathmann. The apparatus and method were substantially the same as those shown and described in Gathmann's letters patent.

The tests began in October, 1903, and continued until October, 1904, during which time reports of the results obtained by the tests, comparative and otherwise, were periodically made by the officer making the tests, com-

parison being made with results obtained from concurrent operations under the regular government method. In making the tests, the instructions and wishes of Gathmann were complied with, except that he desired a continuous and unbroken operation, though he had acceded at first to the closing down of the operation of the government plant on Sundays. His desire was not acceded to.

In the tests the time required for drying the powder was not reduced, nor did it appear that the former methods used and results obtained by the government in drying and solvent recovery were otherwise improved upon, nor did Gathmann's apparatus work satisfactorily to the Bureau of Ordnance, and at the close of the tests, Gathmann was so notified by a letter from the Acting Chief of Ordnance.

No change was made in the government's solvent recovery and drying processes as a result of the test of Gathmann's method.

On June 28, 1904, a patent, No. 763,387, in pursuance to his application of February 9, 1903, was issued to Gathmann. On the same day there was granted to Gathmann and his assignees of a fourth interest therein, United States patent No. 763,388. These patents and the applications upon which they were granted were the applications and patents in contemplation by Gathmann, and Admiral O'Neil in their respective letters of March 24 and 26, 1903.

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*Beginning in 1907 the Navy Department at various times in the manufacture of smokeless powder used drying and solvent recovery apparatuses and methods.

They are illustrated by figures attached to the findings. From August 1, 1910, to 1916, an apparatus known as the box-type method was used, in which "the circulation is gravity circulation, induced wholly by the heating and the cooling of the air in the different parts of the circuit." It is not necessary to reproduce the illustrations, and the processes need but little explanation. They are all of the closed-circuit method of drying and solvent recovery. All have a heating chamber, a powder chamber, and a condensing chamber, with connecting pipes or conduits and means of effecting circulation of air in the circuit, as by fan or by gravity. It is not necessary to compare their mechanisms. We think that the apparatus received by the Bureau from the California Powder Works did not differ in essential structure from them and, of course, it differed from that of Gathmann's apparatus. And differed from them necessarily, otherwise Gathmann would have had no purpose in submitting a proposition to the Bureau. The difference was in the method—amount of vapor, means "provided," to quote the patent, "to produce a vapor-laden atmosphere in the drying chamber" and "so as to maintain," and to quote the patent further, "a substantially vapor-saturated atmosphere in

the drying chamber nearly to the end of the operation of drying. * * *

In other words, the vapor from the moisture of the materials was added to "by admitting vapor as steam."

[1] Considering the methods, their illustrations, and the letters exchanged by Gathmann to the Bureau of Ordnance, the conclusion of the Court of Claims was that a contract was not created. "At most," the conclusion was, "a mere option was granted by Gathmann to the government to use his

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method if found suitable after making a test of certain apparatus furnished by him, which he continued to improve or change." And again:

"There was never any agreement between the parties to use Gathmann's method, and all we have is, as has been stated, an option granted, declined and terminated."

This conclusion appellant resists, and insists here, as she insisted in the Court of Claims, that a contract was created with its comprehensive and determining effect, it having continued, is the contention, after the date of the letters. That a contract existed or continued we cannot concede to appellant. But whether option or contract, we think it was terminated. There was an election given to the government to be exercised by it according to the judgment of its officers of a test of the "experimental apparatus" submitted by Gathmann. The test was made, judgment was exercised and its effect notified to Gathmann in the letter of October 14, 1904. Gathmann's letter gave "the option of using" his "method of drying materials, if they [Navy Department] find it to their advantage, by paying to" him, his heirs or legal representatives "\$0.01 (one cent) for each pound of material dried by" his "method."

Clearly, therefore, there was a conditional proposal, and an acceptance upon the condition that the apparatus, after test, should work "satisfactorily to the Bureau." It did not so work, and the Bureau so declared to Gathmann.

[2] It is true that there was no response by Gathmann to the letter of the Bureau. His silence, however, was tantamount to acquiescence. It does not appear when that silence was broken. The original petition was filed in this case April 17, 1915; that is, more than ten years after the Bureau's action in declining the proposal. We think that he could not keep the government in obligation, uncertainty and restraint all that time, or even until April, 1909, the first date

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alleged of the use by the *government of his apparatus. He, therefore, must be considered as having accepted the decision of the Bureau and the termination of the relation created by the letters whether it was obligation or option, "right" or "privilege." Responding, therefore, to the contention of appellant that a contract (license, to use ap-

pellant's word) can "not be renounced or ended in any manner except by mutual consent or the fault of Gathmann," we think there was such consent—that which must be considered as tantamount to consent.

[3] We do not think it is necessary to review the claims of the patents and wherein either of them is an advance upon the uses and knowledge of the world, and, necessarily, including the methods of the government. The Court of Claims has done this, and, we think, so satisfactorily, that we content ourselves by referring to its opinion. We need only to say that Gathmann emphasized the distinction of his patents from all that preceded them as using a "vaporous or vapor-laden atmosphere," and that such necessarily existed or will occur in the methods used by the government.

It is counsel's contention that it is "inevitable that vaporous and vapor-laden atmosphere would be created the instant the heated air came in contact with the green powder, and would continue vaporous and vapor-laden until all of the alcohol and ether were extracted from the powder or the powder be removed from the drier." And of this, it is asserted, this court takes judicial notice as "the law of physics," and the further assertion is that:

"Of course this contact of the heated air with the alcohol and ether caused the air to become vapor laden whether the defendant wished it or not."

The assertions prove too much. They leave the patents without basis, and the distinction they express and dwell on as merely verbal. If the asserted result was inevitable in the method of the patents, it was inevitable.

^{*677} In the method ^{*in} use prior to the patents, and, we repeat, the patents are left without justification.

The conclusion, therefore, must be that if the methods of the patents are different from the prior art by reason of the "initial vapor-laden atmosphere by admitting vapor as steam" the government does not use it; if that be not its distinction, and the methods of the prior art inevitably have it, the patents are no advance upon that art and are invalid.

Judgment affirmed.

(260 U. S. 682)

LEIGH ELLIS & CO. v. DAVIS, Agent, etc.

(Argued Jan. 18, 19, 1923. Decided Jan. 29, 1923.)

No. 246.

1. Carriers ⚡160 — Statutory provision for suits after federal control does not invalidate contract provision.

The provision of Transportation Act Feb. 28, 1920, § 206a, permitting actions against

the federal Agent to be brought within the periods of limitation then prescribed by state or federal statutes, but not later than two years from the date of passage of the act, was intended to limit, not to extend, rights of action, and does not invalidate existing contracts limiting the period within which an action must be brought which were valid when they were made.

2. Carriers ⚡160—Contract limiting time to sue to two years is reasonable.

A provision in a bill of lading requiring actions for loss or damage to be brought within two years and one day after the delivery of the goods or the lapse of a reasonable time for delivery is reasonable and valid.

3. Carriers ⚡160—Statutes of state held not to affect contract provision of interstate bill of lading limiting actions.

The statutes of the state where the goods were shipped and the suit was brought do not affect the contract provision of an interstate bill of lading limiting time to sue.

4. Carriers ⚡166—Reasonableness of provision limiting time to sue is question of law.

The reasonableness of the limitation of time to sue specified in the bill of lading is a question of law.

5. Carriers ⚡160—Claim for short weight is "loss," within provision limiting time to sue.

A claim by the purchaser of goods in shipment against the carrier for a shortage in the weight of the goods below that stated in the bill of lading is a "claim for loss," within the provision of the bill of lading requiring suits for loss, damage, or debt to be brought within two years and one day.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Loss.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by Leigh Ellis and another, doing business under the firm name of Leigh Ellis & Co., against James C. Davis, as Agent, under Transportation Act 1920, c. 91, § 206. Judgment for defendant, after demurrer to the petition was sustained (274 Fed. 443), was affirmed by the Circuit Court of Appeals (276 Fed. 400), and plaintiffs bring error. Affirmed.

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*Mr. Edgar Watkins, of Atlanta, Ga., for plaintiffs in error.

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*Mr. W. T. Colquitt, of Atlanta, Ga., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit upon two bills of lading for failure to deliver the full amount of cotton covered by them. The plaintiffs allege that they purchased the bills at a rate determined by the number of pounds specified in the bills but that on delivery it turned out that the weight of 100 bales covered by one of the

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bills was 15,312 *pounds short, and that of 200 bales covered by the other was 11,527 pounds short. The 200 bales were delivered to the carrier on March 25, 1918, and the 100 on March 26, 1918, when the railroads were under federal control. A claim for this loss was made to the Atlanta, Birmingham & Atlantic Railroad, the road over which the cotton was sent, on April 25, 1918, and denied by the road on July 28, 1918. This suit was begun on January 29, 1921, more than two years and a day after the short delivery. The bills of lading which were in the same general form provided that:

"Suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

They also stated the weight "subject to correction." The District Court after careful consideration dismissed the petition upon demurrer, on the ground that the suit was too late under the quoted words of the contract, and also on the merits. 274 Fed. 443. The Circuit Court of Appeals affirmed the judgment, adopting the opinion below as to the time within which the suit must be brought. 276 Fed. 400.

[1-4] We find it unnecessary to consider other defences besides the contract limitation, as we agree with the Courts below that that disposes of the case. The main objection urged is that the contract is overridden by section 206(a) of the Transportation Act Feb. 28, 1920, c. 91, 41 Stat. 456, 461, giving actions in cases like this against an agent designated by the President, and providing that they may be brought within the periods of limitation now prescribed by State or Federal statutes, but not later than two years from the date of the passage of the Act. The contention is supported with some ingenuity but we think it enough to observe that the general purpose was to limit not to extend

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rights of action and that we *cannot suppose that it was intended to invalidate existing contracts good when made. New York Central R. R. Co. v. Lazarus (C. C. A.) 278 Fed. 900; William F. Mosser Co. v. Payne, Director General (W. Va.) 114 S. E. 365; Northern Milling Co. v. Davis, Agent (Wis.) 190 N. W. 351. In our opinion this contract was good when made. The time allowed was reasonable. Missouri, Kansas & Texas Ry. Co. v. Harriman, 227 U. S. 657, 672, 33 Sup. Ct. 397, 57 L. Ed. 690; Texas & Pacific Ry. Co. v. Leatherwood, 250 U. S. 478, 481, 39 Sup. Ct. 517, 63 L. Ed. 1096. We agree with the District Court that Decker & Sons v. Director General, 55 I. C. C. 453, should not be understood or allowed to contravene our conclusion, upon the facts here. The statutes of

the States where the goods were shipped and the suit was brought do not affect the contract, and the reasonableness of the limitation is a matter of law; Missouri, Kansas & Texas Ry. Co. v. Harriman, 227 U. S. 657, 672, 33 Sup. Ct. 397, 57 L. Ed. 690, so that the bringing of a previous suit, alleged in the declaration, does not save the case. Riddlebarger v. Hartford Insurance Co., 7 Wall. 386, 19 L. Ed. 257.

[5] The only other argument that seems to us to need notice is that the claim is not within the words of the limitation. But it is of the kind that the clause "suits for loss, damage or delay" manifestly intended to limit and we see no reason why it should not be included under the head of loss.

Judgment affirmed.

(260 U. S. 689)

A. BOURJOIS & CO., Inc., v. KATZEL.

(Argued Jan. 18, 1923. Decided Jan. 29, 1923.)

No. 190.

1. Trade-marks and trade-names and unfair competition $\S$ 54 $\frac{1}{2}$, New, vol. 16A Key-No. Series—Foreign manufacturer cannot compete with assignee of trade-mark.

A foreign manufacturer, who has sold his business in this country, with his good will and trade-marks, cannot come to this country and use his old trade-marks in competition with plaintiff, in view of the terms of Trade-Mark Act Feb. 20, 1905, § 10 (Comp. St. § 9495), authorizing assignments.

2. Trade-marks and trade-names and unfair competition $\S$ 54 $\frac{1}{2}$, New, vol. 16A Key-No. Series—Buyer of foreign goods takes subject to seller's inability to resell in this country.

The buyer of foreign goods from a manufacturer, who had sold his business and trade-marks in this country, acquires the goods subject to the restriction on resale by the buyer, and cannot resell the goods in the original boxes bearing the trade-marks in competition with the assignee of the trade-marks in this country.

3. Trade-marks and trade-names and unfair competition $\S$ 53—Monopoly should be protected with care.

Though the monopoly of a trade-mark is not so extensive as that of a patent, it is as complete so far as it goes, and since it deals with a delicate matter that may be of great value, but is easily destroyed, it should be protected with corresponding care.

4. Trade-marks and trade-names and unfair competition $\S$ 54 $\frac{1}{2}$, New, vol. 16A Key-No. Series—Trade-mark bought from foreign manufacturer indicates goods come from assignee.

The use by a domestic corporation of a trade-mark bought from a foreign manufacturer indicates in law that the goods come from the domestic buyer of the mark, although not made by it, and stakes the reputation of the domestic buyer on the character of the goods.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit by A. Bourjois & Co., Inc., against Anna Katzel to restrain the infringement of trade-marks. An order of the District Court granting a preliminary injunction (274 Fed. 856) was reversed by the Circuit Court of Appeals (275 Fed. 539), and complainant brings certiorari. Decree of Circuit Court of Appeals reversed.

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*Mr. Hans v. Briesen, of New York City, for petitioner.

Mr. John B. Doyle, of New York City, for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill to restrain the infringement of the trade-marks "Java" and "Bourjois" registered in the Patent Office of the United States. A preliminary injunction was granted by the District Court (274 Fed. 856), but the order was reversed by the Circuit Court of Appeals, one Judge dissenting (275 Fed. 539). A writ of certiorari was granted by this court. 257 U. S. 630, 42 Sup. Ct. 92, 66 L. Ed. 406. In 1913 A. Bourjois & Cie., E. Wertheimer & Cie. Successeurs, doing business in France and also in the United States, sold to the plaintiff for a large sum their business in the United States, with their good will and their trade-marks registered in the Patent Office. The latter related particularly to face powder, and included the above words. The plaintiff since its purchase has registered them again and

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goes on with the business that it bought, using substantially the same form of box and label as its predecessors and importing its face powder from France. It uses care in selecting colors suitable for the American market, in packing and in keeping up the standard, and has spent much money in advertising, etc., so that the business has grown very great and the labels have come to be understood by the public here as meaning goods coming from the plaintiff. The boxes have upon their backs:

"Trade-Marks Reg. U. S. Pat. Off. Made in France—Packed in the U. S. A. By A. Bourjois & Co. Inc. of New York, Succ'rs in the U. S. to A. Bourjois & Cie. and E. Wertheimer & Cie."

The defendant, finding that the rate of exchange enabled her to do so at a profit, bought a large quantity of the same powder in France and is selling it here in the French boxes which closely resemble those used by the plaintiff except that they have not the last quoted statement on the backs, and that

the label reads "Poudre de riz de Java" whereas the plaintiff has found it advisable to strike out the suggestion of rice powder and has "Poudre Java" instead. There is no question that the defendant infringes the plaintiff's rights unless the fact that her boxes and powder are the genuine product of the French concern gives her a right to sell them in the present form.

[1-4] We are of opinion that the plaintiff's rights are infringed. After the sale the French manufacturers could not have come to the United States and have used their old marks in competition with the plaintiff. That plainly follows from the statute authorizing assignments. Act of February 20, 1905, c. 592, § 10, 33 Stat. 727 (Comp. St. § 9495). If for the purpose of evading the effect of the transfer it had arranged with the defendant that she should sell with the old label, we suppose that no one would doubt that the contrivance must fail. There is no

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such conspiracy here, *but apart from the opening of a door to one, the vendors could not convey their goods free from the restriction to which the vendors were subject. Ownership of the goods does not carry the right to sell them with a specific mark. It does not necessarily carry the right to sell them at all in a given place. If the goods were patented in the United States a dealer who lawfully bought similar goods abroad from one who had a right to make and sell them there could not sell them in the United States. *Boesch v. Gräff*, 133 U. S. 697, 10 Sup. Ct. 378, 33 L. Ed. 787. The monopoly in that case is more extensive, but we see no sufficient reason for holding that the monopoly of a trade-mark, so far as it goes, is less complete. It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care. It is said that the trade-mark here is that of the French house and truly indicates the origin of the goods. But that is not accurate. It is the trade-mark of the plaintiff only in the United States and indicates in law, and, it is found, by public understanding, that the goods come from the plaintiff although not made by it. It was sold and could only be sold with the good will of the business that the plaintiff bought. *Eiseman v. Schiffer*, 157 Fed. 473. It stakes the reputation of the plaintiff upon the character of the goods. *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526. The injunction granted by the District Court was proper under sections 17 and 19 of the Trade-Mark Act. Act of February 20, 1905, c. 592 (Comp. St. §§ 9502, 9504).

Decree of Circuit Court of Appeals reversed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1922

(260 U. S. 756)

No. 54. WEST SIDE IRRIGATING COMPANY, appellant, v. The UNITED STATES of America. Jan. 2, 1923. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 269 Fed. 759. Messrs. John P. Hartman and Carroll B. Graves, both of Seattle, Wash., for appellant. The Attorney General, for the United States. Dismissed, per stipulation.

(260 U. S. 707)

No. 109. COLONIAL BEACH COMPANY, Owner and Claimant of THE STEAMER ST. JOHNS, petitioner, v. QUEMAHONING COAL COMPANY et al. Jan. 2, 1923. On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. For opinion below, see 273 Fed. 1005. Mr. Hugh H. Obear, of Washington, D. C., for petitioner.

PER CURIAM. Reversed with costs, and cause remanded to the District Court of the United States for the Eastern District of Virginia. United States v. Carver, 260 U. S. 482, 43 Sup. Ct. 181, 67 L. Ed. —, No. 402, this day decided; Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 41 Sup. Ct. 1, 65 L. Ed. 97.

(260 U. S. 745)

No. 603. BOARD OF LEVEE COMMISSIONERS OF the ORLEANS LEVEE DISTRICT, petitioner, v. William H. WARD. Jan. 2, 1923. For opinion below, see 92 South. 769. Messrs. John H. Cohen, of New York City, and Arthur McGuirk, of New Orleans, La., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied.

(260 U. S. 745)

No. 676. Fred P. VIOLETTE, appellant, v. James A. WALSH, Collector, etc. Jan. 2, 1923. For opinion below, see 282 Fed. 582. Mr. J. W. Cox, of Washington, D. C., for appellant. Petition for a writ of certiorari herein denied.

(260 U. S. 745)

No. 691. Eddie HARRISON et al., petitioners, v. Dick HARRISON. Jan. 2, 1923. For opinion below, see 209 Pac. 737. Messrs. Wesley E. Disney and John M. Wheeler, both of Muskogee, Okl., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(260 U. S. 745)

No. 712. EDGAR-MORGAN COMPANY, petitioner, v. ALFOCORN MILLING COMPANY. Jan. 2, 1923. For opinion below, see 282 Fed. 394. Messrs. Joseph H. Milans, of Washington, D. C., and Arthur E. Wallace, and Max W. Zabel, both of Chicago, Ill., for petitioner. Mr. H. G. Cook, of St. Louis, Mo.,

(Mr. Thos. H. Cobbs, of St. Louis, Mo., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 756)

No. 775. The UNITED STATES of America, plaintiff in error, v. Mark BOASBERG, alias "Jack Sheehan." Jan. 2, 1923. In error to the District Court of the United States for the Eastern District of Louisiana. For opinion below, see 283 Fed. 305. Mr. H. Garland Dupre, of New Orleans, La., for defendant in error. Docketed and dismissed, on motion of Mr. H. Garland Dupre for the defendant in error.

(260 U. S. 757)

No. 166. H. G. KOLLER, appellant, v. The UNITED STATES. Jan. 3, 1923. Appeal from the District Court of the United States for the Western District of Washington. Mr. D. V. Halverstadt, of Seattle, Wash., for appellant. Mr. James M. Beck, Sol. Gen., of Washington, D. C., for the United States. Dismissed, pursuant to the 16th rule, on motion of Mr. Solicitor General Beck for the appellee.

(260 U. S. 757)

No. 171. The UNITED STATES ex rel. WORKINGMEN'S COOPERATIVE PUBLISHING ASSOCIATION, plaintiff in error, v. Hubert WORK, Postmaster General, etc. Jan. 3, 1923. In error to the Court of Appeals of the District of Columbia. For opinion below, see Burleson v. United States, 51 App. D. C. 65, 274 Fed. 749. Mr. S. John Block, of New York City, for plaintiff in error. Dismissed, per stipulation.

(260 U. S. 757)

No. 12. EXCHANGE OIL COMPANY, appellant, v. F. C. CARTER, as State Auditor, etc., et al. Jan. 8, 1923. Appeal from the District Court of the United States for the Western District of Oklahoma. See, also, 260 U. S. 757, 43 Sup. Ct. 246, 247, 67 L. Ed. —. Mr. William O. Beall, of Tulsa, Okl., for appellant. Dismissed with costs, per stipulation.

(260 U. S. 757)

No. 13. EXCHANGE OIL COMPANY, plaintiff in error, v. F. C. CARTER, as State Auditor, etc. Jan. 8, 1923. In error to the District Court of the United States for the Western District of Oklahoma. See, also, 260 U. S. 757, 43 Sup. Ct. 246, 247, 67 L. Ed. —. Mr. William O. Beall, of Tulsa, Okl., for plaintiff in error. Dismissed with costs, per stipulation.

(260 U. S. 757)

No. 14. EXCHANGE OIL COMPANY, plaintiff in error, v. F. C. CARTER, as State Auditor, etc. Jan. 8, 1923. In error to the

District Court of the United States for the Western District of Oklahoma. See, also, 260 U. S. 757, 43 Sup. Ct. 246, 67 L. Ed. —. Mr. William O. Beall, of Tulsa, Okl., for plaintiff in error. Dismissed with costs, per stipulation.

(260 U. S. 757)

No. 15. EXCHANGE OIL COMPANY, plaintiff in error, v. F. C. CARTER, as State auditor, etc. Jan. 8, 1923. In error to the District Court of the United States for the Western District of Oklahoma. See, also, 260 U. S. 757, 43 Sup. Ct. 246, 67 L. Ed. —. Mr. William O. Beall, of Tulsa, Okl., for plaintiff in error. Dismissed with costs, per stipulation.

(260 U. S. 708)

Nos. 173, 174. Clyde CHANDLER, plaintiff in error, v. The STATE OF TEXAS (two cases); Nos. 175, 176. John CHANDLER, plaintiff in error, v. The STATE OF TEXAS (two cases). Jan. 3, 1923. In error to the Court of Criminal Appeals of the State of Texas. For opinions below, see 89 Tex. Cr. R. 306, 232 S. W. 317; 89 Tex. Cr. R. 597, 232 S. W. 318; 89 Tex. Cr. R. 308, 232 S. W. 336; 89 Tex. Cr. R. 599, 232 S. W. 337. Mr. J. M. Edwards, of Tyler, Tex., for plaintiff in error.

PER CURIAM. Affirmed upon the authority of *Vigliotti v. Commonwealth of Pennsylvania*, 258 U. S. 403, 42 Sup. Ct. 330, 66 L. Ed. 686, decided April 10, 1922; *United States v. Lanza et al.*, 260 U. S. 377, 43 Sup. Ct. 141, 67 L. Ed. —, decided December 11, 1922.

(260 U. S. 758)

No. 206. CORVALLIS CREAMERY COMPANY, appellant, v. I. H. VAN WINKLE, Attorney General, etc., et al. Jan. 8, 1923. Appeal from the District Court of the United States for the District of Oregon. For opinion below, see 274 Fed. 454. Mr. Thos. E. Haven, of San Francisco, Cal., for appellant. Dismissed with costs, per stipulation.

(260 U. S. 757)

No. 236. Charles M. WATERS, appellant, v. Henry W. PHILLIPS et al. Jan. 8, 1923. On appeal from the District Court of the United States for the Northern District of Illinois. Mr. James M. Beck, Sol. Gen., of Washington, D. C., for appellant. Dismissed with costs, on motion of Mr. Solicitor General Beck for the appellant.

(260 U. S. 758)

No. 612. KANSAS CITY BRIDGE COMPANY, appellant, v. Frank BLAKEMORE. Jan. 8, 1923. Appeal from the District Court of the United States for the Western District of Missouri. Mr. Cyrus Crane, of Kansas City, Mo., for appellant. Dismissed with costs, on motion of counsel for the appellant.

(260 U. S. 747)

No. 705. UNITED STATES RAILWAY ADMINISTRATION et al., petitioners, v. Fannie SLATINKA, Administratrix, etc. Jan. 8, 1923. For opinion below, see 188 N. W. 20. Mr. T. P. Littlepage, of Washington, D. C., for petitioners. Mr. Wm. Chamberlain, of

Cedar Rapids, Iowa, for respondent. Petition for writ of certiorari to the Supreme Court of the State of Iowa denied because the case abates for failure to substitute successor of petitioner within one year after petitioner vacated office.

(260 U. S. 746)

No. 719. The K. W. IGNITION COMPANY et al., petitioners, v. TEMCO ELECTRIC MOTOR COMPANY. Jan. 8, 1923. For opinion below, see 283 Fed. 873. Mr. W. F. Murray, of Cincinnati, Ohio, for petitioners. Messrs. H. A. Toulman and H. A. Toulman, Jr., both of Dayton, Ohio, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(260 U. S. 748)

No. 720. MISHAWAKA WOOLEN MANUFACTURING COMPANY, petitioner, v. FEDERAL TRADE COMMISSION. Jan. 8, 1923. For opinion below, see 283 Fed. 1022. Mr. H. E. Bodman, of Detroit, Mich., for petitioner.

PER CURIAM. The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is denied. The Solicitor General, in his brief for the Federal Trade Commission, concedes that the order affirmed by the Circuit Court of Appeals is broader than the decision in *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 455, 42 Sup. Ct. 150, 56 L. Ed. 314, 19 A. L. R. 882, which the Circuit Court of Appeals followed in dismissing the petition for the Woolen Manufacturing Co. The court denies the application for writ of certiorari herein, assuming that the Federal Trade Commission will modify its order accordingly, and without prejudice to an application for that purpose by the petitioner.

(260 U. S. 746)

No. 721. Edward J. ADER, petitioner, v. The UNITED STATES of America. Jan. 8, 1923. For opinion below, see 284 Fed. 13. Messrs. Jas. Hamilton Lewis, of Chicago, Ill., T. B. Felder, of New York City, and Edward Maher and J. G. Grossberg, both of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 746)

No. 722. Goldie A. SKOLNIK, petitioner, v. The UNITED STATES of America. Jan. 8, 1923. For opinion below, see 284 Fed. 13. Messrs. Jas. Hamilton Lewis, of Chicago, Ill., T. B. Felder, of New York City, and Edward Maher and J. G. Grossberg, both of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 746)

No. 723. VIRGINIA RAILWAY & POWER COMPANY et al., petitioners, v. Charles Hall DAVIS. Jan. 8, 1923. For opinion below, see 284 Fed. 479. Mr. Samuel Seabury, of New York City, E. R. Williams and Thos. B. Gay, both of Richmond, Va., for petitioners. Petition for a writ of certiorari to the United

States Circuit Court of Appeals for the Fourth Circuit denied.

(260 U. S. 746)

No. 726. **L. V. ORSINGER**, petitioner, v. **THE CONSOLIDATED FLOUR MILLS COMPANY**. Jan. 8, 1923. For opinion below, see 284 Fed. 224. Mr. M. G. Gallaher, of Fresno, Cal., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 748)

No. 730. **W. K. EPHRAIM et al.**, petitioners, v. **NEVADA & CALIFORNIA LAND & LIVE STOCK COMPANY et al.** Jan. 8, 1923. For opinion below, see 282 Fed. 610. Mr. Charles J. Kappler, of Washington, D. C., for petitioners. Mr. Edward Hohfeld, of San Francisco, Cal., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied for failure to file the petition within the time prescribed by the statute.

(260 U. S. 747)

No. 735. **SECURITY AUTO LOCK COMPANY et al.**, petitioners, v. **PERRY AUTO LOCK COMPANY**. Jan. 8, 1923. For opinion below, see 286 Fed. 101. Mr. Charles C. Bulkley, of Chicago, Ill., for petitioner. Messrs. Edward Rector, Frank Parker Davis and Glenn E. Smith, all of Chicago, Ill., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(260 U. S. 747)

No. 745. **ATLANTIC TRANSPORT COMPANY (Limited)**, petitioner, v. **H. C. JONES & COMPANY (Inc.)** Jan. 8, 1923. For opinion below, see 284 Fed. 310. Messrs. Burlington, Veeder, Masten & Fearey, of New York City, and Lord & Whip, of Baltimore, Md. (Van Vechten Veeder and Roscoe H. Hupper, both of New York City, of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(260 U. S. 747)

No. 766. **Antonio ABELLA et al.**, petitioners, v. **Pedro UNSON**. Jan. 8, 1923. Mr. Gabriel La O, of Manila, P. I., for petitioners. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(260 U. S. 747)

No. 768. **James C. DAVIS**, Director General of Railroads, etc., petitioner, v. **McWILLIAMS BROS. (Inc.)** Jan. 8, 1923. For opinion below, see 285 Fed. 312. Messrs. Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for petitioner. Messrs. Leo J. Curren, Henry M. Earle and Joseph P. Nolan, all of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 708)

No. 157. **The UNITED STATES of America**, plaintiff in error, v. **Ray JANES et al.** Jan. 15, 1923. In error to the District Court of the United States for the District of Colorado. The Attorney General, for the United States.

PER CURIAM. Judgment reversed, and cause remanded for further proceedings. **McKelvey et al. v. United States**, 260 U. S. 353, 43 Sup. Ct. 132, 67 L. Ed. —, decided December 4, 1922.

(260 U. S. 719)

No. 718. **The STANDARD PARTS COMPANY**, petitioner, v. **William J. PECK**. Jan. 15, 1923. For opinion below, see 282 Fed. 443. Mr. J. M. Garfield, of Cleveland, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

(260 U. S. 748)

No. 746. **F. E. MARKELL**, petitioner, v. **D. M. HERTZOG et al.** Jan. 15, 1923. For opinion below, see *In re Thompson*, 284 Fed. 65. Messrs. E. C. Higbee, of Uniontown, Pa., and Frank Davis, Jr., of Washington, D. C., for petitioner. Mr. A. Leo Weil, of Pittsburgh, Pa., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(260 U. S. 749)

No. 748. **G. R. BAKER et al.**, petitioners, v. **The UNITED STATES of America**. Jan. 15, 1923. For opinion below, see 285 Fed. 15. Messrs. A. L. Miller and Wallace Miller, both of Macon, Ga., for petitioners. Messrs. James M. Beck, Sol. Gen., of Washington, D. C., John W. H. Crim, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(260 U. S. 749)

No. 752. **MARLBORO COTTON MILLS**, petitioner, v. **The FIRESTONE TIRE & RUBBER COMPANY et al.** Jan. 15, 1923. For opinion below, see 282 Fed. 811. Messrs. D. D. McColl and W. M. Stevenson, both of Bennington, S. C., for petitioner. Messrs. D. W. Robinson, of Columbia, S. C., Amos C. Miller, of Chicago, Ill., and Tillett & Guthrie, of Charlotte, N. C., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(260 U. S. 749)

No. 753. **M. D. WANDELL**, petitioner, v. **NEW HAVEN TRAP ROCK COMPANY**. Jan. 15, 1923. For opinion below, see 285 Fed. 339. Messrs. T. Catesby Jones and Cipriano Andrade, Jr., both of New York City, for petitioner. Mr. Pierre M. Brown, of New York City, and Mr. George E. Hall, of New Haven, Conn., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(260 U. S. 749)

No. 757. PANGBORN CORPORATION, petitioner, v. The W. W. SLY MANUFACTURING COMPANY. Jan. 15, 1923. For opinion below, see 284 Fed. 217. Mr. William F. Hall, of Washington, D. C. (Messrs. Melville Church and James T. Newton, both of Washington, D. C., of counsel), for petitioner. Mr. Chas. E. Brock, of Cleveland Ohio, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(260 U. S. 749)

No. 761. Addie B. MYERS, petitioner, v. Lena M. VAYETTE et al. Jan. 15, 1923. For opinion below, see 303 Ill. 562, 136 N. E. 467. Mr. Morse Ives, of Chicago, Ill., for petitioner. Messrs. Arthur H. Shay, of Streator, Ill., and Lester H. Strawn, of Ottawa, Ill., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied.

(260 U. S. 750)

No. 780. Alexander McDUGALL, petitioner, v. OLIVER IRON MINING COMPANY. Jan. 15, 1923. For opinion below, see 284 Fed. 466. Messrs. Horace G. Stone and Merritt Starr, both of Chicago, Ill., for petitioner. Messrs. Frederick P. Fish, of Boston, Mass., D. Anthony Usina, of New York City, and Henry M. Huxley, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(260 U. S. 758)

No. 215. C. E. ROY et al., etc., plaintiffs in error, v. E. F. GANAHL. Jan. 16, 1923. In error to the District Court of the United States for the Northern District of California. Mr. Frank D. Madison, of San Francisco, Cal., for plaintiffs in error. Mr. Alexander T. Vogelsang, of San Francisco, Cal., for defendant in error. Dismissed with costs, pursuant to the 16th rule, on motion of Mr. Alexander T. Vogelsang for the defendant in error.

(260 U. S. 758)

No. 230. Abe RASKIN, plaintiff in error, v. Merritt W. DIXON, Sheriff, etc. Jan. 17, 1923. For opinion below, see 152 Ga. 204, 108 S. E. 61. In error to the Supreme Court of the State of Georgia. Messrs. A. A. Lawrence and Robert L. Colding, both of Savannah, Ga., for plaintiff in error. Dismissed with costs, pursuant to the 18th rule.

(260 U. S. 758)

No. 241. David H. CONRAD, plaintiff in error, v. The PEOPLE OF THE STATE OF ILLINOIS. Jan. 18, 1923. In error to the Supreme Court of the State of Illinois. For opinion below, see 299 Ill. 473, 132 N. E. 466. Mr. Rush B. Johnson, of Chicago, Ill., for plaintiff in error. Dismissed with costs, pursuant to the 18th rule.

(260 U. S. 759)

No. 244. Sam WINOKUR, plaintiff in error, v. H. I. HARN, Sheriff, etc., et al. Jan. 18, 1923. In error to the Supreme Court of the State of Georgia. For opinion below, see 152 Ga. 299, 110 S. E. 234. Mr. A. A. Lawrence, of Savannah, Ga., for plaintiff in error. Dismissed with costs, pursuant to the 10th rule.

(260 U. S. 759)

No. 247. Elmer F. ADAMS, plaintiff in error, v. The PEOPLE OF THE STATE OF ILLINOIS. Jan. 18, 1923. In error to the Supreme Court of the State of Illinois. For opinion below, see 300 Ill. 20, 132 N. E. 765. Mr. J. J. Barbour, of Chicago, Ill., for plaintiff in error. Dismissed with costs, pursuant to the 10th rule.

(260 U. S. 759)

No. 650. CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, appellant, v. LOUISIANA PUBLIC SERVICE COMMISSION et al. Jan. 19, 1923. Appeal from the District Court of the United States for the Eastern District of Louisiana. For opinion below, see 283 Fed. 215. Messrs. J. Blanc Monroe and J. C. Henriques, both of New Orleans, La., Hunt Chipley, of Atlanta, Ga., and C. M. Bracelen, of New York City, for appellant. Dismissed with costs, on motion of counsel for the appellant.

(260 U. S. 710)

No. 214. HATTIESBURG GROCERY COMPANY, plaintiff in error, v. Stokes V. ROBERTSON, State Revenue Agent of the State of Mississippi. Jan. 22, 1923. In error to the Supreme Court of the State of Mississippi. For opinions below, see 126 Miss. 34, 88 South. 4; 126 Miss. 655, 89 South. 369. Messrs. Marcellus Green and Garner Wynn Green, both of Jackson, Miss., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Toop v. Ulysses Land Co.*, 237 U. S. 580, 583, 35 Sup. Ct. 739, 59 L. Ed. 1127; *Piedmont Power & Light Co. v. Town of Graham*, 253 U. S. 193, 195, 40 Sup. Ct. 453, 64 L. Ed. 855.

(260 U. S. 709)

No. 222. John J. McGRATH et al., appellants, v. The UNITED STATES OF America. Jan. 22, 1923. Appeal from the District Court of the United States for the Southern District of New York. Mr. Elijah N. Zoline, of New York City, for appellants.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Toop v. Ulysses Land Co.*, 237 U. S. 580, 583, 35 Sup. Ct. 739, 59 L. Ed. 1127; *Piedmont Power & Light Co. v. Town of Graham*, 253 U. S. 193, 195, 40 Sup. Ct. 453, 64 L. Ed. 855.

(260 U. S. 709)

No. 227. **PETERS TRUST COMPANY**, plaintiff in error, v. **THE COUNTY OF DOUGLAS IN THE STATE OF NEBRASKA**. Jan. 22, 1923. In error to the Supreme Court of the State of Nebraska. For opinion below, see 106 Neb. 877, 184 N. W. 812. Mr. Halleck F. Rose, of Omaha, Neb., for plaintiff in error.

PER CURIAM. Affirmed upon the authority of *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *National Bank v. Commonwealth of Kentucky*, 9 Wall. 353, 359, 19 L. Ed. 701. See *People's National Bank v. Board of Equalization*, 260 U. S. 702, 43 Sup. Ct. 98, 67 L. Ed. —, decided November 20, 1922.

(260 U. S. 759)

No. 261. **Joaquin Ramos FERRO et al.**, petitioners, v. **Felix FABIAN et al.** Jan. 22, 1923. On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit. For opinion below, see *Agenjo v. Agenjo*, 276 Fed. 105. Mr. Frederick S. Tyler, of Washington, D. C., for petitioners.

Dismissed without costs to either party, per stipulation, on motion of Mr. Frederick S. Tyler, for the petitioners.

(260 U. S. 759)

No. 262. **J. OCHOA y Hermano**, petitioner, v. **Miguel, Luis, Gerardo, Tereso and Antonio MARTORELL y Torrens**. Jan. 22, 1923. On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit. For opinion below, see 276 Fed. 99. Mr. Frederick S. Tyler, of Washington, D. C., for petitioner. Dismissed with costs, per stipulation, on motion of Mr. Frederick S. Tyler, for the petitioner.

(260 U. S. 709)

No. 319. **Henry P. REED et al.**, plaintiffs in error, v. **VILLAGE OF HIBBING et al.** Jan. 22, 1923. In error to the Supreme Court of the State of Minnesota. For opinion below, see 150 Minn. 130, 184 N. W. 842. Mr. H. V. Mercer, of Minneapolis, Minn., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U. S. 1, 5-6, 40 Sup. Ct. 255, 64 L. Ed. 421.

(260 U. S. 750)

No. 700. **John ENDICOTT et al.**, petitioners, v. **THE BOARD OF ASSESSORS OF THE CITY OF DETROIT et al.** Jan. 22, 1923. Mr. P. J. M. Hally, of Detroit, Mich., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied.

(260 U. S. 750)

No. 733. **WILLIAM FILENE'S SONS COMPANY**, petitioner, v. **GILCHRIST COMPANY**. Jan. 22, 1923. For opinion below, see 284 Fed. 664. Messrs. Geo. E. Nutter and J. J. Kaplan, both of Boston, Mass., for petitioner. Petition for a writ of certiorari to the United

States Circuit Court of Appeals for the First Circuit denied.

(260 U. S. 719)

No. 749. **CENTRAL COAL & COKE COMPANY**, petitioner, v. **Jacob OCEPEK**. Jan. 22, 1923. For opinion below, see 244 S. W. 337. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas granted, and cause assigned for argument on Monday, February 19 next, on the summary docket, after the cases heretofore assigned for that day.

(260 U. S. 750)

No. 765. **NEHALEM STEAMSHIP COMPANY et al.**, petitioners, v. **AKTIESELSKABET AGGI et al.** Jan. 22, 1923. For opinion below, see *The Edgar Vance*, 284 Fed. 56. Messrs. George W. Wickersham and Ira A. Campbell, both of New York City, and W. S. Burnett, Edward J. McCutchen, Farnham P. Griffiths, and McCutchen, Olney, Willard, Mannon & Greene, all of San Francisco, Cal., for petitioners. Messrs. Edmund B. McClanahan, S. Haskett Derby and William Denman, all of San Francisco, Cal., for respondents *Aktieselskabet Aggi* and another. Messrs. Louis T. Hengstler, F. W. Dorr, Stanley Moore, and Andros & Hengstler, all of San Francisco, Cal., for respondent *W. R. Grace & Co.* Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(260 U. S. 751)

No. 773. **Dolly McCALMONT**, Administratrix, etc., petitioner, v. **PENNSYLVANIA RAILROAD COMPANY**. Jan. 22, 1923. For opinion below, see 283 Fed. 736. Mr. David F. Anderson, of Youngstown, Ohio, for petitioner. Messrs. William B. Sanders and Thomas M. Kirby, both of Cleveland, Ohio (Squire, Sanders & Dempsey, of Cleveland, Ohio, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(260 U. S. 719)

No. 781. **TAUBEL-SCOTT-KITZMILLER COMPANY (Inc.)**, petitioner, v. **David J. FOX et al.** Jan. 22, 1923. For opinion below, see 286 Fed. 351. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(260 U. S. 720)

No. 793. **PRESTONETTES (Inc.)**, petitioner, v. **Francois Joseph Spoturno COTY**. Jan. 22, 1923. For opinion below, see 285 Fed. 501. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(260 U. S. 760)

No. 272. **William F. KRELL**, plaintiff in error, v. **THE PEOPLE OF THE STATE OF ILLINOIS**. Jan. 24, 1923. Mr. Rush B. Johnson, of Chicago, Ill., for plaintiff in error. In error to the Supreme Court of the State of Illi-

nois. Dismissed with costs, pursuant to the 10th rule.

(260 U. S. 760)

No. 294. Reuben COOLEY, plaintiff in error, v. The STATE OF GEORGIA. Jan. 26, 1923. In error to the Supreme Court of the State of Georgia. For opinion below, see 152 Ga. 469, 110 S. E. 449. Mr. Alex A. Lawrence, of Savannah, Ga., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(260 U. S. 711)

No. 18, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS. Jan. 29, 1923. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Corsicana, Tex., Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., C. M. Cureton, of Austin, Tex., W. A. Keeling, of Mexia, Tex., R. H. Ward, of Houston, Tex., and T. W. Gregory, of Washington, D. C., for the State of Texas.

PER CURIAM. Application of Red River Syndicate, claimants, for a modification of the opinion delivered in this cause on May 1, 1922, is denied. 258 U. S. 574, 42 Sup. Ct. 406, 66 L. Ed. 771.

No. 121. The UNITED STATES, appellant, v. MASON & HANGER COMPANY; and

No. 122. The UNITED STATES, appellant, v. NORTH-WESTERN CONSTRUCTION COMPANY. Jan. 29, 1923. For former opinions, see 260 U. S. 323, 326, 43 S. Ct. 128, 129, 67 L. Ed. —, —. The Attorney General, for the United States. The petition for a rehearing of these cases is granted, and the cases assigned for argument on Monday, February 26 next, after the cases heretofore assigned for that day.

(260 U. S. 711)

No. 201. David LAMAR, appellant, v. The UNITED STATES of America. Jan. 29, 1923. Appeal from the District Court of the United States for the Southern District of New York. Mr. Elijah N. Zoline, of New York City, for appellant.

PER CURIAM. This is a habeas corpus proceeding designed to retard petitioner's incarceration in Mercer County jail after trial and conviction on charge of conspiracy to restrain foreign trade and commerce by instigating strikes, etc., intended to prevent the manufacture and transportation of war supplies.

The points relied upon are without merit, and the judgment dismissing the writ (274 Fed. 160) is affirmed.

The clerk is instructed to issue the mandate at once.

(260 U. S. 760)

No. 234. WASHINGTON TERMINAL COMPANY, plaintiff in error, v. Emma G. CALLAHAN, Administratrix, etc. Jan. 29, 1923. In error to the Court of Appeals of the District of Columbia. For opinion below, see 276 Fed. 334. Messrs. Geo. E. Hamilton and John J. Hamilton, both of Washington, D. C., for plaintiff in error. Dismissed with costs on motion of counsel for the plaintiff in error.

(260 U. S. 720)

No. 774. The JOHN E. THROPP'S SONS COMPANY, petitioner, v. Frank A. SEIBERLING. Jan. 29, 1923. For opinion below, see 284 Fed. 746. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(260 U. S. 720)

No. 777. Samuel D. WHITE, as Trustee, etc., petitioner, v. Veta STUMP. Jan. 29, 1923. For opinion below, see In re Stump, 284 Fed. 199. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(260 U. S. 751)

No. 778. S. H. BENJAMIN FUEL & SUPPLY COMPANY, petitioner, v. BELL UNION COAL & MINING COMPANY. Jan. 29, 1923. For opinion below, see 284 Fed. 227. Mr. Joshua F. Bullitt, of Philadelphia, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(260 U. S. 751)

No. 790. Edward J. DONEGAN, petitioner, v. The UNITED STATES of America. Jan. 29, 1923. For opinion below, see 287 Fed. 641. Mr. Elijah N. Zoline, of New York City, for petitioner. Messrs. James M. Beck, Sol. Gen., of Washington, D. C., John W. H. Crim, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 253)

RANDALL et al. v. BOARD OF COM'RS OF TIPPECANOE COUNTY, IND.

(Argued Jan. 25, 1923. Decided Feb. 19, 1923.)

No. 274.

Courts ⇐397—Writ of error directed to Supreme Court dismissed, when that court declined jurisdiction.

Where the Supreme Court of Indiana transferred an appeal to the Appellate Court for want of jurisdiction, and, after affirmance and denial of a rehearing by the Appellate Court, denied an application for an order vacating the order of transfer, or, in the alternative, for a writ of error coram nobis, a writ of error from the United States Supreme Court, under Judicial Code, § 237 (Comp. St. § 1214), should have been directed to the Appellate Court as the highest court in which a decision could be had, and a writ of error directed to the Supreme Court will be dismissed.

In Error to the Supreme Court of the State of Indiana.

Action by William Randall and another against the Board of Commissioners of Tippecanoe County, Ind. A judgment sustaining a demurrer to the complaint was affirmed by the Appellate Court of Indiana (131 N. E. 776), and application to the Supreme Court was denied, and plaintiffs bring error. Writ of error dismissed.

Mr. Otto Gresham, of Chicago, Ill., for plaintiffs in error.

Mr. Clyde H. Jones, of Lafayette, Ind., for defendant in error.

Memorandum opinion by Mr. Justice SUTHERLAND.

This is a writ of error to the Supreme Court of Indiana, when, clearly, it should have been to the state Appellate Court.

The action was brought in the superior court for Tippecanoe county. A demurrer to the complaint was sustained. An appeal was allowed to the Supreme Court, but that court, of its own motion, entered an order transferring the cause to the Appellate Court, for want of jurisdiction. The Appellate Court thereupon took the case, received the briefs of counsel, heard oral arguments and affirmed the judgment of the trial court. A petition for rehearing was submitted and denied. Plaintiffs in error then applied to the Supreme Court for an order to vacate its former order of transfer, or, in the alternative, for a writ of error coram nobis, which the Supreme Court denied.

It therefore appears that the Supreme Court refused to take the case on appeal for want of jurisdiction, and the judgment of the highest court of the state in which a deci-

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*sion in the suit could be had, Judicial Code,

§ 237 (Comp. St. § 1214), is that of the Appellate Court to which the writ should have been directed.

The writ of error must, therefore, be dismissed on the authority of *Western Union Telegraph Co. v. Hughes*, 203 U. S. 505, 27 Sup. Ct. 162, 51 L. Ed. 294; *Lane v. Wallace*, 131 U. S. Appendix, ccxix, 26 L. Ed. 703; *Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia*, 225 U. S. 264, 269, 32 Sup. Ct. 828, 56 L. Ed. 1082; *Second National Bank v. First National Bank*, 242 U. S. 600, 37 Sup. Ct. 236, 61 L. Ed. 518; *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 42 Sup. Ct. 516, 66 L. Ed. 1044, decided June 5, 1922.

Dismissed.

(261 U. S. 264)

WESTERN & A. R. R. v. RAILROAD COMMISSION OF GEORGIA et al.

(Argued Jan. 9, 1923. Decided Feb. 19, 1923.)

No. 195.

Courts ⇐328(3)—Suit to restrain state commission's order requiring maintenance of spur track involves capitalization of annual cost.

In a suit to restrain the enforcement of an order made by the Railroad Commission of Georgia under Civ. Code Ga. 1910, § 2664, requiring the railroad company to construct and maintain a spur track for a shipper, the amount in controversy is not limited to the original cost of the spur track, but the value to the carrier of relief from maintaining the track is also involved, so that the United States court has jurisdiction where the permanent annual burden on account of interest on the cost, depreciation, maintenance, and operating expenses amounts to a sum which, capitalized at a reasonable rate, exceeds \$3,000.

Appeal from the District Court of the United States for the Northern District of Georgia.

Suit by the Western & Atlantic Railroad against the Railroad Commission of Georgia and others. From an order of the District Court, declining to take jurisdiction because the amount in controversy was insufficient (275 Fed. 128), complainant appeals. Order vacated, with directions for further proceedings.

Messrs. Fitzgerald Hall, of Nashville, Tenn., and Henry C. Peeples, of Atlanta, Ga., for appellant.

Mr. Justice BUTLER delivered the opinion of the Court.

This is a suit commenced in the District Court by the Western & Atlantic Railroad, against the Railroad Commission of Georgia, its members, its special attorney, and the Attorney General of the state, to restrain and enjoin the enforcement of an order of the

commission requiring the plaintiff to construct and put in service a spur or industrial track to the Farmers' Warehouse Company's warehouse abutting the right of way of the railroad at Smyrna, Ga. A law of Georgia (section 2664 of the 1910 Georgia Code) authorizes the commission to prescribe rules with reference to spur tracks and side tracks,

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and *with reference to their use and construction, and gives it power to compel service to be furnished warehouses and similar places of business along the line of railroads where practicable and in the judgment of the commission the business is sufficient to justify, and on such terms and conditions as the commission may prescribe. The plaintiff attacks the order as unreasonable and arbitrary because under the circumstances it would deprive the plaintiff of its property without due process of law in contravention of the Fourteenth Amendment, interfere with and burden the interstate commerce of the plaintiff and compel it unjustly to discriminate against other shippers in violation of the Act to Regulate Commerce (Comp. St. § 8563 et seq.). Before the expiration of the time allowed by the commission for compliance with its order, this suit was commenced and plaintiff gave notice of motion for temporary injunction. The defendants answered and, among other things, denied that the value of the matter in controversy is sufficient to give the court jurisdiction and averred that it does not exceed \$3,000. There was a hearing before three judges, as required by section 266 of the Judicial Code (Comp. St. § 1243), and the application for a temporary injunction was denied upon the sole ground that the requisite amount was not involved. This appeal calls for a review of that ruling. *North Pacific S. S. Co. v. Soley*, 257 U. S. 216, 221, 42 Sup. Ct. 87, 66 L. Ed. 203; *Gilbert v. David*, 235 U. S. 561, 568, 35 Sup. Ct. 164, 59 L. Ed. 360.

The complaint alleges that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and by way of detail it is stated, among other things, that the initial cost of the construction of the side track would be \$1,266.24; that the interest on the money which plaintiff would have to expend for the construction of the track, depreciation charges, necessary maintenance and operating expenses would exceed \$200 a year, and that compliance with the order would hamper and delay the plaintiff in the

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proper *operation of its trains and would impose upon it additional costs and expenses, but would not increase its earnings. The affidavit of the plaintiff's general manager supports the allegations of the complaint and states that the patrons of the plaintiff, including the Farmers' Warehouse Company, have adequate trackage and depot facilities, not only to take care of present business but of any probable increase at Smyrna; that the railroad line from Atlanta to Chattanooga is largely single track; that the traffic is

very heavy, and that the problem of keeping trains moving promptly is serious and difficult; that, because business does not justify it, the plaintiff does not have a switch engine at Smyrna, and, if the private siding were constructed in accordance with the order of the Railroad Commission, plaintiff would have to delay its freight trains, so that the road engines could switch this additional track, thereby delaying the prompt movement of the trains, and that the track could never be used by others and would be simply an accommodation for one patron, adding nothing to the earnings of the railroad, but considerably increasing its expense. The affidavit of the plaintiff's superintendent also supports the complaint and is in substance to the same effect. Defendants' answer states that in all human probability the business of the warehouse will be permanent, and affidavits of directors of the warehouse company tend to support that statement. The denial of jurisdictional amount in defendants' answer is not supported by any affidavit in their behalf.

The decision in the District Court states:

"The propriety of requiring the construction of this particular track is alone in issue. The cost in material and labor is stated in the petition to be but \$1,260, and this amount alone is involved. * * * The cost of future maintenance is not involved now, because that is an incident of the future use. The maintenance cost for some years will be slight, and if

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the business done over *the track does not justify its maintenance, the question of its abandonment will be open then." 275 Fed. 128.

We are unable to agree that the cost in material and labor is all that is involved in this case. Plaintiff seeks to be relieved, not only from constructing the side track, but also from maintaining it in suitable condition for use and, from the cost and expense of using and operating it for the movement of cars to and from the warehouse. The value of all these is involved. *Glenwood Light Co. v. Mutual Light Co.*, 239 U. S. 121, 125, 36 Sup. Ct. 30, 60 L. Ed. 174; *Berryman v. Board of Trustees of Whitman College*, 222 U. S. 334, 32 Sup. Ct. 147, 56 L. Ed. 225; *Bitterman v. Louisville & Nashville R. R.*, 207 U. S. 205, 225, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322, 336, 27 Sup. Ct. 529, 51 L. Ed. 821. It is shown that the permanent annual burden on account of interest on such cost, depreciation, maintenance and operating expenses of such side track will exceed \$200, and this capitalized at a reasonable rate exceeds \$3,000. Laying aside other considerations bearing upon the matter, the amount is shown to be sufficient. This being so, the District Court should have taken jurisdiction, and should have proceeded to determine the merits of plaintiff's application for a temporary injunction, which it did not do.

Order declining jurisdiction vacated, with directions for further proceedings.

(261 U. S. 24)

CROWN DIE & TOOL CO. v. NYE TOOL & MACHINE WORKS.

(Argued Jan. 17, 18, 1923. Decided Feb. 19, 1923.)

No. 240.

1. Courts ⇨290—Suit for infringement by assignee of right to exclude particular defendant held within jurisdiction of United States court.

Where a patentee attempted to make an assignment of the right to exclude defendant from making, using, or vending the patented article, and of the right to recover damages for infringements, a suit by the assignee to enjoin infringement, and for damages and an accounting, in which the validity of the assignment was attacked, was one arising under the patent laws, and within the jurisdiction of a United States court.

2. Patents ⇨193—Owner cannot assign right to exclude particular person from use of invention.

An assignment by a patentee of the right to exclude a particular party from making, using, or vending the patented article, with the right to recover damages for past or future infringements by such party, carried with it no part of the title to the patent or interest therein, and conferred no right on the assignee to sue for past infringement, since, while the patentee's right to make, use, and vend the invention is a common-law right, and the patent merely confers a monopoly, the exclusive right is granted only to one having the common-law right, and as an incident thereof, and can only pass by assignment when attached to the right to make, use, and vend.

3. Patents ⇨193—Transfer not wholly governed by rules governing transfers of choses in action at common law.

Patent property and its incidents are the creatures of the statute law, and depend on the construction to be given to the statutes, and the transfer of rights under the patent law is not entirely governed by the rules governing the transfer of a chose in action at common law.

4. Patents ⇨286—Assignee of claim for damages for past infringement cannot sue, without joining owner of patent at time of infringement.

One to whom a claim for damages for past infringement of a patent was assigned, without assigning any interest in the patent, could not sue for past infringements without joining with it the owner of the patent when infringements were committed, as the only exception to the rule that such owner must sue is when the patent and the claim for past infringements are assigned to the same person.

5. Patents ⇨286—Equity rule held not to change rule as to proper party to sue for infringement of patent.

Equity rule 37 (33 Sup. Ct. xxviii), requiring actions to be prosecuted in the name of the real party in interest, does not change the rule that only he who owns the patent at the time of its infringement can sue for damages, as the

rule was not intended to set aside a policy and rule having its source in the patent statutes.

Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

Suit by the Nye Tool & Machine Works against the Crown Die & Tool Company. A decree dismissing the suit (270 Fed. 587) was reversed by the Circuit Court of Appeals (276 Fed. 376), and defendant brings certiorari. Reversed, and decree of the District Court affirmed.

This was a bill in equity filed in the United States District Court for the Northern District of Illinois by the Nye Tool & Machine Works, a corporation of Illinois, having its place of business in Chicago, against the

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Crown Die & Tool Company, a corporation of the same state and doing business in the same city. The plaintiff sought to enjoin the infringement of a patent for a machine for forming screw-thread cutting devices, and for an accounting of profits and for damages. The inventors were Wright & Hubbard, and the patent issued to their assignee, the Reed Manufacturing Company of Pennsylvania.

The plaintiff based its right to sue on the following instrument which it terms an assignment:

Exhibit A.

Whereas, Reed Manufacturing Company, a corporation of Pennsylvania, is the owner of letters patent of the United States, No. 1,033,142, for a machine for forming screw-thread cutting devices, granted July 23, 1912, on an application of Wright & Hubbard; and

Whereas, under said patent said Reed Manufacturing Company has the right to exclude others from manufacturing, using and selling the devices of said patent; and

Whereas, it is believed by the parties that Crown Die & Tool Company, a corporation of Illinois, has been manufacturing and using devices in infringement of said patent; and

Whereas, Nye Tool & Machine Works is engaged in the manufacture of dies with which the dies made by said Crown Die & Tool Company, by the use of said infringing machine, are in competition; and

Whereas, Nye Tool & Machine Works is desirous of acquiring from Reed Manufacturing Company all of its rights of exclusion under said patent, so far as the same may be exercised against the Crown Die & Tool Company, together with all rights of the Reed Manufacturing Company against the Crown Die & Tool Company arising out of the infringement aforesaid:

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*Now, therefore, in consideration of one thousand dollars (\$1,000.00), and other good and valuable considerations, the receipt of which is hereby acknowledged, the Reed Manufacturing Company hereby assigns and sets over to the Nye Tool & Machine Works all claims recoverable in law or in equity, whether for damages, profits, savings, or any other kind or description which the Reed Manufacturing Company has against the Crown Die & Tool Company arising out of the infringement by the

Crown Die & Tool Company of the Wright & Hubbard patent, No. 1,033,142, and for the same consideration assigns and sets over all the rights which it now has arising from said patent of excluding the Crown Die & Tool Company from the practice of the invention of said patent, the intention being that, in so far as concerns the exclusion of the Crown Die & Tool Company under said patent, the Nye Tool & Machine Works shall be vested with as full rights in the premises as the Reed Manufacturing Company would have had had this assignment not been made, and that the Nye Tool & Machine Works shall have the full right to bring suit on said patent, either at law or in equity against said Crown Die & Tool Company, and for its own benefit, to exclude the Crown Die & Tool Company from practicing the invention of said patent, and for its own use and benefit to collect damages which may arise by reason of the future infringement of said patent by the Crown Die & Tool Company, but nothing herein contained shall in any way affect or alter the rights of the Reed Manufacturing Company against other than the Crown Die & Tool Company, and for the same consideration all rights as are herein given against the Crown Die & Tool Company are given as against any successor or assignee of the business thereof.

Reed Manufacturing Company,
By P. D. Wright, Its President.

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*The defendant moved to dismiss the bill as follows:

Now comes the defendant, Crown Die & Tool Company, by its solicitor, and moves the court to dismiss the bill of complaint instituted in the above-entitled cause upon grounds and reasons therefor as follows:

1. That the bill of complaint states an alleged cause of action arising out of the assumed infringement of a patent in which plaintiff has no title, and prays an injunction, and accounting and damages.

2. That the owner of the entire or any part of the legal title to the patent sued on is not made a party to the suit.

3. That the legal effect of the alleged assignment set up as the basis of this cause of action and forming part of the bill of complaint herein is contrary to the statutes covering suits for infringement of patents, and shows on its face that the plaintiff has no interest in the patent sued on.

4. That the bill of complaint herein, including the alleged assignment, evidences a conspiracy against this defendant by the parties to the document identified as "Exhibit A," in which the plaintiff and the Reed Manufacturing Company assumed the function of the court in having already decreed that this defendant infringes patent No. 1,033,142, and now seeks to utilize this court to annoy and harass the Crown Die & Tool Company by instituting legal proceedings when no right of action exists.

5. That "Exhibit A" attached to the bill of complaint in this case purports only to convey to plaintiff all claims recoverable in law or in equity which the Reed Manufacturing Company may have against the Crown Die & Tool Company, over which subject-matter this court has no jurisdiction.

6. Prior suit pending, between the same par-

ties in this court, decision of which will determine any questions involved in this case.

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*Therefore this defendant respectfully moves the court to dismiss said bill of complaint with its reasonable costs and charges in its behalf most wrongfully sustained.

Crown Die & Tool Co.,

By Florence King, Solicitor for Defendant.

The District Judge in the interest of expedition granted the motion to dismiss, in order that the main question, i. e., the plaintiff's right to sue might be determined by the Circuit Court of Appeals before the expense of an accounting should be incurred, although he thought the plaintiff had acquired the right under the instrument 270 Fed. 587. The Circuit Court of Appeals reversed the decree of dismissal, holding the instrument to be a valid assignment of an interest in the patent conferring the right to sue and remanded the cause to the District Court for an accounting and further proceedings. 276 Fed. 376.

Although the decree of the Circuit Court of Appeals is not final the importance of the question involved and the possible saving of useless litigation led this court to grant the writ of certiorari before further proceedings in the District Court.

Miss Florence King, of Chicago, Ill., for petitioner.

Mr. Russell Wiles, of Chicago, Ill., for respondent.

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*Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

[1] The petitioner raises a question of jurisdiction. It says that the suit does not arise under the patent laws of the United States, but is merely a suit on a contract like one for royalties under a license of which the District Court could not have jurisdiction because the parties are both citizens of the same state. To sustain this argument are cited *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295; *Pratt v. Paris Gaslight Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458; and *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910. The cases have no application and the point is without merit. The bill in this case is based on an assignment of a patent claimed to be valid under the statutes of the United States, and asking the protection of the patent right thus assigned by injunction and an accounting. It therefore involves the validity of the assignment of a patent, which is a question arising under the patent laws because it depends upon their construction, and if the assignment is valid, the suit is just an ordinary suit for injunction and profits dependent on the validity of the patent and its infringement under those same laws. There is no question of royalties by contract in the case.

[2] The main question is an interesting one. The argument of counsel for the respondent

and the one upon which the Circuit Court of

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Appeals proceeded to its conclusion is that the right which the patentee derives from the government by its grant is not the right to make, use and vend; that such a right is a so-called natural right, not dependent on statute, but arises under the common law, and has no peculiar federal source or protection other than any other right of liberty or property. All that the government grants and protects is the power to exclude others from making, using, or vending during the grant of 17 years. Under the patent law, section 4898, R. S. (Comp. St. § 9444), a patentee may assign by an instrument in writing his patent or any interest therein. It is argued that, as the patent is only the power to exclude all from making, using and vending, the power to exclude some particular person from doing so is a part of that power of exactly the same nature, and therefore is a definite interest in the patent that can be assigned.

The analysis of the rights which a patentee acquires under the grant is sustained by a line of authorities. *Bloomer v. McQuewan*, 14 How. 539, 548, 14 L. Ed. 532; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *United States v. Bell Telephone Co.*, 167 U. S. 224, 249, 17 Sup. Ct. 809, 42 L. Ed. 144; *Bement v. National Harrow Co.*, 186 U. S. 70, 90, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; *Heaton Peninsular Co. v. Eureka Specialty Co.*, 77 Fed. 288, 294, 25 C. A. 267, 35 L. R. A. 728; *Fuller v. Berger*, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381. The fullest and most satisfactory discussion of the subject is found in the *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, *supra*. In that case it was sought to defeat a suit by a patent owner for infringement of a patent on the ground that he was not entitled to ask a court of equity to aid him in protecting the grant of the patent to him by the government because he had failed and neglected ever to use the patent himself or to allow anybody else to do so, and therefore had not rendered to the public the benefit and consideration for which the patent was granted. This court held that the benefit which the government intended to secure was not the

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*making or use of the patent for the benefit of the public during the 17 years of the grant, except as the patentee might voluntarily confer it from motives of gain, but only the benefit of its public use after the grant expired. The court held that the government did not confer on the patentee the right himself to make, use or vend his own invention, that such right was a right under the common law, not arising under the federal patent laws, and not within the grant of power to Congress to enact such laws, and that, in the absence of the express statutory imposition upon the patentee of the obligation to make, use or

vend his patented invention as a condition of receiving his patent, it would not be implied. The court further held that in its essence all that the government conferred by the patent was the right to exclude others from making, using or vending his invention.

We do not think, however, that these clearly established principles sustain the next step in the reasoning of the counsel for the respondent and the Circuit Court of Appeals which is that they make the mere right to exclude persons from the making, using and vending of an invention such an interest in a patent that it can be assigned. It ignores the indispensable condition of the granting and establishment of a patent right and patent property that the patentee shall have himself the common-law right of making, using and vending the invention. The sole reason and purpose of the constitutional grant to Congress to enact patent laws is to promote the progress of science and useful arts by securing for limited times to inventors the exclusive right to their respective discoveries. Article 1, § 8, cl. 8. In pursuance thereof, section 4886, R. S., as amended, 29 Stat. 692 (Comp. St. § 9430), provides that any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new or useful improvements thereof, upon certain conditions not

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important here, may obtain a patent therefor. Section 4884, R. S. (Comp. St. § 9428), directs that the grant of a patent shall be to the patentee, his heirs or assigns, for the term of 17 years of the exclusive right to make, use and vend the invention or discovery throughout the United States. An inventor may in writing assign his invention and the right to a patent before the patent is granted, and under section 4895, R. S. (Comp. St. § 9439), a patent will issue to the assignee. Can it be claimed that an assignment of the right to exclude all from making, using and vending and excepting therefrom the right to make, use and vend in the assignee, would be such an assignment as would justify the Patent Office in issuing the patent under the statute to the assignee? Yet if all that there is in a patent property is the bare right to exclude others from making, using or vending something, the patent should issue in such a case.

The error in the position of the respondent and the court below is in a failure to distinguish between the property or title or interest in a patent capable of assignment and the chief incident of that property, title or interest, an incident which can only pass by assignment when attached to the right to make, use and vend. It is the fact that the patentee has invented or discovered something useful and thus has the common-law right to make, use and vend it himself which induces the government to clothe him with power to exclude every one else from making, using or vending it. In other words, the

patent confers on such common-law right the incident of exclusive enjoyment and it is the common-law right with this incident which a patentee or an assignee must have. That is the implication of the descriptive words of the grant "the exclusive right to make, use and vend the invention." The government is not granting the common-law right to make, use and vend, but it is granting the incident of exclusive ownership of that common-law right, which can not be enjoyed save with

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the common-law right. *A patent confers a monopoly. So this court has decided in the Paper Bag Case, *supra*, and in many other cases. The idea of monopoly held by one in making, using and vending connotes the right in him to do that thing from which he excludes others.

Dealing with question of patent assignments under the laws of the United States, Mr. Justice Gray, in *Waterman v. Mackenzie*, 138 U. S. 252, 255, 11 Sup. Ct. 334, 335 (34 L. Ed. 923), said:

"The monopoly thus granted is one entire thing, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant, convey, either, first, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, second, an individual part or share of that exclusive right; or, third, the exclusive right under the patent within and throughout a specified part of the United States. Rev. Stat. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat. § 4919; *Gayler v. Wilder*, 10 How. 477, 494, 495; *Moore v. Marsh*, 7 Wall. 515."

The learned Justice then proceeds (138 U. S. 256, 11 Sup. Ct. 334, 34 L. Ed. 923) to give examples of what would and would not constitute an assignment. A grant of an exclusive right to make, use, and vend two patented machines within a certain district, he points out, citing *Wilson v. Rousseau*, 4 How. 646, 686, 11 L. Ed. 1141, is an assignment because the right, although limited to making, using and vending two machines excludes all other persons even the patentee

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from making, using or vending like machines within the district. "On the other hand," he says, "the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license."

In *Gayler v. Wilder*, 10 How. 477, 13 L. Ed.

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504, it was held that the grant of an exclusive right to make and vend an article within a certain territory upon paying to the assignor a cent per pound, reserving to the assignor the right to use and manufacture the article by paying the assignee a cent per pound, was only a license, and that a suit for the infringement of the patent right must be brought in the name of the assignor. The effect of the opinion in that case is that the monopoly granted the patentee is for one entire thing and in order to enable an assignee to sue he must have received the entire and unqualified monopoly in the territory specified. Chief Justice Taney's reason for this (10 How. 494, 13 L. Ed. 504) is useful in this case. "For," said he, "it was obviously not the intention of the Legislature to permit several monopolies to be made out of one, and divided among different persons within the same limits. Such a division would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits instead of one, and to successive recoveries of damages by different persons holding different portions of the patent right in the same place." See also *Pope Manufacturing Co. v. Gormully Manufacturing Company*, 144 U. S. 238, 250, 12 Sup. Ct. 637, 36 L. Ed. 420.

These cases do not present the same facts as the one before us; but they indicate clearly what view the courts deciding them would have taken of an effort like that in the case at bar to divide up the monopoly of patent

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property so that the patentee retains the right to make, use and vend, but gives to many different individuals the right to sue certain named infringers, respectively, and that with the sole motive of harassing them such as is avowed in the recitals of the instrument before us. If held legal, it would give the patentee an opportunity without expense to himself to stir up litigation by third persons that is certainly contrary to the purpose and spirit of the statutory provisions for the assigning of patents.

Nor do we think that the principle of *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115, or the instance of a patent for an improvement on a machine, patent for which is held by another, involves anything inconsistent with our conclusion that the right to exclude others conferred in a patent can only be conferred upon one who has the common-law right to use, make and vend. In *Patterson v. Kentucky*, the patentee had the common-law right to make, use and vend, but the state of Kentucky exercising her lawful police power restricted him in it. In the case of the patentee for improvement on a patented machine, the patentee has the right to make, use and vend the improvement, but he cannot make it profitable or useful unless he

can secure the right to put it onto another machine.

For the reasons given, we think the attempted assignment in this case carried no part of the title to the patent or interest in it and therefore conferred no right to sue for damages for infringement of the patent after the execution of the instrument.

The remaining question is whether the instrument relied on by the plaintiff below gave it the right to sue in its own name in this case for damages for past infringements. We think not.

[3, 4] The plaintiff below could not bring such a suit for past infringements without

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joining with it the owner of the *patent when the infringements were committed. It is said that the claim of an owner of a patent for damages for infringement is only a chose in action which in modern days may be so assigned that the assignee acquires full title and the right to sue at law as well as in equity without joining his assignor. This view ignores the peculiar character of patent property and the recognized rules for the transfer of its ownership and its incidents. Patent property is the creature of statute law and its incidents are equally so and depend upon the construction to be given to the statutes creating it and them, in view of the policy of Congress in their enactment. This is shown by the opinion of this Court in *Waterman v. MacKenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923, already cited, and in the line of authorities followed therein. It is not safe, therefore, in dealing with a transfer of rights under the patent law to follow implicitly the rules governing a transfer of rights in a chose in action at common law.

As Chief Justice Taney said in *Gayler v. Wilder*, 10 How. 477, 494 (13 L. Ed. 504):

"The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of the common law. It is created by the act of Congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes."

The law as to who should bring a suit at law for damages by infringement of a patent is clearly and correctly stated in *Robinson on Patents*, vol. 3, § 937, as follows:

"With a single exception the plaintiff in an action at law must be the person or persons in whom the legal title to the patent resided at the time of the infringement. An infringement is an invasion of the monopoly created by the patent, and the law which defines and authorizes this monopoly confers only upon its legal owners the right to institute proceedings for its violation. These owners are the patentee, his

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assignee, his grantee, or his *personal representatives; and none but these are able to maintain an action for infringement in a court of law. Moreover, the injury inflicted by an act of infringement falls upon the individual who owns the monopoly at the date of the infringement. It does not affect former owners whose

interest had terminated before the infringement was committed, nor does it so directly prejudice a future owner that the law can recognize his loss and give him a pecuniary redress. Hence the plaintiff must not only have a legal title to the patent, but must have also been its owner at the time of the infringement. The exception above referred to arises where an assignment of a patent is coupled with an assignment of a right of action for past infringements. In this case the present owner of the monopoly may institute proceedings for its violation during the ownership of his assignor as well as for infringements committed since the transfer of the title to himself."

In *Moore v. Marsh*, 7 Wall. 515, 19 L. Ed. 37, the question was whether a sale and assignment by a patentee of his patent right was, under the fourteenth section of the Patent Act of 1836 (chapter 357, 5 Stat. 117, 123) now embodied in section 4919 of the Revised Statutes (Comp. St. § 9464), a bar to an action by him to recover damages for an infringement committed before such sale and transfer. The section provided:

"And such damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentees, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States."

The neat issue in that case was whether "the name or names of the person or persons interested" meant the person interested when the infringement took place or when the suit was brought. The court held that it meant the person who was patentee, assignee, or

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grantee when *the infringement occurred and the cause of action accrued. The court held, therefore, that the proper plaintiff in a suit for past infringements was not the present owner of the patent, and that he did not acquire the right to bring suits for prior infringements merely by the conveyance of the full title to the patent and its enjoyment. This case was followed by that of *Gordon v. Anthony*, on the circuit reported in 16 Blatchf. 234, 10 Fed. Cas. 773, No. 5605. The decision was by Blatchford, Circuit Judge of the Second Circuit, who had been District Judge, and who subsequently became a justice of this court and had great experience in the administration of the patent law.

The question before him was whether the vendee and assignee of a receiver appointed by a state court of New York in proceedings supplementary to execution on a judgment against a debtor whose assets included a patent right, and who was directed by the court to convey the same to the receiver, but did not do so, could sue for damages, for infringement of the patent occurring before the receivership. After saying that under the law of 1836 and under the Revised Statutes in which the sections of that law were em-

bodied, no one could bring a suit either at law or in equity for infringement of a patent in his own name alone unless he were patentee, assignee, or grantee, the judge continues:

"A claim to recover profits or damages for past infringement cannot be severed from the title by assignment or grant, so as to give a right of action for such claim, in disregard of the statute. The profits or damages for infringement cannot be sued for except on the basis of title as patentee, or as such assignee or grantee, to the whole or a part of the patent, and not on the basis merely of the assignment of a right to a claim for profits and damages, severed from such title. Therefore, if, in the present case, no such assignment or grant

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has been made to the defendants as the statute contemplates, they could not bring suit, in their own names, under the assignment made to them, to recover any claims, profits or damages for infringement, which belonged to Gordon (i. e., the patentee), nor can they use the assignment as a defense against any such claims existing against themselves in favor of Gordon. In this case there has been no assignment executed by Gordon."

See, also, *Ball v. Coker* (C. C.) 168 Fed. 304, 307.

Counsel for plaintiff cites *Hayward v. Andrews* (C. C.) 12 Fed. 786, to maintain the contrary and to sustain the right of the assignee of claims for past infringements to maintain suit. The case cited is not in point, the assignee in that case held the legal title to the patent.

The sole exception to the rule that only he who is the owner of the patent at the time of the infringement can sue for damages to which Professor Robinson refers is when such owner assigns the patent and also the claim for past infringements to the same person. In such a case, as the title and ownership of the claims are united, it is held that the owner may sue. *Dibble v. Augur*, 7 Blatchf. 86, 7 Fed. Cas. 642, No. 3,879; *Hamilton v. Rollins*, 5 Dill. 495, 11 Fed. Cas. 364, No. 5,988; *Henry v. Francetown Soapstone Stove Co.*, 2 Ban. & A. 221, 11 Fed. Cas. 1180, No. 6,382; *Consolidated Oil Well Packer Co. v. Eaton, Cole & Burnham Co.* (C. C.) 12 Fed. 865, 870; *Spring v. Domestic Sewing Machine Co.* (C. C.) 13 Fed. 446, 449; *Nellis v. Pennock Mfg. Co.* (C. C.) 38 Fed. 379. Under this exception, therefore, if the instrument here relied on had been effective to make the plaintiff an assignee or grantee of the patent or "of any interest therein" within the meaning of section 4898, R. S., as amended, then the plaintiff could have maintained this action for damages for infringements prior to the execution of the instrument; but, as we hold, the instrument did not have this effect.

[5] But it is urged that under equity rule

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37 (33 Sup. Ct. xxviii) every action *must be prosecuted in the name of the real party

in interest, and therefore, as the plaintiff is the beneficial owner of the claims for past infringements, it should be permitted to sue in a court of equity. The equity rule was not intended to set aside a policy and rule having its source in the patent statutes and cannot affect this case. The rule laid down by Circuit Judge Blatchford in *Gordon v. Anthony*, supra, applied to both actions in equity and law, and grew out of the sections of statutes quoted by him and not since amended. Both at law and in equity, either the owner of the patent at the time of the past infringement, or the subsequent owner of the patent who is at the same time the assignee of the claims for past infringement, must be a party to a suit for damages for the past infringement. If the owner of the patent when the infringements took place has assigned his patent to one, and his claims for damages for infringement to another, then the latter cannot sue at law at all but must compel his assignor of the claims to sue for him. In equity both such assignor and the assignee who is the real party in interest must join as plaintiffs. Such assignor is a necessary party and a bill for accounting and damages is fatally defective otherwise. *Robinson*, vol. 3, § 1099; *Dibble v. Augur*, 7 Blatchf. 86, 7 Fed. Cas. 642, No. 3,879; *Game-well Fire Alarm Telegraph Co. v. City of Brooklyn* (C. C.) 14 Fed. 255; *Ball v. Coker* (C. C.) 168 Fed. 304. As the owner of the patent is not a party to this bill, the result is that on no ground can the bill of the plaintiff be sustained and that the motion to dismiss should have been granted.

The decree of the Circuit Court of Appeals is reversed, and that of the District Court is affirmed.

(261 U. S. 133)

KANSAS CITY SOUTHERN RY. CO. v. WOLF et al.

(Argued Jan. 9, 1923. Decided Feb. 19, 1923.)

No. 194.

Carriers ⇐202—Action for charges in excess of tariffs cannot be begun after expiration of two years.

Interstate Commerce Act, § 9 (Comp. St. § 8573), authorizing a person claiming to be damaged by a common carrier to make complaint to the Commission, or bring suit in court, and section 16 (Comp. St. § 8584), requiring all complaints for the recovery of damages to be filed with the Commission within two years from the time the cause of action accrues, and a petition for the enforcement of an order of the Commission to be filed within one year from the date of the order, apply to a suit to recover charges collected by a carrier in excess of its tariffs on file, even though the demand for such relief required no administrative act by the Commission, so that an application to the Commission before suit was unnecessary,

and the provision is a condition to the right to recover, so that a demurrer, raising the objection that the pleading showed on its face that more than two years had elapsed since the right to recover accrued, should have been sustained.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by Harry B. Wolf and others against the Kansas City Southern Railway Company. A judgment overruling a demurrer was affirmed by the Circuit Court of Appeals (272 Fed. 681), and defendant brings error. Reversed.

Messrs. F. H. Moore, of Kansas City, Mo., S. W. Moore, of New York City, and A. F. Smith, Cyrus Crane, and G. H. Muckley, all of Kansas City, Mo., for plaintiff in error.

Mr. Charles M. Blackmar, of Kansas City, Mo., for defendants in error.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The original action was begun in the United States District Court, Western District of Missouri, May 12, 1915, to recover charges in excess of the published tariff rates collected by the plaintiff in error upon sundry interstate shipments of strawberries. All the shipments and payments were made prior to June 1, 1912. The company demurred:

"Because each of said counts shows upon its face that the pretended claim which is made the basis of such count accrued more than two years prior to the institution of this action."

The trial court overruled the demurrer, and this was approved by the Circuit Court of Appeals (272 Fed. 681), which said:

"The controlling question in the case is whether the claims for repayment of the overcharges might be the subject of an original action in court, or, on the other hand, should first have been submitted to the Interstate Commerce Commission. * * * The former procedure was adopted in this case. If the latter should have been followed, the claims were barred by the limitation provided in section 16. We think it quite plain that there was nothing about the tariffs, rules, or claims for overcharge calling for any administrative action of the Commission as a prerequisite to an action in court. There was no attack upon the tariffs or the rules."

From 1906 to 1920 the Interstate Commerce Act (24 Stat. 379, 382; 34 Stat. 584, 590 [Comp. St. §§ 8573, 8584]), provided:

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject

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to the provisions *of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or per-

sons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

Sec. 16. * * * All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court * * * within one year from the date of the order, and not after.¹

In *Phillips v. Grand Trunk Western Railway Co.*, 236 U. S. 662, 667, 35 Sup. Ct. 444, 446 (59 L. Ed. 774), an action begun in the

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United States Circuit Court, the plaintiff alleged that the Interstate Commerce Commission had declared the published tariff rate unreasonable and sought to recover overcharges paid more than four years prior thereto. Referring especially to section 16, supra, this court declared:

"Under such a statute the lapse of time not only bars the remedy, but destroys the liability (*Finn v. United States*, 123 U. S. 227, 232), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. * * * To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction, or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. * * * The railroad company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer; for when it appeared that the complaint had not been filed within the time required by the statute—

¹ The Transportation Act, February 28, 1920, 41 Stat. 456, 492, amended the pertinent portion of section 16 so that it now reads—

"Sec. 16. * * * (3) All actions at law by carriers subject to this act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the District Court or state court within one year from the date of the order, and not after."

Section 9 was not changed by the Transportation Act of 1920.

ute it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action."

True it is that the claim of Phillips & Co. was based upon schedule tariff charges theretofore declared to be unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the Phillips Case and the

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reasoning advanced to support it, we think, are applicable to the circumstances of the instant cause. The lapse of time had destroyed any liability by the carrier to the shipper or his assignee for the alleged overcharges, and the demurrer should have been sustained.

Reversed.

(261 U. S. 155)

VALLEY FARMS CO. OF YONKERS v. WESTCHESTER COUNTY.

(Argued Jan. 24, 1923. Decided Feb. 19, 1923.)

No. 136.

1. Taxation $\S$ 29—Legislature can create tax district and levy general tax to pay for public improvement.

The Legislature of a state can create a tax district and levy therein a general tax, based on the assessed valuation of all property in the district, to pay for a public improvement, so long as its act does not amount to a flagrant abuse or purely arbitrary exercise of its power.

2. Municipal corporations $\S$ 450(1)—Creation of tax district to pay for sewer held not arbitrary act.

The creation, by Laws N. Y. 1917, c. 646, of a tax district, and the levy of a tax on the property in the district according to its assessed valuation, to pay for the sewer constructed under Laws N. Y. 1905, c. 646, was not palpably arbitrary and a plain abuse of power, where all of the lands within the district ultimately may be connected with some portion of the sewer, so that it cannot be said they derived no benefits therefrom, or were included arbitrarily for improper purposes, though the lands of the objecting owner could be connected only with the outlet portion of the sewer, after the construction of additional sewers which had not yet been undertaken.

3. Municipal corporations $\S$ 450(4)—Legislature need not give notice before establishing tax district.

It is unnecessary for a state Legislature to give notice and grant hearings to landowners before fixing the boundaries of a tax district, levying a tax based on the assessed valuation of the property in the district to pay for a sewer, where the owners had the right under the state decisions to be heard as to the assessment of

values of their property, which was all they could demand under the circumstances.

4. Municipal corporations $\S$ 450(1)—Legislature can create tax district to pay for sewer already constructed.

The Legislature can create a tax district and levy a general tax on the property therein to pay for a sewer constructed before the district was created.

In Error to the Supreme Court of the State of New York.

Action by the Valley Farms Company of Yonkers against the County of Westchester and others. A judgment of the trial court, overruling the demurrer of the named defendant to the complaint, was reversed by the Appellate Division of the Supreme Court of New York (193 App. Div. 433, 184 N. Y. Supp. 300), and the judgment of the Appellate Division was affirmed by the New York Court of Appeals (231 N. Y. 558, 132 N. E. 887), and plaintiff brings error. Affirmed.

Mr. Robt. C. Beatty, of New York City, for plaintiff in error.

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*Messrs. Wm. A. Davidson, of Port Chester, N. Y., and Charles M. Carter, of White Plains, N. Y., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error, a New York corporation, seeks cancellation of an assessment of taxes upon its real property to pay for construction and operation of the Bronx Valley sewer. Westchester county, a necessary party under the local statute, demurred to the complaint upon the ground that it states no

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cause of action. The trial court overruled the demurrer. The Appellate Division reversed the judgment (Valley Farms Co. of Yonkers v. City of Yonkers, 193 App. Div. 433, 184 N. Y. Supp. 300), and the Court of Appeals affirmed this action, without opinion (231 N. Y. 558, 132 N. E. 887).

The complaint alleges—

Plaintiff in error owns certain designated lands in Westchester county assessed for taxes for the year 1918 for the benefit of the Bronx Valley sewer.

That under chapter 646, New York Laws of 1905, entitled "An act to provide for the construction and maintenance of a sanitary trunk sewer and sanitary outlet sewer in the county of Westchester, and to provide means for the payment thereof," and sundry amendments thereto, especially chapter 646, Laws of 1917, the Legislature attempted to designate the area benefited by the trunk and outlet sewers and to provide for taxing all property therein. The trunk sewer is 11¼ miles long; the outlet sewer 3 miles. Both are wholly within Westchester county. The former lies along the Bronx river. At a point near the south line of the county it connects with the outlet sewer, which extends

thence westwardly under two high ridges and across Tibbetts Valley to the Hudson river.

That the sewer system carries house drainage only—no surface water, and throughout its entire course the grade is downward. The sewage flows by gravity. There are no pumping stations.

That east of and near Hudson river a high ridge runs north and south. Immediately east of this lies Tibbetts Valley; further east there is a second north and south ridge; then comes Bronx Valley, shut in on the east by a third ridge. The natural drainage of Bronx Valley is southerly into East river; Tibbetts Valley also drains southerly, but into Harlem river. No natural drainage connection exists between the two valleys; they are separated throughout their entire length by the second ridge.

That the outlet sewer, through which the whole system discharges, extends from the

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trunk sewer in Bronx Valley *under the second ridge a great depth below the surface, thence across Tibbetts Valley and under the first ridge, also at great depth, to the Hudson river. Any connection with this sewer from Tibbetts Valley must be made therein, and lands there cannot be connected at all with the trunk sewer.

That about 2,500 acres—Lincoln Park section—of Tibbetts Valley is now connected with the outlet sewer; no other lands therein can use it, unless and until a connecting line, 4 miles long, is constructed, at a probable cost of \$300,000.

That notwithstanding this limited possible use Tibbetts Valley is assessed to meet the cost of the entire system, just as the lands in Bronx Valley. Taxes for construction and maintenance are based wholly upon assessed valuations for general purposes. Each lot is taxed according to value and irrespective of benefits received. No power is conferred to reduce assessments in one section not benefited equally with others.

That the district was defined by the amendment of 1917, 12 years after the original act and 5 years after completion of the sewers. The first act limited the total cost to \$2,000,000 and provided that commissioners should determine the benefited area after opportunity for hearings. Amendments have changed these fundamental provisions; the total cost exceeds \$3,250,000, and the boundaries have been designated without notice to owners.

That the challenged assessments are upon valuations of both land and improvements and disproportionate to benefits. The board of supervisors is required to adopt a budget, which includes unconstitutional and unlawful items—among them cost of litigation and contingent fund for deficiencies.

That the act as amended prohibits assessments against lands within the sewer district when also in Mt. Vernon, but directs that

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a corresponding sum shall be *paid by levy

upon all property, real and personal, within that city.

That plaintiff's lands have been illegally assessed. The act as amended violates the Fourteenth Amendment, by depriving plaintiff of property without due process of law and without just compensation, and by denying it equal protection of the laws. The assessments are a cloud upon plaintiff's title and greatly depreciate market values. There is no adequate remedy at law.

The prayer is for a decree declaring the assessments void, directing their cancellation and restraining collection, and for general relief.

Counsel for plaintiff in error states that:

"The question here involved is whether the statutes of the state of New York, under which the Bronx Valley sewer assessments were imposed over a large area of many square miles, in Westchester county, New York, are in contravention of due process of law under the Fourteenth Amendment of the Constitution of the United States."

The argument proceeds thus—

The sewer system, intended for house drainage only, consists of a trunk sewer 11¼ miles long, in the Bronx Valley, connected with an outlet sewer extending westward 3 miles to the Hudson river. The act of 1905—chapter 646—provided that commissioners should prepare a map of the assessment district after notice to owners and opportunity to be heard. The supplemental act of 1917—chapter 646—disregards this map, substitutes definite boundaries and directs assessments upon all lands therein according to value, including improvements; all parcels to be treated alike.

That such assessments disregard the difference in conditions, locations, and benefits, and no notice or opportunity for hearing concerning the apportionments to particular parcels is provided for.

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*That plaintiff's Tibbetts Valley lands are so situated that they can never utilize any part of the sewer system, except the lower portion of the outlet sewer, and this will be possible only through costly connections not yet planned.

That the statutes are unconstitutional, in that they provide for no notice of hearing upon apportionment of the assessments; they direct assessments of all parcels of land according to values fixed for general taxation purposes irrespective of relation to the sewer, street frontage, depth or shape; they include improvements in assessed values and thereby adjoining lots of equal size are taxed for different sums. And they are "of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred," so that such legislative action is "palpably arbitrary or a plain abuse."

Myles Salt Co., Ltd., v. Board of Commissioners, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, L. R. A. 1918E, 190, Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523, and Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151, are cited and relied upon; but we think it clearly appears, upon examination of those cases in connection with *Wagner v. Baltimore*, 239 U. S. 207, 217, 218, 36 Sup. Ct. 66, 60 L. Ed. 230, *Houck v. Little River District*, 239 U. S. 254, 262, 265, 36 Sup. Ct. 58, 60 L. Ed. 266, and *Miller & Lux v. Sacramento Drainage District*, 256 U. S. 129, 41 Sup. Ct. 404, 65 L. Ed. 859, that the allegations of the complaint are insufficient to bring this cause within the doctrine which plaintiff invokes.

The courts below have upheld the assessment under the Constitution and laws of the state. We are concerned only with application of the Fourteenth Amendment.

[1] In *Houck v. Little River District*, the owners of a large area sought to enjoin collection of a tax of 25 cents per acre levied

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generally upon lands in the district to pay preliminary expenses. They alleged that the lands varied greatly in value and that no benefits would accrue to theirs, some of which would be condemned and others damaged. The judgment of the state courts sustaining a demurrer to the petition was affirmed here. Speaking through Mr. Justice Hughes, this court declared:

"In view of the nature of this enterprise it is obvious that, so far as the federal Constitution is concerned, the state might have defrayed the entire expense out of state funds raised by general taxation or it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. *County of Mobile v. Kimball*, 102 U. S. 691, 703, 704. It was equally within the power of the state to create tax districts to meet the authorized outlays. * * * And with respect to districts thus formed, whether by the Legislature directly or in an appropriate proceeding under its authority, the Legislature may itself fix the basis of taxation or assessment, that is, it may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. * * *

"When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly, but even in such case there is no requirement of the federal Constitution that for every payment there must be an equal benefit. The state in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners."

In *Miller & Lux v. Sacramento Drainage District*, supra, we said:

"Since *Houck v. Little River Drainage District* (1915) 239 U. S. 254, the doctrine has been definitely settled that in the absence of flagrant abuse or purely arbitrary action a state

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may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits."

[2] *Myles Salt Co., Ltd., v. Board of Commissioners, Gast Realty & Investment Co. v. Schneider Granite Co., and Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, supra, present facts deemed sufficient to show action "palpably arbitrary and a plain abuse" of power. Here the allegations make out no such situation. All lands within the district ultimately may be connected with some portion of the sewer and we cannot say they derive no benefits therefrom or that any were included arbitrarily or for improper purposes.

[3, 4] It was unnecessary for the Legislature to give notice and grant hearings to owners before fixing the boundaries of the district so as to include their lands, and prescribing the method of taxation. And it is unimportant that the sewer had been completed before the boundaries of the present district were established. *Wagner v. Baltimore*, supra.

The state courts held that, as the rolls of local assessors are adopted for taxing property within the district, the right of owners to be heard as to values is adequately protected; and we think that under the circumstances they can demand no more.

The judgment of the court below is Affirmed.

(261 U. S. 216)

BROWNLOW et al. v. SCHWARTZ.

(Argued Jan. 16, 1923. Decided Feb. 19, 1923.)

No. 95.

1. Appeal and error  19—Case not determined when it has become moot.

The Supreme Court will not proceed to a determination of a case, when its judgment would be wholly ineffectual for want of a subject-matter on which it could operate, because the case has become moot.

2. Appeal and error  163—When case moot, judgment reversed for dismissal of petition.

Where, after a judgment was reversed by the Court of Appeals of the District of Columbia, with directions to issue a writ of mandamus requiring the issuance of a building permit, and before the allowance of a writ of error from the Supreme Court the permit was issued, and the building was thereafter constructed and sold by the petitioner, the judgment will be reversed, with directions to remand the cause to the District Supreme Court, with instructions to dismiss the petition, as either an affirmance or reversal on the merits.

would be vain, while a dismissal of the writ of error would leave the judgment apparently in force.

In Error to the Court of Appeals of the District of Columbia.

Mandamus proceeding by Mollie Schwartz against Louis Brownlow and another, Commissioners of the District of Columbia, and another. A judgment dismissing the petition was reversed by the Court of Appeals (50 App. D. C. 279, 270 Fed. 1019), and defendants bring error. Reversed, with directions.

Messrs. Robert L. Williams and F. H. Stephens, both of Washington, D. C., for plaintiffs in error.

Mr. W. Gwynn Gardiner, of Washington, D. C., for defendant in error.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The defendant in error, petitioner below, on June 9, 1920, filed a petition in the Supreme Court of the District of Columbia, praying for a writ of mandamus against respondents requiring them to issue to her a permit to erect a building for business purposes on a lot situated on a residence street in Washington. Prior to filing the petition she made preparations to erect the building and applied to the building inspector for a

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permit, which he *declined to issue, upon grounds not necessary to be stated here.

The plaintiffs in error, respondents below, filed an answer to the petition and return to the rule to show cause, and to the answer a demurrer was interposed. On July 6, 1920, the demurrer was overruled, the rule to show cause discharged, and petition dismissed. Upon appeal to the Court of Appeals this judgment was, on February 7, 1921, reversed and the cause remanded, with directions to issue the writ as prayed. *Schwartz v. Brownlow*, 50 App. D. C. 279, 270 Fed. 1019. On March 19, 1921, an application for a rehearing was overruled, and on June 13th following, this writ of error was allowed.

On March 14th, after the decision of the Court of Appeals, but before the allowance of the writ of error, the permit demanded by petitioner was issued by the building inspector, and thereupon the building was constructed. It had been fully completed when the writ of error was allowed. On June 2, 1921, petitioner conveyed all her interest in the property to persons not parties to this cause.

It thus appears that there is now no actual controversy between the parties—no issue on the merits which this court can properly decide. The case has become moot for two reasons: (1) Because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued and the building to which it related has been completed; and (2) because, the first reason aside, petitioner no longer has an interest in the building, and

therefore has no basis for maintaining the action.

[1, 2] This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject-matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a

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cause *which no longer exists is a proceeding which this court uniformly has declined to entertain. See *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *Codlin v. Kohlhäusen*, 181 U. S. 151, 21 Sup. Ct. 584, 45 L. Ed. 793; *Little v. Bowers*, 134 U. S. 547, 556, 10 Sup. Ct. 620, 33 L. Ed. 1016; *Singer Manufacturing Co. v. Wright*, 141 U. S. 696, 699, 12 Sup. Ct. 103, 35 L. Ed. 906; *American Book Co. v. Kansas*, 193 U. S. 49, 24 Sup. Ct. 394, 48 L. Ed. 613; *United States v. Hamburg-American Co.*, 239 U. S. 466, 475, 36 Sup. Ct. 212, 60 L. Ed. 387; *Berry v. Davis*, 242 U. S. 468, 470, 37 Sup. Ct. 208, 61 L. Ed. 441; *Board of Public Utility Com'rs v. Compañía General de Tabacos de Filipinas*, 249 U. S. 425, 39 Sup. Ct. 332, 63 L. Ed. 687; *Commercial Cable Co. v. Burleson*, 250 U. S. 360, 39 Sup. Ct. 512, 63 L. Ed. 1030; *Heitmüller v. Stokes*, 256 U. S. 359, 41 Sup. Ct. 522, 65 L. Ed. 990.

It is urged that the permit was issued by the inspector of buildings only because he believed it was incumbent upon him to comply with the judgment of the Court of Appeals and avoid even the appearance of disobeying it. The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate. *American Book Co. v. Kansas*, supra. The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the writ of error would leave the judgment of the Court of Appeals requiring the issuance of the mandamus in force—at least apparently so—notwithstanding the basis therefor has disappeared. Our action must, therefore dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this court, under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint, or petition. *United States v. Hamburg-American Co.*, supra; *Barry v. Davis*, supra; *Board of Public Utility Com'rs v. Compañía General de Tabacos de Filipinas*, supra; *Commercial Cable Co. v. Burleson*, supra; *Heitmüller v. Stokes*, supra.

Following these precedents, the judgment below should be reversed, with directions to

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the Court of Appeals to *remand the cause to

the Supreme Court, with instructions to dismiss the petition, without costs, because the controversy involved has become moot, and therefore is no longer a subject appropriate for judicial action.

And it is so ordered.

(261 U. S. 86)

**MOORE et al. v. DEMPSEY, Keeper of
Arkansas State Penitentiary.**

(Argued Jan. 9, 1923. Decided Feb. 19, 1923.)

No. 199.

Habeas corpus 54—Petition, charging trial was dominated by mob, held sufficient against demurrer.

A petition for writ of habeas corpus, which alleged that the trial at which petitioners were convicted of murder and sentenced to death was held when public feeling growing out of a race riot was high, that the petitioners were represented by an attorney appointed by the court at the beginning of the trial, which lasted only three-quarters of an hour, that the denial of a motion for new trial based on those facts was affirmed by the highest court of the state, and the state chancery court prohibited from entertaining an application for habeas corpus, is sufficient as against demurrer to show that petitioners were being deprived of their lives without due process of law, so as to entitle them to a hearing in a federal court.

Mr. Justice McReynolds and Mr. Justice Sutherland, dissenting.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Habeas corpus proceedings by Frank Moore and others against E. H. Dempsey, Keeper of the Arkansas State Penitentiary. From an order dismissing the writ upon demurrer, the petitioners appeal. Reversed.

Messrs. U. S. Bratton, of Detroit, Mich., Scipio A. Jones, of Little Rock, Ark., and Moorfield Storey, of Boston, Mass., for appellants.

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*Mr. Elbert Godwin, of Melbourne, Ark., for appellee.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an appeal from an order of the District Court for the Eastern District of Arkansas dismissing a writ of habeas corpus upon demurrer, the presiding judge certifying that there was probable cause for allowing the appeal. There were two cases originally, but by agreement they were consolidated into one. The appellants are five negroes who were convicted of murder in the first degree and sentenced to death by the Court of the State of Arkansas. The ground of the petition for the writ is that the proceedings in the State Court, although a trial in form,

were only a form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law.

The case stated by the petition is as follows, and it will be understood that while we put it in narrative form, we are not affirming the facts to be as stated but only what we must take them to be, as they are admitted by the demurrer: On the night of September 30, 1919, a number of colored people assembled in their church were attacked and fired upon by a body of white men, and in the disturbance that followed a white man was killed. The report of the killing caused great excitement and was followed by the hunting down and shooting of many negroes and also by the killing on October 1 of one Clinton Lee, a white man, for whose murder the petitioners were indicted. They seem to have been arrested with many others on the same day. The petitioners say that Lee must have been killed by other whites, but that we leave on one side as what we have

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to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved. They say that their meeting was to employ counsel for protection against extortions practiced upon them by the landowners and that the landowners tried to prevent their effort, but that again we pass by as not directly bearing upon the trial. It should be mentioned, however, that O. S. Bratton, a son of the counsel who is said to have been contemplated and who took part in the argument here, arriving for consultation on October 1, is said to have barely escaped being mobbed; that he was arrested and confined during the month on a charge of murder and on October 31 was indicted for barratry, but later in the day was told that he would be discharged but that he must leave secretly by a closed automobile to take the train at West Helena, four miles away, to avoid being mobbed. It is alleged that the judge of the Court in which the petitioners were tried facilitated the departure and went with Bratton to see him safely off.

A Committee of Seven was appointed by the Governor in regard to what the committee called the "insurrection" in the county. The newspapers daily published inflammatory articles. On the 7th a statement by one of the committee was made public to the effect that the present trouble was "a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the 'Progressive Farmers' and 'Household Union of America' established for the purpose of banding negroes together for the killing of white people." According to the statement the organization

was started by a swindler to get money from the blacks.

Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob

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would refrain, as *the petition puts it, they would execute those found guilty in the form of law. The Committee's own statement was that the reason that the people refrained from mob violence was "that this Committee gave our citizens their solemn promise that the law would be carried out." According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, produced by the petitioners since the last decision of the Supreme Court hereafter mentioned, the Committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. However this may be, a grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and on the morning of the 29th the indictment was returned. On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no jurymen could have voted for an acquittal and continued to live in Phillips County and

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if *any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.

The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners. One came from five members of the Committee of Seven, and stated in addition to what has been quoted heretofore that "all our citizens are of the opinion that the law

should take its course." Another from a part of the American Legion protests against a contemplated commutation of the sentence of four of the petitioners and repeats that a "solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld." A meeting of the Helena Rotary Club attended by members representing, as it said, seventy-five of the leading industrial and commercial enterprises of Helena, passed a resolution approving and supporting the action of the American Legion post. The Lions Club of Helena at a meeting attended by members said to represent sixty of the leading industrial and commercial enterprises of the city passed a resolution to the same effect. In May of the same year, a trial of six other negroes was coming on and it was represented to the Governor by the white citizens and officials of Phillips County that in all probability those negroes would be lynched. It is alleged that in order to appease the mob spirit and in a measure secure the safety of the six the Governor fixed the date for the execution of the petitioners at June 10, 1921, but that the execution was stayed by proceedings in Court; we presume the proceedings before the Chancellor to which we shall advert.

In *Frank v. Mangum*, 237 U. S. 309, 335, 35 Sup. Ct. 582, 590 (59 L. Ed. 969), it was recognized of course that if in fact a trial is

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dominated by a *mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by habeas corpus ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.

In this case a motion for a new trial on the ground alleged in this petition was overruled and upon exceptions and appeal to the Supreme Court the judgment was affirmed. The Supreme Court said that the complaint of discrimination against petitioners by the exclusion of colored men from the jury came

too late and by way of answer to the objection that no fair trial could be had in the circumstances, stated that it could not say "that this must necessarily have been the case"; that eminent counsel was appointed to defend the petitioners, that the trial was had according to law, the jury correctly charged, and the testimony legally sufficient. On June 8, 1921, two days before the date fixed for their execution, a petition for habeas corpus was presented to the Chancellor and he issued the writ and an injunction against the execution of the petitioners; but

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the Supreme Court of the State *held that the Chancellor had no jurisdiction under the state law whatever might be the law of the United States. The present petition perhaps was suggested by the language of the Court: "What the result would be of an application to a Federal Court we need not inquire." It was presented to the District Court on September 21. We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.

Order reversed. The case to stand for hearing before the District Court.

Mr. Justice McREYNOLDS, dissenting.

We are asked to overrule the judgment of the District Court discharging a writ of habeas corpus by means of which five negroes sought to escape electrocution for the murder of Clinton Lee. Sec. 753, Rev. Stat. (Comp. St. § 1281).¹ They were convicted and sentenced in the circuit court of Phillips county, Arkansas, two years before the writ issued. The petition for the writ was supported by affidavits of these five ignorant men whose lives were at stake, the ex parte affidavits of three other negroes who had pleaded guilty

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*and were then confined in the penitentiary

¹ The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

under sentences for the same murder, and the affidavits of two white men—low villains according to their own admissions. It should be remembered that to narrate the allegations of the petition is but to repeat statements from these sources. Considering all the circumstances—the course of the cause in the state courts and upon application here for certiorari, etc.—the District Court held the alleged facts insufficient *prima facie* to show nullity of the original judgment.

The matter is one of gravity. If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are "true to the best of his knowledge and belief," and thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment. The delays incident to enforcement of our criminal laws have become a national scandal and give serious alarm to those who observe. Wrongly to decide the present cause probably will produce very unfortunate consequences.

In *Frank v. Mangum*, 237 U. S. 309, 325, 326, 327, 329, 335, 35 Sup. Ct. 582, 59 L. Ed. 969, after great consideration a majority of this court approved the doctrine which should be applied here. The doctrine is right and wholesome. I can not agree now to put it aside and substitute the views expressed by the minority of the court in that cause.

Much of the opinion in the *Frank Case* might be repeated here, if emphasis were nec-

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essary. It will suffice *to quote a few paragraphs; but fully to understand the whole should be read.

"In dealing with these contentions, we should have in mind the nature and extent of the duty that is imposed upon a federal court on application for the writ of habeas corpus under section 753, Rev. Stat. Under the terms of that section, in order to entitle the present appellant to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. *Rogers v. Peck*, 199 U. S. 425, 434, 26 Sup. Ct. 87, 50 L. Ed. 256. Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on habeas corpus. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. * * *

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of

the state, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. * * *

"It is, therefore, conceded by counsel for appellant that in the present case we may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of habeas corpus will lie only in case the judgment under which the prisoner is detained is

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shown to be abso*lutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings. * * *

"But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the state of Georgia (as will appear from decisions elsewhere cited), provide for an appeal in criminal cases to the Supreme Court of that state upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. * * *

"It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the federal governments. As was declared by this court in *Ex parte Royall*, 117 U. S. 241, 252, 6 Sup. Ct. 734, 29 L. Ed. 868, applying in a habeas corpus case what was said in *Covell v. Heyman*, 111 U. S. 176, 182, 4 Sup. Ct. 355, 358 (28 L. Ed. 390), a case of conflict of jurisdiction: 'The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a

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principle of right and of law, *and therefore, of necessity.' And see *In re Tyler*, Petitioner, 149 U. S. 164, 186, 13 Sup. Ct. 785, 37 L. Ed. 689. * * *

"We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law.

"But the state may supply such corrective process as to it seems proper. Georgia has

adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justices have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner's right to a fair trial." *Myers v. State*, 97 Ga. 76(5), 99, 25 S. E. 252; *Collier v. State*, 115 Ga. 803, 42 S. E. 226.

Let us consider with some detail what was presented to the court below.

There was the complete record of the cause in the state courts—trial and Supreme—showing no irregularity. After indictment the defendants were arraigned for trial and eminent counsel appointed to defend them. He cross-examined the witnesses, made exceptions, and evidently was careful to preserve a full and complete transcript of the proceedings. The trial was unusually short but there is nothing in the record to indicate that it was illegally hastened. November 3, 1919, the jury returned a verdict of "guilty"; November 11th the defendants were sen-

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*tenced to be executed on December 27th; December 20th new counsel chosen by them or their friends moved for a new trial and supported the motion by affidavits of defendants and two other negroes who declared they testified falsely because of torture. This motion questioned the validity of the conviction upon the very grounds now advanced—torture, prejudice, mob domination, failure of counsel to protect interests, etc. It is thus summarized by counsel for appellants:

"The grounds urged in the motion were the state of public feeling against the defendants, the fact that the defendants and witnesses were frequently subjected to torture for the purpose of extracting from them admissions of guilt and to make them testify against the defendants; that they were given no opportunity to consult with their friends and seek assistance, or informed of the charge against them until after their indictment; that they were carried from jail to the courtroom without having been permitted to see or talk with an attorney or any other person in regard to their defense; that the court appointed counsel for the defendants without consulting them, or giving them an opportunity to employ their own counsel; that the state of public feeling was such that they could not have a fair jury; that the trial proceeded without their consulting with their counsel or any witnesses, or being given an opportunity to obtain witnesses; that they were never in court before and were entirely ignorant of what they could do to defend themselves; that the trial from beginning to end occupied three-fourths of an hour and the verdict was returned in from three to six minutes. Four of the defendants say that they never had a copy of the indictment served upon them, one had it only forty-eight hours before the trial.

"Another ground was that under the practice

which prevailed in the state only white men were summoned *to sit on the grand jury or the jury, and that by this discrimination the defendants were deprived of their rights under the Constitution of the United States; that they had no notice or knowledge of what steps they should take to raise this point before the trial; that the verdict is contrary to the law and evidence.

"To this motion are attached two affidavits, one of Alf Banks, Jr., and another of William Wordlaw, who testified to the fact that they were whipped, placed in the electric chair and strangled by something put in their noses to make them testify. These defendants did not suffer from what was done to these witnesses, as they did not testify at their trial, but their affidavits confirm the testimony of the others as to the treatment to which the negroes in confinement were exposed."

A new trial having been denied, an appeal was granted to the State Supreme Court and 60 days allowed for preparing bill of exceptions; March 22, 1920, this appeal was argued orally and by briefs; March 29th the court announced its opinion, reviewed the proceedings and affirmed the judgment. *Hicks v. State*, 143 Ark. 158, 220 S. W. 308. A petition for rehearing was presented April 19th and overruled April 26th.

A petition for certiorari filed in this court May 24, 1920, with the record of proceedings in the state courts, set forth in detail the very grounds of complaint now before us. It was presented October 5, denied October 11, 1920, 254 U. S. 630, 41 Sup. Ct. 6, 65 L. Ed. 447.

April 29, 1921, the Governor directed execution of the defendants on June 10th. June 8th the chancery court of Pulaski county granted them a writ of habeas corpus; on June 20th the state Supreme Court held that the chancery court lacked jurisdiction and prohibited further proceedings. *State v. Martineau*, 149 Ark. 237, 232 S. W. 609. August 4th a justice of this court denied writ of error. Thereupon, the Governor fixed Sep-

tember 23d for execu*⁹⁹tion. On September 21st the present habeas corpus proceeding began, and since then the matter has been in the courts.

It appears that during September, 1919, bloody conflicts took place between whites and blacks in Phillips county, Arkansas—"the Elaine riot." Many negroes and some whites were killed. A committee of seven prominent white men was chosen to direct operations in putting down the so-called insurrection and conduct investigation with a view of discovering and punishing the guilty. This committee published a statement, certainly not intemperate, about October 7th, wherein they stated the "ignorance and superstition of a race of children" was played upon for gain by a black swindler, and told of an organization to attack the whites. It urged all persons white or black, in posses-

sion of information which might assist in discovering those responsible for the insurrection, to confer with it, upon the understanding that such action would be for the public safety and informant's identity carefully safeguarded. I find nothing in this statement which counsels lawlessness or indicates more than an honest effort by understanding men to meet the grave situation.

It is true that in October, 1920, almost a year after the trial here under consideration, the American Legion post at Helena—approximately 300 ex-service white men—made protest to the Governor against commutation of the sentences. It is copied in the margin as printed in the record.² The Helena Ro-

*¹⁰⁰ tary Club, November 10, *1920, expressed emphatic approval of this protest, and the Lions Club took like action. These resolutions are not violent and certainly do not

* Resolution.

It has been brought to the attention of the Richard L. Kitchens Post, No. 31, American Legion, Helena, Arkansas, that the Governor is contemplating commuting the sentence of four of the negroes, who are now under death sentences for their participation in the Elaine riot, to lesser sentences, and we, the members of this post, feel that any action toward this end by the Governor would do more harm in the community and breed lawlessness, as well as disregard for constituted authority, as at the time of this race riot the members of this post were called upon to go to Hoop Spur and Elaine to protect life and property, and in compliance with this request, there were two American Legion members killed and one seriously injured, besides the other nonmembers who also perished, and when the guilty negroes were apprehended, a solemn promise was given by the leading citizens of the community, that if these guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld.

The twelve negroes now under sentence of death, but whose sentences are suspended—account of court procedure, and six of these negroes cases have—taken to the Supreme Court of the United States, which court declined to review. The other six cases, whose original trials were reversed and new trials given them, were convicted, and their cases were appealed to the Supreme Court of the state and attorneys of their own selection were permitted to handle their cases.

Now, therefore, be it resolved by this post assembled on this the 19th day of October, 1920, that we most earnestly protest against the commutation of any of the sentences of these twelve negroes convicted of murder in the Elaine riot of October 1919, their having received a fair trial and—proven guilty, and the leniency of the court was shown in the balance of the cases tried, these being the ring leaders and guilty murderers, and that law and order will be vindicated and a solemn promise kept.

Be it further resolved that a committee of four be appointed by the Post Commander. This committee is hereby empowered to represent this post at a conference, or several conferences, with the Governor of Arkansas and to take such steps as they may deem necessary to carry out the wishes of this resolution and leaving nothing undone to have these sentences carried out. This committee to report in full to the next meeting of this post.

Passed unanimously 8:30 p. m. October 19, 1920, basement of the Episcopal Church, Helena, Arkansas.

establish the theory that defendants' conviction in November, 1919—a year before—was an empty form and utterly void; nor, as the

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*petition recklessly alleges, do they "further and conclusively show the existence of the mob spirit prevailing among all the white people of Phillips county at the time petitioners and the other defendants were put through the form of trials and show that the only reason the mob stayed its hand, the only reason they were not lynched was that the leading citizens of the community made a solemn promise to the mob that they should be executed in the form of law."

The Supreme Court of the state twice reversed the conviction of other negroes charged with committing murder during the disorders of September, 1919. The first opinion came down on the very day upon which the judgment against petitioners was affirmed, and held the verdict so defective that no judgment could be entered upon it. The second directed a reversal because the trial court had refused to hear evidence on the motion to set aside the regular panel of the petit jury. *Banks v. State*, 143 Ark. 154, 219 S. W. 1015; *Ware v. State*, 146 Ark. 321, 225 S. W. 626. The Supreme Court, as well as the trial court, considered the claims of petitioners set forth by trusted counsel in the motion for a new trial. This court denied a petition for certiorari wherein the facts and circumstances now relied upon were set out with great detail. Years have passed since they were convicted of an atrocious crime. Certainly they have not been rushed towards the death chair; on the contrary, there has been long delay and some impatience over the result is not unnatural. The recent execution of assassins in England within 30 days of the crime, affords a striking contrast.

With all those things before him, I am unable to say that the District Judge, acquainted with local conditions, erred when he held the petition for the writ of habeas corpus insufficient. His duty was to consider the whole case and decide whether there appeared to be substantial reason for further proceedings.

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*Under the disclosed circumstances I cannot agree that the solemn adjudications by courts of a great state, which this court has refused to review, can be successfully impeached by the mere ex parte affidavits made upon information and belief of interested convicts joined by two white men—confessedly atrocious criminals. The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system.

I am authorized to say that Mr. Justice SUTHERLAND concurs in this dissent.

AKRON, C. & Y. RY. CO. et al. v. UNITED STATES et al.

THE NEW ENGLAND DIVISION CASE.

(Argued Jan. 9, 10, 1923. Decided Feb. 19, 1923.)

No. 646.

1. Carriers ⇐29—Order adjusting division of through rates to provide greater revenue for certain roads not void as unauthorized.

An order of the Interstate Commerce Commission, granting to New England railroads a larger share of the through rates on freight moving between New England and the rest of the United States, in order to meet in part the greater need of New England lines for increased revenues, was not void, as made to accomplish an unauthorized purpose, since, while Transportation Act Feb. 28, 1920, § 418, amending Interstate Commerce Act, § 15 (6), is in part designed to remove doubts as to the Commission's power to act on its own initiative, that act also seeks to insure adequate transportation service, and to that end to secure a fair return on capital devoted to such service, without permitting an unreasonably large return to prosperous roads.

2. Carriers ⇐23—Act, construed as authorizing apportionment of joint rate according to needs, not unconstitutional.

Transportation Act Feb. 28, 1920, § 418, amending Interstate Commerce Act, § 15 (6), construed as authorizing apportionment by the Interstate Commerce Commission of a joint rate on the basis of the greater needs of particular carriers, is not unconstitutional, as depriving carriers of their just share of the joint rate, as it is for the Commission to determine what is just, reasonable, and equitable, and it may be just to give a prosperous carrier a smaller proportion of an increased rate than of the original rate.

3. Carriers ⇐29—Order adjusting apportionment of through rates treated as supplement of order increasing rates.

Where the Interstate Commerce Commission, at all times having the special needs of New England roads before it, granted an increase in rates to all roads in the Eastern group, and thereafter made an order increasing the share of New England roads in joint rates on traffic between New England and other parts of the country, the order may properly be deemed a supplement to, or modification of, the order granting the increase, and the fact that two orders, instead of one, were made, is of no legal significance.

4. Carriers ⇐29—Commission may act on typical evidence in dividing joint rates.

Under Transportation Act Feb. 28, 1920, § 418, amending Interstate Commerce Act, § 15 (6), and authorizing the Interstate Commerce Commission to prescribe proper divisions of joint rates, the Commission is authorized to base findings in respect to each division of each rate of every carrier in a particular group upon evidence typical in character and ample in

quantity, as it must be assumed that Congress knew of the practice of the Commission to adjudicate comprehensively on substantially all rates in a large territory, and knew that to require specific evidence and separate adjudication respecting each division of each rate would be tantamount to a denial of relief.

5. Carriers ⇨23—State permitting division of joint rates to be based on typical evidence not unconstitutional.

Transportation Act Feb. 28, 1920, § 418, amending Interstate Commerce Act, § 15(6), construed as authorizing Interstate Commerce Commission, in dividing joint rates, to act on evidence typical in character and ample in quantity, without requiring specific evidence, and making a separate adjudication respecting each division of each rate of each carrier, is not unconstitutional.

6. Constitutional law ⇨311—Due process not denied by creating presumptions and shifting burden of proof.

Congress may, consistently with the due process clause, create rebuttable presumptions, and shift the burden of proof.

7. Commerce ⇨87—Provisional order adjusting division of joint rates not void as not made after full hearing.

Under Interstate Commerce Act, § 15 (6), as amended by Transportation Act Feb. 28, 1920, § 418, authorizing the Interstate Commerce Commission, after full hearing, to prescribe proper divisions of joint rates, where voluminous evidence was received, and carriers had ample time and opportunity to introduce all evidence desired, a provisional order increasing the share of New England roads in joint rates pending a comprehensive revision was not void, as not made after full hearing, as it is the character of the hearing, and not of the order entered, that determines whether a hearing was full.

8. Commerce ⇨87—"Full hearing" on division of through rates defined.

Within Interstate Commerce Act, § 15 (6), as amended by Transportation Act Feb. 28, 1920, § 418, authorizing the Interstate Commerce Commission, after full hearing, to prescribe proper divisions of joint rates, a "full hearing" is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety from the standpoint of justice and law of the step asked to be taken.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hearing.]

9. Constitutional law ⇨298(2)—Order adjusting division of through rates not unconstitutional, because provisional.

An order made by the Interstate Commerce Commission, after affording time and opportunity to carriers to introduce any and all evidence desired, increasing the share of New England roads in through rates, pending a comprehensive revision of divisions of through rates, was not obnoxious to the due process clause, because provisional.

10. Commerce ⇨88—Order dividing joint rates need not subdivide them.

Under Interstate Commerce Act, § 15 (6), as amended by Transportation Act Feb. 28, 1920, § 418, authorizing the Interstate Commerce Commission to prescribe proper divisions of joint rates, the duty imposed on the Commission does not extend beyond the need for action, and if the real controversy concerns the division of the joint rate between carriers east of the Hudson river and those west thereof, there is nothing in the law preventing the Commission from letting the carriers in each section apportion their respective shares among themselves; and, moreover, an order directing that the shares of New England roads should be increased 15 per cent., and that the balance of the joint rate should be divided among the lines west of the Hudson river in the same proportions as then existing, or otherwise as they might agree, sufficiently prescribed the subdivisions, as well as the primary divisions, of the joint rates.

11. Commerce ⇨88—Order apportioning joint rate held not to show failure to consider matters prescribed by statute.

An order of the Interstate Commerce Commission, providing that the share of New England roads in joint rates on freight moving between New England and the rest of the United States should be increased 15 per cent., and that the balance of the joint rate should be divided among the other carriers in the existing proportions, or otherwise as they might agree, or as might be determined by the Commission on application, did not, as claimed, show failure on the part of the Commission to consider the several factors which Transportation Act Feb. 28, 1920, § 418, amending Interstate Commerce Act, § 15 (6), requires the Commission to take into consideration in making divisions of joint rates.

12. Commerce ⇨88—Order of Commission, unsupported by evidence, void.

An order of the Interstate Commerce Commission, fixing rates or apportioning joint rates between carriers, if unsupported by evidence, is invalid.

13. Commerce ⇨95—Weight of evidence or wisdom of Commission's order not reviewed.

Where the evidence was ample to support an order of the Interstate Commerce Commission dividing joint rates between carriers, it is beyond the province of the Supreme Court to consider the weight of evidence or the wisdom of the order made.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Akron, Canton & Youngstown Railway Company and others against the United States to set aside an order of the Interstate Commerce Commission, in which numerous other parties intervened as plaintiffs or defendants. From an order denying an interlocutory injunction (282 Fed. 306), plaintiffs appeal. Affirmed.

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*Messrs. Walter C. Noyes and H. T. Newcomb, both of New York City, for appellants.

Mr. H. A. Taylor, of New York City, for Erie R. Co. and others.

Mr. Alexander H. Elder, of New York City, for Central R. Co. of New Jersey.

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*Mr. Charles F. Choate, Jr., of Boston, Mass., for Boston & M. R. R.

Mr. Blackburn Esterline, of Washington, D. C., for the United States.

Mr. Walker D. Hines, of New York City, for Interstate Commerce Commission.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Transportation Act 1920, c. 91, § 418, 41 Stat. 456, 486, amending Interstate Commerce Act, § 15 (6), authorizes the Commission, upon complaint or upon its own initiative, to prescribe, after full hearing, the divisions of joint rates among carriers parties to the rate. In determining the divisions, the Commission is directed to give due consideration, among other things, to the importance to the public of the transportation service rendered by the several carriers; to their revenues, taxes, and operating expenses; to the efficiency with which the carriers concerned are operated; to the amount required to pay a fair return on their railway property; to the fact whether a particular carrier is an original, intermediate, or delivering line; and to any other fact which would, ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another of the joint rate.

Invoking this power of the Commission, the railroads of New England¹ instituted,

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in August, 1920, proceedings to *secure for themselves larger divisions from the freight moving between that section and the rest of the United States, the joint rates on which had just been increased pursuant to the order entered in Ex parte 74, Increased Rates, 1920, 58 I. C. C. 220. More than 600 carriers of the United States, mostly railroads, were made respondents. The case was submitted on voluminous evidence. On July 6, 1921, a report was filed. The relief sought was not then granted; but no order was entered. Instead, the parties were directed by the report to proceed individually to readjust their divisional arrangements, and the record was held open for submission of the readjustment. New England Divisions, 62 I. C. C. 513. This direction was not acted on. Five months later the case was reargued upon the same evidence. On January 30, 1922, the Commission modified its findings and made an order (amended March 28, 1922) which directed, in sub-

stance, that the divisions, or shares, of the several New England railroads² in the joint through freight rates be increased 15 per cent. New England Divisions, 66 I. C. C. 196. Since it did not increase any rate, it necessarily reduced the aggregate amounts receivable from each rate by carriers operating west of Hudson river. The order was limited to joint class rates and those joint commodity rates which are divided on the same basis as the class rates.³ It related only to transportation wholly within the United States. It was to continue in force only until further order of the Commission, and it left the door open for correction upon application of any carrier in respect to any rate.

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*Prior to the effective date of that order, there was in force between each of the New England carriers and substantially each of the railroads operating west of the Hudson, a series of contracts providing for the division of all joint class rates upon the basis of stated percentages.⁴ These agreements were in the form of express contracts. Section 208 (b) of Transportation Act of 1920 provided that all divisions of joint rates in effect at the time of its passage should continue in force until thereafter changed either by mutual agreement between the interested carriers or by state or federal authorities. The second report enjoined upon all parties the necessity for proceeding, as expeditiously as possible, with a revision of divisions upon a more logical and systematic basis, made specific suggestions as to the character of the study to be pursued, and invited carriers to present to the Commission any cases of inability to agree upon such revision. No further application was, however, made to the Commission.

In March, 1922, this suit was commenced in the federal court for the Southern District of New York to enjoin enforcement of the order and to have it set aside as void. The Akron, Canton & Youngstown Railway and 43 other carriers⁵ joined as plaintiffs, suing on behalf of themselves and others similarly

² Other than the Bangor & Aroostook, which had been a complainant before the Commission, and the Boston & Albany, which had not.

³ Thus the order does not include traffic passing through Canada. Nor does it apply to rates on coal (which constitutes about two-fifths of the total interchanged tonnage), nor to those on certain other commodities.

⁴ Compare *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 139, note 2, 38 Sup. Ct. 49, 62 L. Ed. 199; *Central R. R. Co. of New Jersey v. United States*, 257 U. S. 247, 42 Sup. Ct. 80, 66 L. Ed. 217.

⁵ The number of carriers named as respondents in the order entered by the Commission is 617. Only 44 of these originally joined as plaintiffs in this suit. One of these, the Illinois Central, withdrew; 39 intervened later as plaintiffs. Leading trunk lines—the New York Central, the Pennsylvania, and the Baltimore & Ohio—by which a large part of all traffic interchanged with the New England railroads was carried, acquiesced in the Commission's order.

¹ Except the Boston & Albany, which is leased to the New York Central, one of the trunk lines which was a respondent before the Commission, and branches of two Canadian systems, the Grand Trunk and the Canadian Pacific.

situated. The United States alone was named as defendant. But the Interstate Commerce Commission and 10 New England carriers intervened as such and filed answers. The case was then heard, on application for an interlocutory injunction, by

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*three judges, under the provisions of Urgent Deficiencies Act Oct. 22, 1913, c. 32, 38 Stat. 208, 219 (Comp. St. § 998). The full record of the proceedings before the Commission, including all the evidence, was introduced. The injunction was denied ([D. C.] 282 Fed. 306), and the case is here by direct appeal. Plaintiffs urge six reasons why the order of the Commission should be held void.

[1] First. It is contended that the order is void, because its purpose was not to establish divisions just, reasonable, and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. The argument is that Congress did not authorize the Commission to exercise its power to accomplish that purpose. An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. Compare *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 443, 31 Sup. Ct. 288, 55 L. Ed. 283. But the order here assailed is not subject to that infirmity.

Transportation Act 1920, introduced into the federal legislation a new railroad policy. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 585, 42 Sup. Ct. 232, 66 L. Ed. 371. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language.⁶ And, to

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attain it, new *rights, new obligations, new machinery, were created. The new provisions took a wide range.⁷ Prominent among

them are those specially designed to secure a fair return on capital devoted to the transportation service.⁸ Upon the Commission new powers were conferred, and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet

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the situation. *There was a limit to what the traffic would bear. A 5 per cent. increase had been granted in 1914, *The Five Per Cent. Case*, 31 I. C. C. 351; *Id.*, 32 I. C. C. 325; 15 per cent. in 1917, *The Fifteen Per Cent. Case*, 45 I. C. C. 303; 25 per cent. in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines), if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: The group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshaling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped,

⁶ Thus: To enable the carriers "properly to meet the transportation needs of the public," section 422, p. 491; to give due consideration to "the transportation needs of the country, and the necessity * * * of enlarging [transportation] facilities," section 422, p. 488; to "best meet the emergency and serve the public interest," section 402, p. 477; to "best promote the service in the interest of the public and the commerce of the people," section 402, pp. 476, 477; "that the public interest will be promoted," section 407, p. 482.

⁷ Among them are the establishment of the Railroad Labor and the Adjustment Boards. Title III, pp. 469-474. See *Pennsylvania R. R. Co. v. United States Railroad Labor Board*, decided this day. The provisions for raising capital, by new government loans, section 210, pp. 468, 469; by loans from the railroad contingent fund (the recapture provision), section 15a (10, 16), pp. 490, 491; those placing the issue of new securities under the control of the Commission, unaffected by the laws of the several states, section 439, pp. 494-496; the provision for consolidation of railways into a limited number of systems, section 407, pp. 480-482; provi-

sions for securing adequate car service, *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 42 Sup. Ct. 349, 66 L. Ed. 671; for joint use of terminals; for routing; for interchange of traffic between railroads, and between a railroad and water carrier, section 402, pp. 476-478; section 405, p. 479; sections 412, 413, p. 483.

⁸ Section 422, pp. 488, 489. To this end, also, the Commission was empowered, among other things, to permit pooling of traffic or earnings, section 407, pp. 480, 481; to authorize abandonment of unprofitable and unnecessary lines, section 402, p. 477; *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, 42 Sup. Ct. 281, 66 L. Ed. 566; to fix minimum, as well as maximum, rates; and thus prevent cut-throat competition and the taking away of traffic from weaker competitors, section 418, p. 485; to prevent the depletion of interstate revenues by discriminating intrastate rates, *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371; *New York v. United States*, 257 U. S. 591, 42 Sup. Ct. 239, 66 L. Ed. 385; and to determine the division of joint rates.

would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without

proving burdensome.^{*192} On the other *hand the revenues of connecting carriers might be ample; so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them, and give to the weak line the whole of the resulting increase in revenue. That, to some extent, may have been the situation in New England, when, in 1920, the Commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a return of substantially 6 per cent. on the value of the property used in the transportation service. Ex parte 74, Increased Rates, 1920, 58 I. C. C. 220.⁹

The deficiency in income of the New England lines in 1920 was so great that (even before the raise in wages ordered by the Railroad Labor Board) an increase in freight revenues of 47.40 per cent. was estimated to be necessary to secure to them a fair return. On a like estimate, the increased revenues required to give the same return to carriers in Trunk Line Territory was only 29.76 per cent. and to carriers in Central Freight Association Territory 24.31 per cent.¹⁰ To have raised the additional revenues needed by the New England lines wholly by raising the rates within New England—particularly when rates west of the Hudson were raised much less—might have killed New England traffic. Rates there had already been subjected (besides the three general increases mentioned above) to a special increase, applicable only to New England, of about 10 per

cent. in 1918. Proposed *Increases in New England, 49 I. C. C. 421. A further large increase in rates local to New England would, doubtless, have provoked more serious competition from auto trucks and water car-

riers. For hauls are short and the ocean is near. Instead of erecting New England into a separate rate group, the Commission placed it, with the other two subdivisions of Official Classification Territory, into the Eastern Group, and ordered that freight rates in that group be raised 40 per cent. At that rate level the revenues of the carriers in Trunk Line and Central Freight Association territories would, it was asserted, exceed by 1.48 per cent. what they would have received if they had been a separate group. It was estimated that the excess would be about \$25,000,000.¹¹ Substantially that amount (besides the additional revenue to be raised otherwise) was said to be necessary to meet the needs of the New England lines.

Plaintiffs insist that Transportation Act 1920, did not, by its amendment of section 15 (6) change, or add to, the factors to be considered by the Commission in passing upon divisions; that it had theretofore been the Commission's practice to consider all the factors enumerated in section 15 (6);¹² that this enumeration merely put into statutory form the interpretation theretofore adopted; that the only new feature was the grant of authority to enter upon the inquiry into divisions on the Commission's initiative; that

this authority was conferred in order to *protect the short lines, which, because of their weakness, might refrain from making complaint, for fear of giving offense;¹³ and that the power conferred upon the Commission is coextensive only with the duty imposed on the carriers by section 400 of Transportation Act 1920, which declares that they shall establish "in case of joint rates * * * just, reasonable, and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers." It is true that section 12 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 551, 552 (Comp. St. § 8583), which first conferred upon the Commission authority to establish or adjust divisions,¹⁴ did not, in terms, confer upon the Commission power to act on its own initiative. The language of the act seemed to indicate that the authority was to

¹¹ Estimated on the volume of traffic moving in 1919.

¹² Citing *Star Grain & Lumber Co. v. Atchison, Topeka & Santa Fé Ry. Co.*, 14 I. C. C. 364, 370; *Manufacturers' Railway Co. v. St. Louis, Iron Mt., & Southern Ry. Co.*, 21 I. C. C. 304, 313; *Investigation of Alleged Unreasonable Rates on Meats*, 23 I. C. C. 656, 661; *Class Rates from Chestnut Ridge Railway Stations*, 41 I. C. C. 62; *Western Pacific Co. v. Southern Pacific Co.*, 55 I. C. C. 71, 84. See *Low Moor Iron Co. v. Chesapeake & Ohio R. R. Co.*, 42 I. C. C. 221.

¹³ Citing H. R. No. 456, pp. 9, 10, 66th Congress, 1st Session; Conference Report No. 650, 66th Congress, 2d Session; Mr. Esch, 59 Cong. Rec. part 4, p. 3268; Senator Robinson, 59 Cong. Rec. pt. 4, p. 3331.

¹⁴ Power to establish through routes and joint rates had been conferred by section 4 of the Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 584, 589 (Comp. St. § 8583).

⁹ There is evidence that the rate per ton per mile received by the New Haven from freight local to its lines was four times as high as the rate per ton per mile, under existing divisions, on freight interchanged by it with carriers west of Hudson river.

¹⁰ What is known as Official Classification Territory comprises the three subdivisions, New England Freight Association Territory, Trunk Line Association Territory, and Central Freight Association Territory. See map, *The Five Per Cent. Case*, 31 I. C. C. 350.

be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates.¹⁵ The extent of the Commission's power was a subject of doubt, and Transportation Act 1920 undertook by section 15 (6) to remove doubts which had arisen. But Congress had, also, the broad purpose explained above. This is indicated, among other things, by expressions used in dealing with joint rates. By new section 15 (6), p. 486, the Commission is directed to give due consideration, in determining divisions, to "the importance to the

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public of the transportation services of *such carriers;"¹⁶ just as by new section 15 (3), p. 45, the Commission is authorized upon its own initiative when "desirable in the public interest" to establish joint rates and "the divisions of such rates."

[2] Second. It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers it is unconstitutional. There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention. The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. What is its just share? It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable, and equitable. Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom.

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[3] *What the Commission did was to raise

¹⁵ Compare *Morgantown & Kingwood Divisions*, 49 I. C. C. 540. The section was involved in *Tap Line Cases*, 234 U. S. 1, 28, 34 Sup. Ct. 741, 58 L. Ed. 1185; *O'Keefe, Receiver, v. United States*, 240 U. S. 294, 300, 36 Sup. Ct. 313, 60 L. Ed. 651; *Manufacturers' Railway Co. v. United States*, 246 U. S. 457, 480, 483, 38 Sup. Ct. 333, 62 L. Ed. 831; *Louisiana & Pine Bluff Railway Co. v. United States*, 257 U. S. 114, 118, 42 Sup. Ct. 25, 66 L. Ed. 156.

¹⁶ In thus making clear that in fixing divisions as well as rates the public interest should be considered, Congress doubtless had in mind expression to the contrary in opinions of the Commission. See *Germain Co. v. New Orleans & Northeastern R. R. Co.*, 17 I. C. C. 22, 24; *Board of Trade of Chicago v. Atlantic City R. R. Co.*, 20 I. C. C. 504, 508; *In re Divisions of Joint Rates on Coal*, 22 I. C. C. 51, 53; *Morgantown & Kingwood Divisions*, 49 I. C. C. 540, 550.

the additional revenues needed by the New England lines, in part, directly, through increase of all rates 40 per cent. and, in part, indirectly, through increasing their divisions on joint rates. In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax. It is not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues needed by the New England lines is paid by the western carriers. All is paid by the community pursuant to the single rate increase ordered in Ex parte 74. If, by a single order, the Commission had raised joint rates throughout the Eastern group 40 per cent., and, in the same order, had declared that 90 per cent. of the whole increase in the joint rates should go to the New England lines (in addition to what they would receive under existing divisions), clearly nothing would have been taken from the Trunk Line and Central Freight Association carriers, in so ordering. The order entered in Ex parte 74 was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders, instead of one, is not of legal significance. The order here in question may properly be deemed a supplement to, or modification of, that entered in Ex parte 74.

[4] Third. It is asserted that the order is necessarily based upon the theory that, under section 15 (6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually; that Congress did not confer such authority; and that, hence, the order is void. Whether Congress did confer that authority we have no occasion to consider; for it is clear that the Commission did not base its order upon any such theory. The order directs a 15 per cent. increase in the divisions to the several New England lines. It is comprehensive. But it is based upon evidence

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which the *Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier. Whether the assumption was well founded will be discussed later. Here we are to consider merely, whether Congress authorized the method of proof and of adjudication pursued, and whether it could authorize it, consistently with the Constitution.

Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed 600; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be

tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew, also, that the Commission had been confronted with similar situations in the past and how it had dealt with them.

For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order, and, in large part, on evidence deemed typical of the whole rate structure.¹⁷ This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551, 552, to be upon

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*the carrier.¹⁸ Thus, the practice did not have its origin in the group system of rate making provided for in 1920 by the new section 15 (6). It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such inquiries,¹⁹

¹⁷ Compare *Burnham, Hanna, Munger Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 14 I. C. C. 299; *City of Spokane v. Northern Pacific Ry. Co.*, 15 I. C. C. 376.

¹⁸ *Advances in Rates—Eastern Case*, 20 I. C. C. 243, 248; *Railroad Commission of Texas v. Atchison, Topeka & Santa Fé Ry. Co.*, 20 I. C. C. 463, 484; *Five Per Cent. Cases*, 31 I. C. C. 351, 402, 403, 448, 449; *1915 Western Rate Advance Case*, 35 I. C. C. 497; *Western Passenger Fares*, 37 I. C. C. 1; *The Fifteen Per Cent. Case*, 45 I. C. C. 303. See also the successive orders issued in the Shreveport controversy, 23 I. C. C. 31; 34 I. C. C. 472; 41 I. C. C. 83; 43 I. C. C. 45; 48 I. C. C. 312. Compare *Houston & Texas Ry. Co. v. United States*, 234 U. S. 342, 349, 34 Sup. Ct. 833, 58 L. Ed. 1341; *Eastern Texas R. R. Co. v. Railroad Commission (D. C.)* 242 Fed. 300; *Looney v. Eastern Texas R. R. Co.*, 247 U. S. 214, 38 Sup. Ct. 460, 62 L. Ed. 1084; also *Illinois Central R. R. Co. v. Public Utilities Commission*, 245 U. S. 493, 38 Sup. Ct. 170, 62 L. Ed. 425, with *Business Men's League of St. Louis v. Atchison, Topeka & Santa Fé Ry. Co.*, 41 I. C. C. 13, 503, and 49 I. C. C. 713. The Commission has, since 1920, also reduced rates in broad group proceedings upon consideration of typical conditions throughout the entire region involved in the reduction. *Reduced Rates, 1922*, 68 I. C. C. 676; *Rates on Grain, etc.*, 64 I. C. C. 85. Referring to the latter case the Commission said in their second report in this case (66 I. C. C. 203): "In all such general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis."

¹⁹ Plaintiffs argue that there is a difference, because all interstate rates are required to be filed with the Commission and published, and hence appear specifically in the record; whereas divisions are not required to be filed or published. The difference is without legal significance. Papers on the Commission files are not a part of the record in a case, unless they are introduced as evidence. It is the nature of the inquiry, not the accident whether papers are on file or published, which de-

and we must assume that *Congress intended to confer upon the Commission power to pursue it.²⁰

[5, 6] That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions. *Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; *Lindsley v. Natural Carbonic Gas. Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; and shift the burden of proof, *Minneapolis & St. Louis R. R. Co. v. Railroad & Warehouse Commission*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614. It might, therefore, have declared in terms that, if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as prima facie evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, 42 Sup. Ct. 232, 66 L. Ed. 371, serious injustice to any carrier could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing.

[7-9] Fourth. It is asserted that the order directs a transfer of revenues of the

Western carriers to the New England *carriers, pending a decision in the matter of divisions; that Congress has not granted authority to take such provisional action; and that, hence, the order is void. The argument is, that under section 15 (6), the Commission may prescribe divisions only when, upon full hearing, it is of opinion that those existing are, or will be, unjust, unreasonable or inequitable; that in such event it shall prescribe divisions which are just, reasonable and equitable; and that the provisional character of the order demonstrates that the

termines whether facts can be proved by evidence which is typical. The Commission could, of course, require carriers to introduce all their division sheets. To a proceeding of this character the rule acted on in *Florida East Coast Line v. United States*, 234 U. S. 167, 34 Sup. Ct. 867, 58 L. Ed. 1267, is not applicable. Compare *United States v. L. & N. R. Co.*, 235 U. S. 314, 35 Sup. Ct. 113, 59 L. Ed. 245.

²⁰ Since Transportation Act 1920, the Commission has on several occasions modified the divisions of a carrier without considering each individual joint rate. *Pittsburgh & West Virginia Ry. Co. v. Pittsburgh & Lake Erie R. R. Co.*, 61 I. C. C. 272; *East Jersey R. R. & Terminal Co. v. Central R. R. Co. of New Jersey*, 63 I. C. C. 80; *Division of Joint Rates and Fares of Missouri & North Arkansas R. R. Co.*, 68 I. C. C. 47.

hearing has not been a full one. Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized, and observed, these essentials of a full hearing.

The complaint before it was filed in August, 1920. The hearings did not begin until December 15, 1920. The parties had, therefore, ample time to prepare to present their evidence and arguments. The case was not submitted until April 23, 1921. There was thus ample time for, and every carrier was, in fact, afforded the opportunity of, introducing any and all evidence it desired. The record made is voluminous. That the evidence left in the minds of the Commission many doubts, is true. But it had brought conviction that the New England lines were entitled to relief; that the divisional arrangements of the carriers required a thorough revision to put them upon a more logical and systematic basis; that a horizontal increase of the New England lines' divisions, made before such revision, would leave some divisions too high and others too low; that the comprehensive revision proposed would necessarily take a long time; and that, meanwhile, the New England lines should be

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accorded "a *portion of the relief to which * * * they are entitled and which the public interest clearly requires." The Commission further concluded that, on the evidence before it, no substantial injustice would be done to the carriers west of the Hudson by an order which increased by 15 per cent. the existing divisions of the New England lines, and reduced, by the amount required for this purpose, the divisions of the several carriers west of the Hudson, in the proportions in which they then shared the balance of each joint rate, or as otherwise might be agreed between them or determined by the Commission upon application.

A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently, and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision, than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carriers. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not

so, most temporary injunctions would violate the Constitution.

[10, 11] Fifth. It is contended that the order is void, because it confines itself to dealing with the main, or primary, divisions of the joint rates at the Hudson river, and fails to prescribe the subdivisions of that part of the rate which goes to the several carriers. The argument is that, if the Commission acts at all in apportioning the joint rate, its action is invalid unless it prescribes the proportion to be received by each of the connecting carriers. For this contention there is no warrant either in the language of the act, in the practice of carriers, or in reason. The duty imposed upon the Commission does not

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extend beyond *the need for its action. If the real controversy is merely how much of the joint rate shall go to carriers east of Hudson river and how much to carriers west, there is nothing in the law which prevents the Commission from letting the parties east of the river, and likewise those west of it, apportion their respective shares among themselves. It is obviously of no interest to the Western carriers how those of New England decide to apportion their share; nor is it of interest to the Eastern carriers how those west of the Hudson divide the share apportioned to that territory. If on these matters the carriers interested can reach an agreement and no public interest is prejudiced, clearly, there is no occasion for the Commission to act.

But there is a further answer to this contention. The Commission has fixed the subdivisions east and also those west of the river. The divisions of the several New England lines are definitely fixed; for the amount receivable by each carrier from each joint rate is ordered increased 15 per cent. What remains of each joint rate goes to the Western lines. This balance, the order recites, shall be divided among them "in the same proportions as at present, or otherwise as they may agree, or failing such agreement, as may be determined by the Commission upon application therefor." That fixes the divisions by reference. The fact that they are fixed provisionally and by reference, does not invalidate the order. It is urged that this disposition demonstrates failure by the Commission to consider the several factors which the statute declares shall be taken into consideration in determining divisions. But this is not true. This feature in the order indicates rather that the Commission has considered the question, concluded that the apportionment by the Western lines of their share on existing proportions, was not inconsistent with the public interest, and that, in the absence of complaint, it might be assumed to be satisfactory to all parties. This objection presents in a

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different form largely *what has been more

fully discussed above. There was, thus, on the part of the Commission neither usurpation of power, nor neglect of duty, in limiting its definite decision to the primary divisions at the Hudson river gateways, and leaving the interested parties to deal, in the first instance, with the subdivisions among the carriers in their respective territories.²¹

[12, 13] Sixth. It is contended that the order is void, because it is unsupported by evidence. An order of the Commission fixing rates, if unsupported by evidence, is clearly invalid. *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 547, 32 Sup. Ct. 108, 56 L. Ed. 308. *Florida East Coast Ry. Co. v. United States*, 234 U. S. 167, 34 Sup. Ct. 867, 58 L. Ed. 1267. The rule must, of course, be the same in respect to an order fixing divisions. The contention that the order is unsupported by the evidence rests largely upon arguments which assume a construction of the statute which we hold to be erroneous, or upon expressions in the first report of the Commission, which, in view of the second report and order thereon, must be deemed to have been withdrawn. That the

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evidence was ample to support the order made, is shown in the opinion of the lower court (282 Fed. 306, 308, 309), and in the reports of the Commission. To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province. *Manufacturers' Railway Co. v. United States*, 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831; *Skinner & Eddy Corporation v. United States*, 249 U. S. 557, 562, 39 Sup. Ct. 375, 63 L. Ed. 772; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 62, 41 Sup. Ct. 24, 65 L. Ed. 129. But the way is still open to any carrier to apply to the Commission for modification of the order, if it is believed to operate unjustly in any respect.

Affirmed.

²¹ The junction points on which are based the divisions between the New England lines and the lines operating west of the Hudson River were fully set forth in the report of the Commission. To fix divisions on the percentage basis with a basic dividing line was what had been commonly done in the agreements of carriers through their freight associations. In leaving to the respondent carriers, in the first instance, the apportionment among themselves of that part of the joint rate receivable by the carriers operating west of the Hudson River the Commission followed a long established practice. *Brownsville Texas Class and Commodity Rates*, 30 I. C. C. 479, 484; *Pacific Fruit Exchange v. Southern Pacific Co.*, 31 I. C. C. 159, 161, 162, 163; *Grain Rates from Milwaukee*, 33 I. C. C. 417, 420, 421; *Sloss-Sheffield Steel & Iron Co. v. Louisville & Nashville R. R. Co.*, 35 I. C. C. 460, 465, 466; *St. Louis, Missouri-Illinois Passenger Fares*, 41 I. C. C. 584, 593, 599. And the practice had at least the tacit approval of this Court. Compare *Intermountain Rate Case*, 234 U. S. 476, 485, 486, 494; *O'Keefe, Receiver, v. United States*, 240 U. S. 294; *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457.

PENNSYLVANIA R. CO. v. UNITED STATES RAILROAD LABOR BOARD et al.

(Argued Jan. 11, 1923. Decided Feb. 19, 1923.)

No. 585.

1. Master and servant $\Leftrightarrow$ 69—Labor Board's decisions enforced by public opinion.

Under Transportation Act Feb. 28, 1920, tit. 3, creating the Railroad Labor Board and defining its powers and duties, the only sanction for the decisions of the board is the force of public opinion, invoked by the fairness of a full hearing, the justice of the conclusion strengthened by the official prestige of the board and the full publication of the violation of such decision by any party to the proceeding.

2. Master and servant $\Leftrightarrow$ 69—Labor Board's authority to determine disputes arising during federal control held immaterial.

In a suit to enjoin Railroad Labor Board from publishing its decision governing the selection of representatives of the employees of plaintiff railroad to confer with the railroad, which was rendered after the dispute as to such representatives had been a matter of conference between an organization of employees and the railroad, as required by Transportation Act Feb. 28, 1920, § 301, it is immaterial whether the board had authority under that act to determine controversies which arose during the government control of the railroads.

3. Master and servant $\Leftrightarrow$ 69—Labor Board's action may be invoked by labor union.

Transportation Act Feb. 28, 1920, § 307, authorizing the chief executive of any organization of employees whose members are directly interested in the dispute to invoke the action of the Railroad Labor Board, does not exclude a labor union from the organizations permitted to invoke such action, since such unions are legal organizations.

4. Master and servant $\Leftrightarrow$ 69—Labor Board has jurisdiction to determine who are representatives of employees.

Railroad Labor Board has jurisdiction to determine a dispute as to who are the representatives of the employees, authorized to represent them in a dispute with the company, and who can make application to the board for determination of the dispute, both under its powers conferred by section 308 to make regulations necessary for the execution of its functions and to carry out the manifest purpose of the act, to promote harmonious relations between the managers of railroads and their employees, since the question of who may represent the employees always has been one of the most important of the rules and working conditions in the operation of the railroad.

5. Master and servant $\Leftrightarrow$ 69—Labor Board not created to determine legal rights.

Railroad Labor Board created under Transportation Act Feb. 28, 1920, tit. 3, was not intended to determine the legal rights of the par-

ties, which is the function of the courts, but was created to decide how the parties ought to exercise their legal rights, so as to enable them to co-operate in running the railroad, and since there is no constraint of the parties to do what the board decides, except the moral restraint resulting from publication of the board's decision, the courts will not pass on the correctness of any conclusion of the Labor Board so long as it keeps within the jurisdiction assigned to it by the statute.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by the Pennsylvania Railroad Company against the United States Railroad Labor Board and the members thereof. A decree for complainant was reversed by the Circuit Court of Appeals, with directions to dismiss the appeal (282 Fed. 701), and complainant appeals. Affirmed.

This case involves the construction of title 3 of the Transportation Act of 1920. Chapter 91, 41 Stat. 456, 469. The title provides for the settlement of disputes between railroad companies engaged in interstate commerce and their employees, and as a means of securing this, it creates a Railroad Labor Board and defines its functions and powers.

The Pennsylvania Railroad Company began this action by a bill in equity against the Railroad Labor Board and its individual

members in the District Court for the *Northern District of Illinois, where the Board has its office, averring that the suit involved more than \$3,000, and praying an injunction against the defendants' alleged unlawful proceedings under the act and especially against their threatened official publication under section 313 of the title that the Railroad Company had violated the Board's decision under the act.

The defendants moved to dismiss the bill on the ground that the suit was one against the United States without its consent, and also for want of equity and a lack of a cause of action. They also filed an answer making the same objections to the bill as in the motion and setting forth by exhibits more in detail the proceedings before the Board and its decisions. The District Court heard the case on the bill, motion and answer, and granted the injunction as prayed. The Board appealed to the Circuit Court of Appeals (282 Fed. 701) which reversed the decree and directed the dismissal of the bill. The decree of the Circuit Court of Appeals, not being made final by the statutes, the case is brought here by appeal under section 241 of the Judicial Code (Comp. St. § 1218).

On December 28, 1917, the President, by authority of the Act of Congress of August 29, 1916 (chapter 418, 39 Stat. 619, 645 [Comp. St. § 1974a]), took over the railroads of the country, including that of the complainant, and operated them through the Director General of Railroads until March 1,

1920, when pursuant to the Transportation Act of 1920, possession of them was restored to the companies owning them. During his operation, the Director General had increased wages and established the rules and working conditions by what were called national agreements with national labor unions composed of men engaged in the various railroad crafts. Further demands by employees through such unions were presented to the Director General and were pending and undetermined when the Transportation Act was approved. Conferences were held

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between the *heads of the labor unions, signatories to the national agreement, and representatives of the railroads after the railroads were restored to private ownership but without successful issue. When the members of the Labor Board were appointed and organized, April 15, 1920, it assumed jurisdiction of these demands and proceeded to deal with them. It rendered its decision as to the wage dispute on July 20, 1920, and postponed that as to rules and working conditions until April 14, 1921, when it decided that such rules and working conditions as were fixed in the so-called national agreements under the Director General and had been continued by the Board as a *modus vivendi* should end July 1, 1921, and remanded the matter to the individual carriers and their respective employees, calling upon them in the case of each railroad to designate representatives to confer and decide so far as possible respecting rules and working conditions for the operation of such railroad and to keep the Board advised of the progress toward agreement. The Board accompanied this decision (No. 119) with a statement of principles or rules of decision which it intended to follow in consideration and settlement of disputes between the carriers and employees. The only two here important are sections 5 and 15, as follows:

"5. The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management.

"15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

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*On June 27, 1921, the Board announced that some carriers in conference with their employees had agreed upon rules and working conditions and others had not. As to the latter the Board continued the old rules and working conditions until it should render a decision as to them.

In May, 1921, the officers of the Federal Shop Crafts of the Pennsylvania System, a labor union of employees of that system engaged in shop work, and affiliated with the American Federation of Labor, met the representatives of the Pennsylvania Railroad Company. They said they represented a majority of the employees of the Pennsylvania System in those crafts and were prepared to confer and agree upon rules and working conditions. The Pennsylvania representatives refused to confer with the Federation for lack of proof that it did represent such a majority, and said they would send out a form of ballot to their employees asking them to designate thereon their representatives. The Federation officers objected to this ballot because it was not in accordance with principles 5 and 15 of the Board, in that it made no provision for representation of employees by an organization, but specified that those selected must be natural persons, and such only as were employees of the Pennsylvania Company, and also because it required that the representatives of the employees should be selected regionally rather than from the whole system. The result was that the company and the Federation each sent out ballots. The Federation then filed a complaint, under section 307 of the Transportation Act, against the Pennsylvania Company, complaining on behalf of its members directly interested of the company's course in respect of the ballots. The company appeared, a hearing was had and the Board decided (decision No. 218) that neither of the ballots sent out by the parties was proper, that representatives so chosen were not proper representatives, and that

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rules and work*ing conditions agreed upon by them would be void. It further appeared that the votes cast on the company's ballots were something more than 3,000 out of more than 33,000 employees entitled to vote. The Federation had advised its members not to vote on the company's ballots. What the result was in the vote of the Federation ballots did not appear. The persons chosen by the 3,000 votes on the company's ballots conferred with the Pennsylvania Company's representatives and agreed upon rules and working conditions. The Board in its decision ordered a new election, for which rules were prescribed and a form of ballot was specified, on which labor organizations as well as individuals could be voted for as representatives at the option of the employee.

The company, on September 16, 1921, applied to the Board to vacate this decision on the ground that there was no dispute before the Board of which by title 3 of the Transportation Act the Board was given jurisdiction. After a hearing the Board declined to vacate its order, but said that it would allow the company to be heard on the question of the ratification of its shop craft rules by

representatives of the crafts concerned when fairly selected.

Title 3 of the Transportation Act of 1920 bears the heading, "Disputes between Carriers and Their Employees and Subordinate Officials."

Section 301 makes it the duty of carriers, their officers, employees, and subordinate officials, to exert every reasonable effort to avoid interruption to the operation of an interstate commerce carrier due to a dispute between the carrier and its employees, and further provides that such disputes shall be considered and if possible decided "in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute."

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*The section concludes:

"If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

Section 302 provides for the establishment of railroad boards of adjustment by agreement between any carrier, group of carriers or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or groups of organizations thereof. No such boards of adjustment were established when this controversy arose.

Section 303 provides for hearing and decision by such boards of adjustment upon petition of any dispute involving only grievances, rules or working conditions not decided as provided in section 301.

Sections 304, 305, and 306 provide for the appointment and organization of the "Railroad Labor Board" composed of nine members, three from the Labor Group, three from the Carrier Group, and three from the Public Group.

Section 307 (a) provides that, when a labor adjustment board under section 303 has not reached a decision of a dispute involving grievances, rules or working conditions in a reasonable time, or when the appropriate adjustment board has not been organized under section 302, the Railroad Labor Board—

"(1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving griev-

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ances, rules, or *working conditions which is not decided as provided in section 301."

Paragraph (b) of the same section provides for a hearing and decision of disputes over wages.

Paragraph (c) makes necessary to a decision of the Board the concurrence of five members of whom, in the case of wage disputes, a member of the Public Group must be one. The paragraph further provides that:

"All decisions of the Labor Board shall be entered upon the records of the Board and copies thereof, together with such statement of facts bearing thereon as the Board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board, and the [Interstate Commerce] Commission, and shall be given further publicity in such manner as the Labor Board may determine."

Paragraph (d) requires that decisions of the Board shall establish standards of working conditions which in the opinion of the Board are just and reasonable.

Section 308 prescribes other duties and powers of the Labor Board, among which is that of making "regulations necessary for the efficient execution of the functions vested in it by this title."

Section 309 prescribes that:

"Any party to any dispute to be considered by an Adjustment Board or by the Labor Board shall be entitled to a hearing either in person or by counsel."

Section 313 is as follows:

"The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine."

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*Messrs. Frederic D. McKenney, of Washington, D. C., and T. J. Scofield, of Chicago, Ill., for appellant.

Mr. Blackburn Esterline, of Washington, D. C., for appellees.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

[1] It is evident from a review of title 3 of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties, failing that, by reference to adjustment boards of the parties' own choosing and, if this is ineffective, by a full hearing before a national board appointed by the President, upon which are an equal number of representatives of the Carrier Group, the Labor Group, and the Public. The decisions of the

Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely

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on all the circumstances *of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it.

The main and controlling question in this case is whether the members of the Board exceeded their powers on the facts as disclosed in the bill and answer.

It is contended by the carrier that the Labor Board cannot obtain jurisdiction to hear and decide a dispute until it is referred by the parties to the Board after they have conferred and failed to agree under section 301. Undoubtedly the act requires a serious effort by the carrier and his employees to adjust their differences as the first step in settling a dispute, but the subsequent sections dispel the idea that the jurisdiction of the Board to function in respect to the dispute is dependent on a joint submission of the dispute to it. If adjustment boards are not agreed upon, then under section 307, either side is given an opportunity to bring its complaint before the Labor Board, which then is to summon everyone having an interest, and after a full hearing is to render a decision. A dispute existed between all the carriers and the officers of the national labor unions as to rules and working conditions in the operation of the railroads. By order of the Labor Board, this dispute which had arisen before the passage of the Transportation Act, and before the government had turned back the railroads to their owners, was continued for settlement before the Labor Board. That Board had been obliged to postpone the decision of the controversy until it could give it full hearing and meantime had ordered that the existing rules and conditions should be maintained as a *modus vivendi*.

[2] Counsel of the railroad company insist that the Board had no jurisdiction to make an order or to take up the controversies between the Government Railroad Administration and the national labor unions; that

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when the railroads were turned back to their owners each company had the right to make its own rules and conditions and to deal with

its own employees under section 301, and that the jurisdiction of the Board did not attach until a dispute as to such rules and conditions between the company and its employees had thereafter arisen.

We are not called upon to pass upon the propriety or legality of what the Labor Board did in continuing the existing rules and labor conditions which had come over from the Railroad Administration, or in hearing an argument as to their amendment by its decision. It suffices for our decision that the Labor Board at the instance of the carriers finally referred the whole question of rules and labor conditions to each company and its employees to be settled by conference under section 301; that such conferences were attempted in this case, and that thereafter the matter was brought before the Board by Federation No. 90 of Shop Crafts of the Pennsylvania System under section 307. It is the alleged invalidity of this proceeding, thus initiated, which is really the basis of the bill of complaint of the company herein, and it is this only which we need consider.

[3] First, Did Federation No. 90 have the right under section 307 to institute the hearing of the dispute? Section 307 says that this may be invoked on the application of the chief executive of any organization of employees whose members are directly interested in the dispute. Its name indicates, and the record shows, that the Federation is an association of employees of the Pennsylvania Company directly interested in the dispute. The only question between the company and the Federation is whether the membership of the latter includes a majority of the company's employees who are interested. But it is said that the Federation is a labor union affiliated with the American Federation of

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Labor and that the phrase "organization of employees" used in the act was not intended by Congress to include labor unions. We find nothing in the act to impose any such limitation if the organization in other respects fulfills the description of the act. Congress has frequently recognized the legality of labor unions, *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975, decided June 5, 1922, and no reason suggests itself why such an association, if its membership is properly inclusive, may not be regarded as among the organizations of employees referred to in this legislation.

The next objection made by the company to the jurisdiction of the Board to entertain the proceeding initiated by the Federation is that it did not involve the kind of dispute of which the Board could take cognizance under the act. The result of the conferences between the Pennsylvania Railroad Company and its employees under section 301 appears in the statement of the case. By a vote of 3,000 out of more than 30,000 employees, a

representative committee was appointed with which the officers of the company made an agreement as to rules and working conditions. Federation No. 90 for its members objected to the settlement on the ground that it had not been made by properly chosen representatives of the employees and brought this dispute before the Labor Board. The Pennsylvania Company was summoned and appeared before the Board and the issue was heard.

[4] It is urged that the question who may represent the employees as to grievances, rules and working conditions under section 301 is not within the jurisdiction of the Labor Board to decide; that these representatives must be determined before the conferences are held under that section; that the jurisdiction of the Labor Board does not begin until after these conferences are held, and that the representatives who can make application under section 307 to the Board are representatives engaged in the conference under section 301. Such a construction

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would give either side *an easy opportunity to defeat the operation of the act and to prevent the Labor Board from considering any dispute. It would tend to make the act unworkable. If the Board has jurisdiction to hear representatives of the employees, it must of necessity have the power to determine who are proper representatives of the employees. That is a condition precedent to its effective exercise of jurisdiction at all. One of its specific powers conferred by section 308 is to "make regulations necessary for the efficient execution of the functions vested in it by this title." This must include the authority to determine who are proper representatives of the employees and to make reasonable rules for ascertaining the will of the employees in the matter.

Again, we think that this question of who may be representatives of employees, not only before the Board, but in the conferences and elsewhere, is and always has been one of the most important of the rules and working conditions in the operation of a railroad. The purpose of Congress to promote harmonious relations between the managers of railroads and their employees is seen in every section of this Act, and the importance attached by Congress to conferences between them for this purpose is equally obvious. Congress must have intended, therefore, to include the procedure for determining representatives of employees as a proper subject-matter of dispute to be considered by the Board under section 307. The act is to be liberally construed to effect the manifest effort of Congress to compose differences between railroad companies and their employees, and it would not help this effort, to exclude from the lawful consideration of the Labor Board a question which has so often seriously affected the relations between the companies and their employees in the past

and is often encountered on the very threshold of controversies between them.

[5] The second objection is that the Labor Board in decision 119 and principles 5 and

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15, and in decision 218, *compels the railroad company to recognize labor unions as factors in the conduct of its business. The counsel for the company insist that the right to deal with individual representatives of its employees as to rules and working conditions is an inherent right which cannot be constitutionally taken from it. The employees, or at least those who are members of the labor unions, contend that they have a lawful right to select their own representatives, and that it is not within the right of the company to restrict them in their selection to employees of the company or to forbid selection of officers of their labor unions qualified to deal with, and protect their interests. This statute certainly does not deprive either side of the rights claimed.

But title 3 was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. The Board is to act as a board of arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for cooperation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions, which, in its opinion, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision.

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*It is not for this or any other court to pass upon the correctness of the conclusion of the Labor Board if it keeps within the jurisdiction thus assigned to it by the statute. The statute does not require the railway company to recognize or to deal with or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory cooperation and leaves it to the two sides to accept or reject the decision. The statute provides the machinery for conferences, the hearings, the

decisions and the moral sanction. The Labor Board must comply with the requirements of the statute; but having thus complied, it is not in its reasonings and conclusions limited as a court is limited to a consideration of the legal rights of the parties.

The propriety of the Board's announcing in advance of litigated disputes the rules of decision as to them is not before us except as to principles 5 and 15 of decision No. 119, so far as they determine the methods by which representatives of employees should be selected. They were applied and followed in the form of ballot prescribed by decision 218. These decisions were necessary in order that conferences should be properly begun under section 301, and that disputes there arising should be brought before the Board. They were therefore not premature. It is not for us to express any opinion upon the merits of these principles and decisions. All that we may do in this case is to hold, as we do, that they were within the lawful function of the Board to render, and not being compulsory, violate no legal or equitable right of the complaining company.

For this reason, we think that the District Court was wrong in enjoining the Labor Board from proceeding to entertain further

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jurisdiction and from publishing its *opinions, and that the Court of Appeals was right in reversing the District Court and in directing a dismissal of the bill. We do not find it necessary, therefore, to consider the questions raised at the bar as to whether the Railroad Labor Board is a corporation under the act and capable of suing or being sued, without the consent of the United States, and whether the Board's publication of its opinions in matters beyond its jurisdiction could be properly enjoined by a court of equity.

Decree affirmed.

(261 U. S. 106)

UNITED STATES GRAIN CORPORATION
v. PHILLIPS.

(Argued Jan. 23, 1923. Decided Feb. 19, 1923.)

No. 290.

I. War  4—Gold received by United States Grain Corporation for ultra vires sale belongs to it.

Even though a sale of grain by the United States Grain Corporation, organized under the war powers conferred on the President by Act Aug. 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115 $\frac{1}{2}$ e-3115 $\frac{1}{2}$ r), to Bulgaria was ultra vires, in view of Act Feb. 25, 1919 (Comp. St. Ann. Supp. 1919, § 7706a), making an appropriation to furnish foodstuffs for the relief of populations outside of certain designated countries, including Bulgaria, the gold received from that country for the grain so sold belonged to the corporation.

2. Army and navy ☞ 13(2)—Reference to Relief Administration, instead of Grain Corporation, held immaterial, as regarded right of naval officer to compensation for transportation of gold.

Where the American Relief Administration was utilizing United States Grain Corporation, as authorized by Act March 4, 1919 (Comp. St. Ann. Supp. 1919, §§ 3115½kk[1]—3115½kk[7]), to carry out its work, and, through the corporation, all of whose stock was owned by the United States, had sold grain to a foreign government, a reference to the proceeds of the sale as the money of the Relief Administration in a cable message asking authority for the transportation of the money as government property on a naval vessel was immaterial, as regarded right of officer to compensation.

3. Army and navy ☞ 13(2)—Officer not entitled to compensation for transporting gold of United States Grain Corporation.

Where gold belonging to United States Grain Corporation, all of whose stock was owned by the United States so that the gold, in effect, was the property of the United States, notwithstanding the legal entity of the corporation, was transported on a naval vessel, the commander of the vessel was not entitled to the compensation permitted by Rev. St. § 1624 (Comp. St. § 2961 et seq.), article 8, subd. 13 (Comp. St. § 2969), and Navy Regulations 1913, art. 1510, so that an order of the Secretary of the Navy directing such transportation without compensation was not a suspension of the regulation which required the approval of the President to be effective, under Rev. St. § 1547 (Comp. St. § 2805).

4. Army and navy ☞ 13(2)—Order of Secretary held not suspension of regulation.

An order of the Secretary of the Navy, authorizing transportation without liability of the commander of the vessel, except as in other cases of government property, of gold belonging to the United States Grain Corporation, was not a suspension of Navy Regulations, art. 1510, governing transportation of gold for private individuals on naval vessels, even though it was made in answer to a request by the commanding officer for a suspension of the regulation, and stated that the regulation was suspended, since such characterization of the act could not change its legal effect.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Suit by Wallace B. Phillips against the United States Grain Corporation. Judgment for defendant on directed verdict was reversed by the Circuit Court of Appeals, and judgment ordered for plaintiff (279 Fed. 244), and defendant brings error. Judgment of the Circuit Court of Appeals reversed, and judgment of the District Court affirmed.

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*Mr. Garrard Glenn, of New York City, for plaintiff in error.

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*Mr. H. N. Whitehouse, of New York City, for defendant in error.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit to recover fifty-two thousand dollars, being one per centum of the value of gold carried from Constantinople to New York upon the steamship Laub, a destroyer in the Navy, of which the plaintiff, the defendant in error, was commanding officer at the time. There was a trial in the District Court in which, after the evidence was in, both sides moved for the direction of a verdict and the Court directed a verdict for the defendant. The judgment was reversed by the Circuit Court of Appeals, 279 Fed. 244, and the facts not being in dispute, judgment was ordered for the plaintiff on motion of the defendant in order to secure an earlier review here.

By Rev. Sts. § 1624 (Comp. St. § 2961 et seq.), establishing Articles for the Government of the Navy, in article 8, subd. 13 (Comp. St. § 2969), the receiving on board of gold, silver, or jewels, and the demand of compensation for carrying them are excepted from the general prohibition there contained. Article 1510 of the Navy Regulations (1913) provides that when gold, etc., shall be placed on board any ship for freight or safe keeping the commanding officer shall sign bills of lading for the amount and be responsible for the same; that the usual percentage shall be demanded from the shippers, one-fourth of which goes to the commander in chief if he signifies to the commander of the ship in writing that he unites with the latter in the responsibility for the care of the treasure. In that case the commander of the ship gets one-half, otherwise two-thirds. By Rev. Sts. § 1547 (Comp. St. § 2805), the Regulations adopted with the approval of the President, as the foregoing was, shall be recognized as the Regulations of the Navy, "subject to alterations adopted in the same manner." The plaintiff founds his claim upon these laws and rules. Naturally, therefore, he does not question the defendant's right to bring the case to this Court. Act of March 3, 1911, c.

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231 (Judicial *Code) §§ 241, 128 (Comp. St. §§ 1218, 1120); Spiller v. Atchison, Topeka & Santa Fé Ry. Co., 253 U. S. 117, 121, 40 Sup. Ct. 466, 64 L. Ed. 810; Howard v. United States, 184 U. S. 676, 681, 22 Sup. Ct. 543, 46 L. Ed. 754.

The defendant, although in form a trading corporation organized under the laws of Delaware, was formed in pursuance of an Executive Order dated August 14, 1917, as an agency to enable the United States Food Administration to buy, store and sell wheat, among other things. The stock, except the shares necessary to qualify seven directors, was all subscribed for and owned by the United States. Even the directors' shares were held by the United States, endorsed in blank. The stock ultimately was \$500,000. By an Executive Order of June 21,

1918, the defendant was designated an agency of the United States under the control of the United States Food Administrator, Mr. Hoover, to buy, hold and sell wheat. These orders were issued under the war powers conferred upon the President by the Act of August 10, 1917, c. 53, 40 Stat. 276 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½e-3115½r). A later Act of February 25, 1919, c. 38, 40 Stat. 1161 (Comp. St. Ann. Supp. 1919, § 7706a), made a large appropriation to furnish foodstuffs for the relief of populations outside of Germany, German-Austria, Hungary, Bulgaria, and Turkey, etc. This was carried out by an Executive Order of March 1, to the effect that the furnishing should be conducted under the direction of Mr. Hoover, who was authorized to establish the American Relief Administration to that end, and particularly to employ the Food Administration Grain Corporation as an agency for transporting and distributing foodstuffs and supplies to the populations requiring relief. Finally, an Act of March 4, 1919, c. 125, 40 Stat. 1348 (Comp. St. Ann. Supp. 1919, §§ 3115½kk[1]-3115½kk[7]), to protect the United States against undue enhancement of its liabilities under its guaranties of the prices of wheat, etc., authorized the President to make necessary orders and to utilize any department or agency of the Government including the Food Administration Grain Corporation.

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Pursuing this Act, on May 14, 1919, *the President authorized the defendant to buy and sell wheat of the crops of 1918 and 1919, and reciting that the defendant was formed as an agency of the United States and that its functions would be substantially complete on June 30, 1919, ordered it to close its books and make a complete report as of that date, change its name to that which it now bears, and to perform such duties thereafter as the President might direct.

We mention these details to show that the defendant although in form a private corporation and liable to be sued as such, was organized and owned by the United States as an agency for public service, was not engaged in ordinary merchandising, but under Mr. Hoover's directions was performing public functions arising out of the war and its sequels. The *Western Maid*, 257 U. S. 419, 432, 42 Sup. Ct. 159, 66 L. Ed. 299. This being its relation to the Government it made a contract with Bulgaria for the sale of wheat under which Bulgaria forwarded the gold in question by a naval vessel of the United States to Constantinople for the defendant. On August 8, 1919, Admiral Knapp, the ranking naval officer of the United States in South European waters, cabled to the Secretary of the Navy that the Relief Administration desired to ship about five millions gold to the United States, and was willing to release the captain from all re-

sponsibility except that usually incumbent for care of public property. He asked if the Department would suspend the mandatory provisions of Article 1510 Navy Regulations including percentage charge, and direct that shipment be received for transportation as desired. On August 16 the Secretary answered that the Department suspends the above mentioned provisions with release for commanding officer and the United States, as offered. On September 10, 1919, the plaintiff was ordered by Captain Greenslade, his senior in rank, to take the gold in question on board from the United States Ship *Galveston* where it then was, and to transport it to

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New York. At the *same time he was informed of the Secretary's cable. On the 15th the plaintiff took the gold on board the *Laub*. On the same day, Major Galbraith purporting to act under authority of Mr. Hoover offered the plaintiff a release in the above terms with a copy of the Secretary's cable. The plaintiff handed back a written reply addressed to Major Galbraith, "Officer in Charge, U. S. Food Administration, Constantinople," saying that he could not accept the release and that he took full responsibility for the gold. On the same day the plaintiff received from Admiral Bristol, in command in Turkish waters, an order purporting to direct the plaintiff to proceed to New York and to authorize him to receive the gold, stated to be the "property of the United States Food Administration (Grain Corporation)." The order added that in accordance with Article 1510, Navy Regulations, the Admiral assumed joint responsibility with the Commanding Officer, but called attention to the cable from the Secretary which was attached.

[1, 2] On the facts thus abridged the plaintiff argues that it is entitled to judgment as matter of law. Some preliminary objections may be dispatched in few words. It is said that the Secretary's order did not apply to this gold, because the request to him spoke of the Relief Association as wishing to ship; that the Relief Association had no power to sell to Bulgaria, that country being excepted in the Act of February 25, 1919, which we have mentioned; that the release by Mr. Hoover, United States Food Administrator, was inadequate, and that the authority of Major Galbraith did not appear. We agree with the District Judge that the authority of Major Galbraith was fully established. Whether the sale to Bulgaria was ultra vires or not the gold belonged to the defendant as fully as any other money received by it, and the relations between the defendant and the Relief Association were such that it did not

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matter whether the one or the other *was named to the Secretary of the Navy. But these questions are immaterial in our view and we deem it apparent that the plaintiff's

DIAZ et al. v. GONZALEZ et al.

(Argued Jan. 24, 1923. Decided Feb. 19, 1923.)

No. 263.

refusal had no reference to any of them, but was intended and purported politely to repudiate the Secretary's authority no matter how accurately given. We gather that the Admiral and the Captain meant to try a fall with the Secretary, on the supposed authority of the law.

[3, 4] The plaintiff's position at the time probably was the same that he takes now and that prevailed with the Circuit Court of Appeals. He took the order of the Secretary according to its face as an attempt to suspend the Regulation and thought that it was invalid without the actual approval of the President. It is suggested also that it was an unauthorized diminution of the plaintiff's compensation as established by the law. *United States v. Symonds*, 120 U. S. 46, 7 Sup. Ct. 411, 30 L. Ed. 557. But in our opinion the view taken by the District Judge was more accurate. The plaintiff did not stand as a private person making a private contract with a business corporation. He was an officer of the United States charged with duties as such. In substance the gold was the property of the United States. It is true that the legal title was in the Corporation, that the property of the Corporation might have been taken to pay a judgment against it, and that in other ways the difference of personality would be recognized. *Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation* (May 1, 1922) 258 U. S. 549, 42 Sup. Ct. 386, 66 L. Ed. 762. But for purposes like the present imponderables have weight. When as here the question is whether the property was clothed with such a public interest that the transportation of it no more could be charged for by a public officer than the carrying of a gun, we must look not at the legal title only but at the facts beneath forms. The facts we have indicated in stat-

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ing the case. The very existence of the *Corporation was created to carry on activities required by the war. Its property was held for that and no other end. It was admitted at the argument, and of course could not be denied, that if the United States had been the legal owner of the gold the plaintiff would have been acting only in the course of his duty in carrying it. We are of opinion that the same thing is true here. The order of the Secretary embodied no suspension of the Regulation but only a recognition of the fact that this was not a service for which the plaintiff was entitled to charge. His acceptance of the characterization of his act by the cable that he answered did not change the legal effect. It simply accepted a wrong reason for a right result.

Judgment reversed.

Judgment of the District Court affirmed.

1. Courts ⇐387(4)—Construction of statutes by Porto Rican court not disturbed.

Where the Supreme Court of Porto Rico held that under Code Civ. Proc. 1904, §§ 76, 77, the district court of a district other than that in which minor's real estate was situated could authorize its sale, notwithstanding Civ. Code, § 229, as amended by Laws 1907, p. 284, and such holding was based on a distinction said by that court to have long been made, similar to the common-law distinction between jurisdiction and venue, and perfectly intelligible, its construction of such statutes will be followed.

2. Courts ⇐387(4)—Interpretation of statute, accepted by the practice of the community, not disturbed, unless plainly wrong.

Where the interpretation of Porto Rican statutes by the Porto Rican courts as permitting a judge other than the one specially designated by statute, but having jurisdiction of the class of cases, to take jurisdiction on submission of the particular case to him, has been accepted by the practice of the community, it should not be disturbed, except on an unescapable conclusion that it is wrong.

3. Courts ⇐387(4)—Porto Rican law not to be remodeled according to common-law conceptions.

Appellate jurisdiction over Porto Rican courts is not given to the United States Supreme Court for the purpose of remodeling Spanish-American law according to common-law conceptions, except so far as such law has to bend to the expressed will of the United States.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Suit by Carlota and Clementina Gonzalez y Lugo, represented by their guardian ad litem, Arturo Aponte, Jr., and others, against Jose J. Benitez Diaz and others. A judgment of the Supreme Court of Porto Rico, dismissing the complaint (*Gonzalez v. Benitez*, 27 P. R. 364), was reversed by the Circuit Court of Appeals (*Lugo v. Benitez*, 276 Fed. 108), and defendants bring certiorari. Reversed, and judgment of the Supreme Court of Porto Rico affirmed.

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*Messrs. C. C. Webster, of New York City, and J. R. F. Savage, of San Juan, Porto Rico, for petitioners.

Mr. J. A. Poventud, of New York City, for respondents.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the respondents

to establish the nullity of a sale of their land while they were all minors. The Supreme Court of Porto Rico upheld the sale and ordered the complaint to be dismissed, *Gonzalez v. Benitez*, 27 P. R. 364; but the judgment was reversed by the Circuit Court of Appeals, *Lugo v. Benitez*, 276 Fed. 108, following another decision made by it at the same term. *Agénjo v. Agénjo* (C. C. A.) 276 Fed. 105. Thereupon a writ of certiorari was granted by this Court.

The father of the respondents (plaintiffs) died in 1904, owning the land in question, and the title passed to his widow and his children, the plaintiffs. The land is in the judicial district of Humacao. In 1908 the widow obtained authority to make the sale from the District Court of the judicial district of San Juan, and the sale was made. This suit proceeds on the ground that only the Court of the judicial district where the land was situated had power to authorize the sale of the minors' interest in the land.

The argument that prevailed with the Circuit Court of Appeals is forcible and perhaps might prevail with us if we looked at the face of the statutes invoked, without more. By section 229 of the Civil Code of Porto Rico, as amended by an Act of March

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14, 1907, Laws of 1907, *p. 284:

"The exercise of the patria potestas does not authorize the father or mother to alienate or burden real property which in any manner belongs to the child, and over which either of them may have the administration, except after securing judicial authorization, which shall be accorded by the District Court of the Judicial District where said property is situated, upon proof being furnished as to the necessity or utility of such transfer or burden."

This naturally enough is taken to mean that the Court of that district alone can give the authority required. The interpretation gains further force when it is known that this section of the Civil Code of 1902 originally gave the power to the District Court of the minors' domicile and that it was amended to its present form in 1907, with a provision, in case of a sale by auction, for a publication in a newspaper having a circulation in the district. It certainly is not unnatural to read the quoted section as excluding the application of the more general sections 76 and 77 of the Code of Civil Procedure, 1904, by which:

(76) "In accordance with its jurisdiction, a court shall have cognizance of the suits to which the maintenance of all kinds of actions may give rise, when the parties have agreed to submit the suit to decision of court."

(77) "The submission shall be understood to be made: 1. By the written agreement of the parties. 2. By the plaintiff through the mere act of applying to the court and filing the complaint. 3. By the defendant when, after his appearance in court, he takes any step other than to request that the trial be held in the proper court."

[1, 2] One might doubt even whether the last cited sections apply to any ex parte proceedings. The respondents made the most of the doubt. But those sections embody earlier law and practice and we accept the conclusion of the Supreme Court that they have been taken to extend to such cases. *Martorell v. J. Ochoa & Bro.*, 26 P. R. 625. *Agénjo v. Santiago Rosa*, 26 P. R. 648. The most

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forcible objection is that which we have stated; that a special law definitely applicable limits general expressions in other laws that otherwise might be sufficient. We will not repeat the argument quoted from *Manresa* and *Scaevola* that jurisdiction is a matter of adjective law and that the general provisions with regard to it are not repealed by a repeal of the substantive law or change in the Civil Code. *Mantorell v. J. Ochoa & Bro.*, 26 P. R. 631, 632. We will do no more than note *Manresa's* conclusion that although it would be more prudent to apply to the Judge specially designated, any Judge having jurisdiction of this class of cases is made competent by the submission implied from invoking his action. The distinction taken seems to be similar to that which we take between jurisdiction and venue. *Martorell v. J. Ochoa & Bro.*, 25 P. R. 707, 729. A mistake as to the latter is waived by submission, *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, 43 Sup. Ct. 230, 67 L. Ed. —, January 22, 1923, and in the Porto Rican law an ex parte application is an adequate submission. This is a perfectly intelligible view, and when we are assured by the Supreme Court that it long has been taken, 25 P. R. 729; 26 P. R. 634; interrupted only by a momentary obstruction caused perhaps by accepting too broadly and absolutely an expression in *Garzot v. Rios de Rubio*, 209 U. S. 283, 303, 28 Sup. Ct. 548, 53 L. Ed. 794, we see no reason for not taking it here. The fact alleged that this interpretation of the law has become a rule of property, 25 P. R. 730, is very important and is not weakened by there being only a small number of decisions on the point. If it has been accepted by the practice of the community it should not be disturbed except upon an unescapable conclusion that it is wrong.

[3] This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *Villanueva v. Villanueva*, 239 U. S. 293, 299, 36 Sup. Ct. 109, 60 L. Ed. 293; *Nadal v. May*, 233 U. S. 447, 454, 34 Sup. Ct. 611, 58 L. Ed. 1040. This is especially true in dealing with the decisions of a Court inheriting and brought

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up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we

are accustomed. But to one brought up with-in it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from the books. In this case a slight difference in the caution felt in dealing with the interest of minors (*Baerga v. Registrar of Humacao*, 29 P. R. 440, 442), and a slight change of emphasis in the reading of statutes, explain the divergence between the Supreme Court and the Circuit Court of Appeals. Our appellate jurisdiction is not given for the purpose of remodeling the Spanish-American law according to common law conceptions except so far as that law has to bend to the expressed will of the United States. The importance that we attribute to these considerations led to our granting the writ of certiorari and requires us to reverse the judgment below.

Judgment of Circuit Court of Appeals reversed. Judgment of Supreme Court of Porto Rico affirmed.

(261 U. S. 114)

ROOKER et al. v. FIDELITY TRUST CO. et al.

(Submitted on Motion to Dismiss or Affirm Jan. 1, 1923. Decided Feb. 19, 1923.)

No. 285.

1. Courts $\hookrightarrow$ 396(2)—Whether federal question was seasonably raised must be determined from the record in state court.

In determining whether a question under the United States Constitution was raised and determined in the state court, so as to authorize a writ of error under Judicial Code, § 237, as amended by Act Sept. 6, 1916, c. 448, § 2 (Comp. St. § 1214), the Supreme Court must be guided by the record.

2. Courts $\hookrightarrow$ 396(6)—Constitutional question first raised in petition for rehearing in state Supreme Court is too late.

A question under the United States Constitution, which was first raised in the state courts, according to the record, on petition for rehearing after affirmance of the judgment by the state Supreme Court, is too late to sustain a writ of error to review the decision.

3. Courts $\hookrightarrow$ 394(9)—Change in judicial decision from interlocutory decision does not impair obligation of contract construed.

A change in the decision of a state Supreme Court in construing deeds of trust from an interlocutory decision rendered on a previous appeal does not impair an obligation of contract contrary to the United States Constitution (article 1, § 10, cl. 1), or violate the due process or equal protection clauses of the Fourteenth Amendment, and therefore does

support a writ of error to review the decision of the state Supreme Court.

In Error to the Supreme Court of the State of Indiana.

Action by Dora E. Rooker and another against the Fidelity Trust Company and others. Judgment for defendants was affirmed by the Supreme Court of Indiana (131 N. E. 769), and plaintiffs bring error. Writ of error dismissed.

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*Mr. Wm. V. Rooker, of Indianapolis, Ind., for plaintiffs in error.

Mr. Charles E. Cox, of Indianapolis, Ind., for defendants in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

For present purposes this case may be shortly stated. A wife and husband, both financially embarrassed, transferred certain land in Indiana to a corporate trustee pursuant to an arrangement whereby the trustee was to advance moneys for their benefit, assist in procuring advances from others, protect the title, ultimately sell the land, use the proceeds in satisfying such mortgages or liens as might be superior to the rights of the trustee and in repaying moneys advanced by it and by others, and turn the residue over to the wife, her personal representatives or assigns. The purpose of the transfer and the engagements of the parties were set forth in two deeds and a trust agreement, all executed the same day. Differences afterwards arose between the parties, and the grantors brought a suit in a state court in Indiana against the trustee charging that it had violated and repudiated the trust, demanding damages and an accounting, and praying that the trustee be removed and a receiver appointed to administer the trust. The trustee answered taking issue with portions of the complaint, and in an amended cross-complaint set up what it claimed had been done under the trust agreement, alleged in substance that the trustee was not in default, but stood ready to carry out the trust and was being hindered and obstructed by the plaintiffs, and prayed that the title of

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the trustee, as such, be *quieted, that further hindrance and obstruction by the plaintiffs be enjoined, that an accounting be had, and that the trustee then be directed to make a sale under the trust agreement and to distribute the proceeds according to its provisions. The plaintiffs traversed portions of the amended cross-complaint. Thereafter a trial of the issues was had, and the court made a special finding of facts favorable to the trustee and entered judgment thereon substantially as prayed in the amended cross-complaint. The Supreme Court of the state affirmed the judgment (131 N. E. 769),

and at the solicitation of the plaintiffs the Chief Justice of that court allowed the present writ of error.

The trustee challenges our jurisdiction on the ground that the case is not one the judgment in which may be reviewed by us on writ of error. The challenge is well taken unless the case comes within that part of section 237 of the Judicial Code, as amended September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214), which provides:

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error."

[1, 2] It is conceded that there was no effort to question the validity of any treaty or law of, or authority exercised under, the United States. But the plaintiffs insist that the validity of a statute of Indiana relating to conclusions stated in pleadings and the mode of securing better statements (chapter 322, Acts 1913; chapter 62, Acts 1915) was

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drawn in *question by them on the ground of the statute's repugnance to various provisions of the Constitution of the United States and that the court upheld and applied the statute. Of course, in determining whether that question was raised and decided we must be guided by the record. *Butler v. Gage*, 138 U. S. 52, 56, 11 Sup. Ct. 235, 34 L. Ed. 869; *Zadig v. Baldwin*, 166 U. S. 485, 488, 17 Sup. Ct. 639, 41 L. Ed. 1087. It has been examined and we find it does not show that the question was raised in any way prior to the judgment of affirmance in the Supreme Court. In their assignments of error on the appeal to that court the plaintiffs said nothing about the statute or its validity; nor was there any reference to either in the court's opinion. All that appears is that after the judgment of affirmance the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late. *Bushnell v. Crooke Mining & Smelting Co.*, 148 U. S. 682, 689, 13 Sup. Ct. 771, 37 L. Ed. 610; *Godchaux Co. v. Estopinal*, 251 U. S. 179, 40 Sup. Ct. 116, 64 L. Ed. 213; *Citizens' National Bank v. Durr*, 257 U. S. 99, 106, 42 Sup. Ct. 15, 66 L. Ed. 149. Federal questions, like others, should be presented in an orderly way before judgment. *Dewey v. Des Moines*, 173 U. S. 193, 200, 19 Sup. Ct. 379, 43 L. Ed. 665. And see *John v. Paullin*, 231 U. S. 583, 585, 34 Sup. Ct. 178,

58 L. Ed. 381; *Atlantic Coast Line R. R. Co. v. Mims*, 242 U. S. 532, 535, 37 Sup. Ct. 188, 61 L. Ed. 476. It is at least doubtful that the question is one of any substance, but its tardy presentation renders further notice of it unnecessary.

[3] The case had been before the Supreme Court of the state on a prior appeal, and the court had then construed the trust agreement and dealt in a general way with the rights of the parties under it. *Rooker v. Fidelity Trust Co.*, 185 Ind. 172, 109 N. E. 766. Referring to this, the plaintiffs, by way of asserting another ground for the writ of error, claim that on the second appeal the court took and applied a view of the trust agreement different from that taken and announced on the first appeal, and that this change in decision impaired the obligation of the agreement contrary to the contract clause

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of the Constitution *of the United States and was a violation of the due process and equal protection clauses of the Fourteenth Amendment. Plainly this claim does not bring the case within the writ of error provision. Both decisions were in the same case. The first was interlocutory (185 Ind. 187-188, 109 N. E. 766); the second, final. Concededly the case was properly before the court on the second appeal; the plaintiffs evidently thought so, for they took it there. Whether the second decision followed or departed from the first, it was a judicial act, not legislative. The contract clause of the Constitution, as its words show, is directed against impairment by legislative action, not against a change in judicial decision. It has no bearing on the authority of an appellate court, when a case is brought before it a second time, to determine the effect to be given to the decision made when the case was first there. *Cross Lake Club v. Louisiana*, 224 U. S. 632, 638, 32 Sup. Ct. 577, 56 L. Ed. 924; *Ross v. Oregon*, 227 U. S. 150, 161, 33 Sup. Ct. 220, 57 L. Ed. 458, Ann. Cas. 1914C, 224; *Seattle, Renton & Southern Ry. Co. v. Linhoff*, 231 U. S. 568, 34 Sup. Ct. 185, 58 L. Ed. 372; *Kryger v. Wilson*, 242 U. S. 171, 177, 37 Sup. Ct. 34, 61 L. Ed. 229; *Columbia Railway, Gas & Electric Co. v. South Carolina*, 261 U. S. 236, 43 Sup. Ct. 306, 67 L. Ed. — (decided to-day). And see *King v. West Virginia*, 216 U. S. 92, 100, 30 Sup. Ct. 225, 54 L. Ed. 396; *Messinger v. Anderson*, 225 U. S. 436, 444, 32 Sup. Ct. 739, 56 L. Ed. 1152. Assuming that the objection to a change in decision was seasonably presented, it amounted to nothing more than saying that in the plaintiffs' opinion the court should follow the first decision. It did not draw in question the validity of an authority exercised under a state in the sense of the writ of error provision. *Philadelphia & Reading Coal & Iron Co. v. Gilbert*, 245 U. S. 162, 166, 38 Sup. Ct. 58, 62 L. Ed. 221; *Stadelman v. Miner*, 246 U. S.

544, 546, 38 Sup. Ct. 359, 62 L. Ed. 875; Moss v. Ramey, 239 U. S. 538, 546, 36 Sup. Ct. 183, 60 L. Ed. 425; Gasquet v. Lapeyre, 242 U. S. 367, 369, 37 Sup. Ct. 165, 61 L. Ed. 367. Whether there was any substantial change in decision we need not inquire.

There is no other ground which tends even remotely to sustain the writ of error.

Writ of error dismissed.

(261 U. S. 149)

DURHAM PUBLIC SERVICE CO. v. CITY OF DURHAM.

(Argued Jan. 19, 1923. Decided Feb. 19, 1923.)

No. 251.

1. Municipal corporations ⚡434(6)—**Contract held not to grant exemption from liability for paving.**

A contract with a street railroad company, providing that the company would be required to bring its roadbed and track to surface grade at its own expense and costs, whenever required, and that nothing therein should be construed to require the company to pave its roadbed, but that it should be required to restore the roadbed to the condition in which it was at the time of laying its track, while imposing no liability for paving, granted no exemption from liability otherwise imposed.

2. Municipal corporations ⚡434(6)—**Exemptions from liability for assessments for improvements must plainly appear.**

Exemptions, such as an exemption of a street railroad from liability for paving, must plainly appear, and doubts as to provisions in respect to them must be resolved in favor of the municipality or the state.

3. Constitutional law ⚡233, 284(1)—**Municipal corporations** ⚡472—**Assessment against street railroad for paving held not to deny due process or the equal protection of the laws.**

An assessment of \$102,942.30 against a street railway for paving between, and for 18 inches outside, its tracks, as authorized by Pub. Laws N. C. 1915, c. 56, on failure of the company to make the improvement, was not arbitrary or wholly unreasonable, so as to constitute a taking of property without due process of law or a denial of the equal protection of the laws, in violation of the Fourteenth Amendment, though the company's property on the street had a value of only \$100,000, while abutting property, against which an assessment of \$89,909.58 was made on a front-foot basis, had an assessed value of \$5,083,250, and though the company was put to an expense of \$75,108.85 in taking up and relaying its track, and though its railway was being operated at a loss.

In Error to the Supreme Court of the State of North Carolina.

Action by the City of Durham against the Durham Public Service Company. A judgment for plaintiff was affirmed by the Supreme Court of North Carolina (182 N. C. 333, 109 S. E. 40), and defendant brings error. Affirmed.

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*Mr. J. S. Manning, of Raleigh, N. C., for plaintiff in error.

Mr. S. C. Chambers, of Durham, N. C., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

As the cause is properly here upon writ of error—Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 555, 34 Sup. Ct. 364, 58 L. Ed. 721; Act September 6, 1916, 39 Stat. 726 (Comp. St. § 1214)—we deny the petition for certiorari.

Plaintiff in error was incorporated by the Legislature of North Carolina in 1901 (Priv. Laws 1901, c. 25) and empowered to operate car lines in the streets of Durham when so authorized by the municipal authorities. Shortly thereafter and in pursuance of an agreement they granted the necessary authority. The Supreme Court of North Carolina (Durham v. Durham Public Service Co.,

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182 N. C. *333, 109 S. E. 40) affirmed a judgment of the superior court which sustained an assessment of \$102,942.30 made in 1920 against the corporation for the cost of paving that portion of Main street occupied by its tracks. It refused to make the improvement as required by an ordinance; thereupon the city caused the work to be done and assessed the cost against it. The formality of the proceeding is not questioned.

Recovery is resisted upon two grounds: (1) That the original contract under which the railway lines were constructed and operated exempts the corporation from liability to pave the roadbed. Constitution, § 10, art. 1. (2) That the assessment is excessive, unreasonable and wholly arbitrary and to enforce it would deprive plaintiff in error of property without due process of law and deny it the equal protection of the laws, contrary to the Fourteenth Amendment.

[1, 2] The original contract with the city is dated February 4, 1901, and the claim of exemption rests upon the following clause therein:

"The said Durham Traction Company [now the Durham Public Service Company] whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed, but it shall be required to restore the roadbed to the condition in which it was at the time of laying said track, provided, however, that if the said city decides to put in or change its sewerage pipes on any of the streets of said city on which the tracks of said Dur-

ham Traction Company may be laid, the said city may require the said Durham Traction Company to remove and replace at its own expense, the said tracks, for said purpose, and said city shall incur no liability for any delays or interruptions of the business or traffic of the said Durham Traction Company, caused thereby."

The court below held that while this con-

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tract imposes *no liability for paving, neither does it grant exemption therefrom. And we agree with their conclusion. Such exemptions must plainly appear. The general rule is that doubts as to provisions in respect of them must be resolved in favor of the municipality or state. *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S. 116, 130, 27 Sup. Ct. 202, 51 L. Ed. 399.

Purporting to proceed under "An act relating to local improvements in municipalities," ratified by the General Assembly of North Carolina, February 27, 1915—chapter 56—the governing body of Durham by resolution provided for improving Main street and directed plaintiff in error to pave between and for 18 inches outside its tracks. The company refused to comply and the challenged assessment followed. Among other things the act of 1915 provides:

"Sec. 4. Every municipality shall have power, by resolution of its governing body, upon petition made as provided in the next succeeding section, to cause local improvements to be made and to defray the expense of such improvements by local assessment, by general taxation, and by borrowing, as herein provided. * * *

"Sec. 6. * * * If the resolution shall provide for a street improvement, it shall direct that any street railway company or other railroad company having tracks on the street or streets or part thereof to be improved shall make such street improvement with such material and of such a character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company, and that unless such improvement shall be made on or before a day specified in such resolution, the governing body will cause such improvement to be made: Provided, however, that where any such company shall occupy such street or streets under a franchise or contract which

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*otherwise provided, such franchise or contract shall not be affected by this act, except in so far as this act may be consistent with the provisions of such franchise or contract. * * *

By agreement of parties, the cause was tried without a jury and the court found the facts. Those so found and presently relied upon to show the arbitrary and unreasonable character of the assessment follow:

That the section of Main street over which the assessment extends is 2.02 miles in length and including double tracks there are 2.65 miles of track on Main street; that there are 154 abutting property owners upon this portion of

Main street; that the assessment against said company for paving Main street is \$102,942.30 and against said 154 property owners is \$89,909.56; that the value of the property of this defendant on Main street within the area which is directly affected by said paving is \$100,000 and the assessed value of said abutting property is approximately \$5,083,250 exclusive of the value of property on Main street not taxed.

That the cost to the Traction Company of furnishing new rails and new cross-ties, of taking up and relaying its track on Main street and doing other work preparatory to the placing of the pavement upon Main street was \$75,108.85, which has been paid by the Traction Company and which said outlay and expenditure was made at the order of the city of Durham; that during the twelve months ending May 31, 1921, the company's railway showed a loss of \$17,388.73 of meeting the operating expense and allowance for depreciation and if the company is required to pay the paving assessment of the city of Durham as demanded, to wit, one-tenth of said assessment each year, with interest, then there will be an additional expense of one-tenth of \$102,942.30 plus interest and depreciation on same; that the gross earnings of said company from all sources for

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the year ending December 31, 1920, were approximately \$540,000, the net earnings \$147,000, the company having other valuable property and business not on Main street, including other railway not on Main street.

[3] The court below held the recited facts insufficient to show that the municipal authorities acted unreasonably or arbitrarily, and we are unable to say that this was error. Counsel concede that the Constitution of North Carolina reserves to the Legislature power to alter or repeal corporate charters; also that, in general, the Legislature either directly or through recognized governmental agencies may impose assessments for local improvements and prescribe the basis of apportionment. But the claim is that the Legislature undertook arbitrarily to direct plaintiff in error to pave more than one-third of the street, while the owners of more valuable property fronting thereon are required to pay out much less and are assessed upon the front-foot basis.

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523; *Hancock v. City of Muskogee*, 250 U. S. 454, 39 Sup. Ct. 528, 63 L. Ed. 1081; and *Kansas City Southern Ry. Co. v. Road Improvement District*, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151—are cited in support of this insistence; but they do not go so far. The power of the Legislature to make reasonable classifications and to impose a different burden upon the several classes cannot be denied. There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks. The facts and circumstances disclosed by the present record are not sufficient to justify us in overruling the judgment of the state court, which held that the assessment

was not the result of arbitrary or wholly unreasonable legislative action. *Sioux City Street Ry. Co. v. Sioux City*, 138 U. S. 98, 107, 108, 11 Sup. Ct. 226, 34 L. Ed. 898; *Fair Haven & Westville Ry. Co. v. New Haven*, 203 U. S. 379, 388, 389, 27 Sup. Ct. 74, 51 L. Ed. 237; *Southern Wisconsin Ry. Co. v. Madison*, 240 U. S. 457, 461, 36 Sup. Ct. 400, 60 L. Ed. 739; *Great Northern Ry. Co. v.*

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Clara City, 246 U. S. *434, 436, 437, 38 Sup. Ct. 346, 62 L. Ed. 817; *Pacific Gas & Elec. Co. v. Police Court*, 251 U. S. 22, 25, 26, 40 Sup. Ct. 79, 64 L. Ed. 112; *Milwaukee Elec. Ry. Co. v. Milwaukee*, 252 U. S. 100, 104, 40 Sup. Ct. 306, 64 L. Ed. 476, 10 A. L. R. 892.

Affirmed.

(261 U. S. 146)

**UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION
v. SULLIVAN (two cases).**

(Argued Jan. 4, 1923. Decided Feb. 19, 1923.)

Nos. 93, 124.

Courts 394(3)—Proceeding in which state tribunals held there was no evidence to support claim of immunity under federal Constitution and laws not reviewable on writ of error.

In a workmen's compensation proceeding, in which defendant claimed immunity under the Constitution and laws of the United States, on the ground that its employés were employés of the United States, but the state tribunals held that there was no evidence to establish the facts necessary to show that defendant was within the class to which exemption might extend, no controversy over the validity of any treaty, statute, or authority, federal or state, was involved, so as to support a writ of error from the United States Supreme Court under Judicial Code, § 237, as amended by Act Sept. 6, 1916 (Comp. St. § 1214).

On Petition for Writ of Certiorari to and Writ of Error to the Superior Court of the State of Pennsylvania.

Proceeding under the Workmen's Compensation Law of Pennsylvania by John E. Sullivan for compensation for injuries, opposed by the United States Shipping Board Emergency Fleet Corporation. Compensation was awarded, and appeals were dismissed by the court of common pleas and the Superior Court of Pennsylvania (76 Pa. Super. Ct. 30), and defendant brings error and petitions for certiorari. Writ of error dismissed, and petition denied.

Mr. Solicitor General Beck, of Washington, D. C., for petitioner and plaintiff in error.

Mr. Samuel Scoville, Jr., of Philadelphia, Pa., for defendant in error and respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Claiming to have been injured (October, 1918) while employed by the United States

Shipping Board Emergency Fleet Corporation as a motor truck driver, defendant in error Sullivan presented a claim for compensation to the Workmen's Compensation Bureau,

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Pennsylvania *Department of Labor and Industry. The corporation answered; denied that the injury was of a permanent nature, and asserted that it was not liable for the further reason "that claimant was a direct employee of the United States Shipping Board Emergency Fleet Corporation, and accordingly is a civil employee of the United States of America, and will be compensated for injury under the federal Workmen's Compensation Act, subject to sustaining proof of disability."

The referee found that, while employed by the Fleet Corporation as a chauffeur, Sullivan suffered injuries from a collision in Philadelphia; that neither party had served notice rejecting article 3 of the Compensation Act (Pa. St. 1920, §§ 21924-21927); and awarded compensation.

The Bureau heard the matter de novo, and affirmed the referee's findings of fact and conclusions of law and dismissed the appeal. It said:

"In the case at bar there is no evidence that claimant was a civil employee of the United States or that he received his wages through the United States Treasury. We cannot infer that such was the case. * * * While it might be difficult to draw the exact line of demarcation as to when the defendant is acting as a private corporation or is acting for the United States, the burden would be on the defendant to prove if it were acting for the United States that it would be exempt—there is no defense of this kind interposed in this case. We only have the question of law raised by defendant that the Pennsylvania workmen's compensation board has no jurisdiction. We cannot agree with this. In conclusion we hold: That we have jurisdiction, on the ground that the defendant doing business as a corporation in the state of Pennsylvania, an employer of labor in the state of Pennsylvania, is liable for compensation to the claimant in this case under our act. It is neither our duty nor privi-

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*lege to make a collateral investigation as to the ownership of the defendant's capital stock."

Successive appeals, limited by statute to matters of law, were dismissed by the court of common pleas and the Superior Court of Pennsylvania. *Sullivan v. United States Shipping Board Emergency Fleet Corporation*, 76 Pa. Super. Ct. 30. The latter court—the highest where decision in the proceeding could be had—said—

"In the present case, the workmen's compensation board and the court are bound to take judicial notice of acts of Congress and executive orders and regulations authorized by acts of Congress which have the force of statutes (*Caha v. United States*, 152 U. S. 211), as well as general acts of assembly affecting the de-

fendant. Anything else must be averred and proved as by any other litigant. * * *

"On its face we have here a claim for workmen's compensation presented against a corporation of the District of Columbia, doing business in this state, engaged in performing certain important matters committed to it by the Shipping Board relative to the purchase, construction, equipment, etc., of merchant vessels in the commerce of the United States, and answer made that it is not liable because the injured man was a civil employee of the United States. No evidence was presented to support this answer. * * * As the case was presented before the referee and the board, we are satisfied that the award was fully justified, and it is accordingly confirmed and the appeal dismissed at the costs of the appellant."

The writ of error (No. 124) must be dismissed. The record fails affirmatively to disclose that there was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, or the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States within the requirements of section 237 of the Judicial Code, as amended *149

*by the Act of September 6, 1916 (Comp. St. § 1214).¹ Considering the whole record, it is clear that there was no controversy over the validity of any treaty, statute, or authority, federal or state. Plaintiff in error by its answer claimed a right or immunity under the Constitution and laws of the United States. The state tribunals held that there was no evidence to establish the facts necessary to show that it was within the class to which exemption might extend. *Champion Lumber Co. v. Fisher*, 227 U. S. 445, 451, 452, 33 Sup. Ct. 329, 57 L. Ed. 591; *St. Louis, Iron Mountain & Southern Ry. Co. v. McWhirter*, 229 U. S. 265, 276, 33 Sup. Ct. 858, 57 L. Ed. 1179; *Straus v. American Publishers' Association*, 231 U. S. 222, 233, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369.

Considering the character of the record, we think it unwise to bring up the cause by certiorari with a view to considering the questions said to be involved. The petition therefor (No. 93) is accordingly denied.

Writ of error dismissed.

Petition for certiorari denied.

¹ Section 237: "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. * * *"

MINNESOTA COMMERCIAL MEN'S ASS'N v. BENN.

(Argued Jan. 12, 1923. Decided Feb. 19, 1923.)

No. 103.

1. Insurance ⇨125(1)—Contract with mutual company having home office in Minnesota, where application accepted and dues payable, held a Minnesota contract.

Where an application for insurance in a Minnesota mutual insurance company was solicited and recommended by a member not authorized to bind the association, and sent by mail from Kalispel, Mont., where the applicant and the soliciting member resided, to the company's home office in Minneapolis, where the application was accepted, and where assessments and dues were payable, the agreement was a Minnesota contract, made and to be performed there.

2. Courts ⇨12(3)—Court without jurisdiction to render judgment against foreign company on service on secretary of state, unless company doing business in the state.

A Montana court was without jurisdiction to render judgment against a Minnesota mutual insurance company on service of the summons and complaint on the secretary of state and insurance commissioner, unless the company by doing business in Montana impliedly assented that process might be served upon the secretary of state as its agent.

3. Insurance ⇨16—Foreign mutual insurance company held not doing business in state, so as to be subject to suit.

A Minnesota mutual insurance association was not doing business in Montana, so as to be suable there, merely because one or more members without authority to obligate it solicited new members, or because it insured lives of persons living in Montana, and mailed notices addressed to beneficiaries at their homes therein, and paid losses by checks from its home office.

On Writ of Certiorari to the Supreme Court of the State of Minnesota.

Action by Minnie Mae Benn, as executrix of Robert J. Benn, deceased, against the Minnesota Commercial Men's Association. A judgment for plaintiff was affirmed by the Supreme Court of Minnesota (149 Minn. 497, 182 N. W. 999), and defendant brings certiorari. Reversed.

Messrs. David F. Simpson and A. V. Rieke, both of Minneapolis, Minn., for petitioner.

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*Mr. A. A. Tenner, of Minneapolis, Minn., for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Petitioner is a mutual assessment, accident, and health insurance company, incorporated under the laws of Minnesota, with many members scattered throughout the Union. It issued a certificate of membership to Robert

J. Benn, of Montana. He died in 1915, and his executrix—respondent here—instituted an action against the association in a Montana court to recover the sum said to be due under the rules. After service of summons and complaint upon the secretary of state and the insurance commissioner, judgment was entered by default. Thereafter she brought an action in Minnesota upon the judgment and prevailed both in the trial and Supreme Court. *Benn v. Minnesota Commercial Men's Ass'n*, 149 Minn. 497, 182 N. W. 999.

Defending, the association claimed that it had never done business in Montana or consented to service of process there; that the insurance contract was executed and to be performed in Minnesota; that the Montana

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*court was without jurisdiction, the judgment void, and enforcement thereof would deprive petitioner of property without due process of law contrary to the Fourteenth Amendment.

The decision here must turn upon the effect of the process served on the secretary of state in Montana. Did the court there acquire jurisdiction to enter judgment?

The Supreme Court of Minnesota followed *Wold v. Minnesota Commercial Men's Association* (1917) 136 Minn. 380, 162 N. W. 461, wherein the opinion referred to *Connecticut Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, and *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782, but did not cite *Hunter v. Mutual Reserve Life Insurance Co.*, 218 U. S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686, or *Provident Savings Society v. Kentucky*, 239 U. S. 103, 36 Sup. Ct. 34, 60 L. Ed. 167, L. R. A. 1916C, 572.

Section 6519, subd. 3, Montana Revised Code of Civil Procedure (1915), provides:

"Any corporation organized under the laws of the state of Montana, or doing business therein, may be served with summons by delivering a copy of the same to the president, secretary, treasurer, or other officer of the corporation, or to the agent designated by such corporation.
* * * And if none of the persons above named can be found in the state of Montana, and an affidavit stating that fact shall be filed in the office of the clerk of the court in which such action is pending, then the clerk of the court shall make an order authorizing the service of summons to be made upon the secretary of state, who shall be and is hereby constituted an agent and attorney in fact to accept service on behalf of such corporation, and service upon said secretary of state shall be deemed personal service upon said corporation."

Petitioner has never maintained any office except in Minneapolis, Minn.; its business is transacted there; it has never owned property or sought permission to do business in any other state.

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*Applications for membership are presented on printed forms, usually by mail. The by-

laws provide that no person can secure membership until the board of directors has accepted his application at the home office and certificate has issued. Such certificates are mailed as directed by the applicants.

Assessments and dues are payable at the Minneapolis office and notices in respect of them are mailed to members at their last known addresses.

New members are procured by advertisement and through the solicitation of older ones. The latter are urged to furnish lists of prospects and to use their influence to increase the membership; but no member has authority to bind the association. Although not essential, applications frequently bear a member's recommendation. Soliciting members receive no compensation except occasional premiums or prizes. No paid solicitors or agents are employed.

Losses are settled by checks on Minneapolis banks mailed from the home office. Proofs of loss must be made on the forms provided. In case the attending physician's certificate is inadequate, the association procures additional information through some local physician, but no resident physicians are employed outside of Minnesota. The right to make further investigation is reserved; but there is no evidence to show anything has been done under this reservation in the present case. Losses are adjusted by the directors in Minneapolis.

The association accepted Robert J. Benn's application for health insurance, solicited and recommended by Harry K. Hartness, a member, November 6, 1908, and a further application for additional protection May 3, 1911. These were sent by mail from Kalispel, Mont., where both individuals resided. Notices were regularly mailed to Benn at his home address, and he paid dues and assessments in the ordinary course. It does not

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appear that there was any*thing unusual or irregular in the proofs of death or the report of attending physician. Without further investigation and upon unsolicited information received through the mail, the association declined to pay.

Respondent claims that the facts show petitioner was doing business in Montana and the insurance contract was made and payable there. And it is said this contention is supported by *Connecticut Mutual Life Insurance Co. v. Spratley*, supra, and *Penn Lumbermen's Insurance Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810.

[1] Considering all the circumstances, it seems sufficiently clear that the agreement incident to membership is a Minnesota contract, there made and to be performed.

[2] The Montana court was without jurisdiction unless petitioner by doing business in the state impliedly assented that process might be served upon the secretary of state as its agent.

"If an insurance corporation of another state transacts business in Pennsylvania without complying with its provisions it will be deemed to have assented to any valid terms prescribed by that commonwealth as a condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter that commonwealth and there exert its corporate powers." *Old Wayne Life Association v. McDonough*, 204 U. S. 8, 21, 27 Sup. Ct. 236, 240 (51 L. Ed. 345).

The circumstances chiefly relied on to show that petitioner was doing business in Montana are these: The insured was asked to send in his application, upon a form furnished by the association, by Hartness, one of its members and a resident of Montana, who with other members had been requested to procure such applications. The form was filled and signed in Montana and then sent to Minneapolis with the requisite fee. It was accepted and certificate of membership mailed to the applicant. After customary notices from the association, with which blank applications for new members were commonly

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enclosed, the insured sent dues and assessments from his home in Montana to Minneapolis by mail and received receipts—all according to the usual method. Other members of the association resided at Kalispel. The association reserved the right to investigate all claims for sickness, accident or death.

[3] Considering what this court held in *Green v. Chicago, Burlington & Quincy Ry.*, 205 U. S. 531, 27 Sup. Ct. 595, 51 L. Ed. 916; *Philadelphia & Reading Ry. v. McKibbin*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537; and *Rosenberg Bros. & Co. v. Curtis Brown Co.* (January 2, 1923) 260 U. S. 516, 43 Sup. Ct. 170, 67 L. Ed. —, we think it cannot be said that the association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough—

"to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted." *People's Tobacco Co. v. American Tobacco Co.*, supra, 246 U. S. 87, 38 Sup. Ct. 235, 62 L. Ed. 587, Ann. Cas. 1918C, 537.

It also seems sufficiently clear from *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Hunter v. Mutual Reserve Life Insurance Co.*, supra, and *Provident Savings Society v. Kentucky*, supra, that an insurance corporation is not doing business within a state merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their

homes and pays losses by checks from its home office. See, also, *Pembleton v. Illinois Commercial Men's Association*, 289 Ill. 99, 124 N. E. 355.

We conclude that the record fails to disclose any evidence sufficient to show that petitioner was doing business in Montana within the proper meaning of those words, and that the court there lacked jurisdiction to award the challenged judgment.

Reversed.

(261 U. S. 253)

UNITED STATES v. STATE OF OKLAHOMA.

(Argued on Motion to Dismiss Jan. 2, 1923.
Decided Feb. 19, 1923.)

No. 25, original.

1. United States $\Leftrightarrow$ 76—Statute giving claims priority does not create lien or overreach bona fide transfer of property.

Rev. St. § 3466 (Comp. St. § 6372), giving claims of the United States against insolvent debtors priority, creates no lien, and does not overreach or supersede any bona fide transfer of property in the ordinary course of business.

2. United States $\Leftrightarrow$ 76—Statutory priority limited to particular state of things specified.

The priority given to claims of the United States against insolvent debtors by Rev. St. § 3466 (Comp. St. § 6372), is limited to the particular state of things specified in the statute.

3. United States $\Leftrightarrow$ 76—Inability to pay debts, unless manifested in way specified, is not "insolvency," giving right of priority.

Under Rev. St. § 3466 (Comp. St. § 6372), providing that, when any person indebted to the United States is insolvent, the debts due the United States shall be first satisfied, and that the priority shall extend as well to cases in which a debtor, not having sufficient property to pay his debts, makes a voluntary assignment, or in which the estate and effects of an absconding, concealed, or absent debtor are attached, as to cases in which an act of bankruptcy is committed, mere inability to pay all debts in the ordinary course of business is not "insolvency," giving the right of priority, unless it be manifested in one of the modes pointed out in the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Insolvency—Insolvent.]

4. United States $\Leftrightarrow$ 76—Person invested with title to insolvent debtor's property is a trustee for the United States.

When an insolvent debtor of the United States is divested of his property in one of the modes specified in Rev. St. § 3466 (Comp. St. § 6372), the person who becomes invested with the title is made a trustee for the United States, and bound first to pay its debt out of the debtor's property.

5. United States ☞76—Priority against insolvent debtors cannot be impaired or superseded by state law.

The priority given claims of the United States against insolvent debtors by Rev. St. § 3466 (Comp. St. § 6372), cannot be impaired or superseded by state law.

6. Banks and banking ☞80(4)—Priority attaches, if at all, immediately on taking over of bank by bank commissioner.

If priority in favor of the United States attaches at all on the taking over of a bank by the state bank commissioner, it takes effect immediately on the taking over of the bank.

7. Banks and banking ☞15—State held to have no lien for benefit of guaranty fund until taking of possession.

Under Rev. Laws Okl. 1910, §§ 302, 303, providing for the payment of depositors of banks or trust companies taken over by the bank commissioner, and for a lien in favor of the state for the benefit of the depositor's guaranty fund on the assets of the bank or trust company, the state has no lien on the assets before the taking of possession by the bank commissioner.

8. Banks and banking ☞80(4) — Complaint held insufficient to show bank was insolvent, within meaning of the priority statute.

A complaint alleging that a bank examiner found that an Oklahoma bank was insolvent, and unable to pay all its debts and to continue as a going banking concern, and that the bank commissioner, pursuant to authority given him by the laws of the state, adjudged the bank insolvent and took charge and possession of its assets for purposes of liquidation, and that the bank was and is insolvent, does not show insolvency within the meaning of the Bankruptcy Act (Comp. St. § 9585 et seq.), or Rev. St. § 3466 (Comp. St. § 6372), giving priority to claims of the United States against insolvent debtors, in view of Rev. Laws Okl. 1910, § 302, relative to the taking over of banks by the commissioner.

9. Banks and banking ☞63½—Bank may be taken over by commissioner, though not insolvent within meaning of federal statutes.

A bank, unable to pay its depositors in the ordinary course of business and to continue as a going banking concern, and taken over by the bank commissioner on the ground of insolvency, under Rev. Laws Okl. 1910, § 302, may not be insolvent within the meaning of the Bankruptcy Act (Comp. St. § 9585 et seq.), or Rev. St. § 3466 (Comp. St. § 6372), relative to priority of claims in favor of the United States.

10. Bankruptcy ☞349—Taking over of bank by commissioner held not an "act of bankruptcy," so as to give right or priority.

The taking over of a bank by the bank commissioner, under Rev. Laws Okl. 1910, § 302, is not an "act of bankruptcy," within Bankruptcy Act, § 3a (Comp. St. § 9587), and hence gives claims of the United States no priority under Rev. St. § 3466 (Comp. St. § 6372), since the bank commissioner does not take possession because of the existence of

insolvency, within the meaning of the federal laws.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act of Bankruptcy.]

Original suit by the United States against the State of Oklahoma. On motion to dismiss. Bill dismissed.

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*Mr. Assistant Attorney General Riter, for the United States.

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*Mr. Wm. H. Zwick, of Oklahoma City, Okl., for the State of Oklahoma.

Mr. Justice BUTLER delivered the opinion of the Court.

This is a suit commenced in this court by the United States against the state of Oklahoma to establish priority in favor of the United States under section 3466 of the Revised Statutes (Comp. St. § 6372), and to have a debt owing by the State Bank of Guthrie, Okl., paid before any distribution of the assets of the bank.

The case was heard on the motion of the state to dismiss the complaint on the ground that the allegations thereof are not sufficient to constitute a cause of action.

The facts as set forth in the complaint are in substance the following. The bank was organized under the laws of Oklahoma, and was engaged in a general banking business at Guthrie until, October 26, 1921, it was found insolvent under the state law and unable to pay its debts and unable to continue as a going banking concern. The United States, under various acts of Congress, is guardian of certain incompetent and restricted Indians residing within Oklahoma, and as such guardian caused to be deposited in that bank certain sums of money received by the United States, through the office of the Superintendent of the Five Civilized Tribes in Oklahoma, on account of certain individual members and allottees of such tribes, who were incompetent and restricted and wards of the United States. Before such deposit was made the bank, pursuant to regulations prescribed by the Secretary of the Interior, delivered to the United States a bond with the Fidelity & Casualty Co. of New York as surety thereon to secure the payment of such

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funds, and that bond is in *force. On October 26, 1921, the sum so deposited and due the United States amounted to not less than \$42,000, with interest. October 7, 1921, a state bank examiner made an examination of the bank and found that it was insolvent under the Oklahoma law, and unable to pay its debts and to continue as a going banking concern, and so reported to the bank commissioner, who, on October 26, 1921, adjudged the bank insolvent and took charge and possession of its assets, books, and records for the purposes specified in the state depositors' guaranty fund law. The assets of the bank so

taken and now in the possession of the bank commissioner are in excess of the amount claimed by the United States, and the United States claims to be entitled to have its debt first satisfied in full out of such assets, before other creditors are paid anything. Demand for such prior payment was made by the United States and refused by the state.

The claim of priority asserted by the United States is based upon section 3466 of the Revised Statutes of the United States (Comp. St. § 6372), which provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The applicable provisions of the Oklahoma statutes are found in chapter 6 of the Revised Laws of Oklahoma of 1910. A state banking board is created and given the supervision and management of a depositors' guaranty fund, created by levying assessments against the capital stock of each bank and trust company.

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*The provision of section 302, under which possession of the bank and its assets were taken, is as follows:

"Whenever any bank or trust company organized or existing under the laws of this state shall voluntarily place itself in the hands of the bank commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this state shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

The state asserts a lien superior to the priority rights of the United States, under section 303, which is as follows:

"In the event that the bank commissioner shall take possession of any bank or trust company, which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to make

up the deficiency; and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

The United States, asserting that it is not bound first to proceed on the bond of the

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surety company (citing *Lewis, Trustee, v. United States, 92 U. S. 618, 23 L. Ed. 513), invokes jurisdiction of this court on the ground that, when the bank and its assets were taken over by the state through its bank commissioner, the state acquired title to the same and is therefore the proper party to be sued. *State v. Cockrell*, 27 Okl. 630, 112 Pac. 1000; *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316; *American Water Co. v. Lankford*, 235 U. S. 496, 35 Sup. Ct. 184, 59 L. Ed. 329; *Farish v. State Banking Board*, 235 U. S. 498, 35 Sup. Ct. 185, 59 L. Ed. 330. No objection to jurisdiction is made by the state, and the state does not deny that the United States is entitled to priority on account of money deposited by it as guardian of the Indians to the same extent as in the case of any other deposit. The state's contentions are that section 3466 properly construed does not give the United States priority; that the state has a lien on the bank's assets, and that the priority rights (if any) of the United States are subject thereto; and that priority rights under the act do not apply where a sovereign state has a lien against its debtor.

[1-7] Section 3466, relied on by the government, is a re-enactment and extension of section 65, Act of March 2, 1799, 1 Stat. 676; and the same or equivalent language, so far as the question here involved is concerned, is found in earlier statutes. Act of March 3, 1797, § 5, 1 Stat. 515; also Act of May 2, 1792, § 18, 1 Stat. 263; Act of August 4, 1790, § 45, 1 Stat. 169; Act of July 31, 1789, § 21, 1 Stat. 42. It has been considered in a number of cases in this court. The claim of the United States to the asserted priority rests exclusively upon the statute. No lien is created by it. It does not overreach or supersede any bona fide transfer of property in the ordinary course of business. It establishes priority which is limited to the particular state of things specified. The meaning of the word "insolvent," used in the act, and of the insolvency therein referred to, is limited by the language to cases where "a debtor not having suffi-

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cient *property to pay all his debts shall make a voluntary assignment," etc. Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which

defines or explains the meaning of insolvency referred to in the earlier part. *United States v. State Bank of North Carolina*, 6 Pet. 29, 35, 8 L. Ed. 308; *United States v. Fisher*, 2 Cranch, 358, 390, 2 L. Ed. 304; *United States v. Hooe et al.*, 3 Cranch, 73, 90, 2 L. Ed. 370; *Prince v. Bartlett*, 8 Cranch 431, 433, 3 L. Ed. 614; *Conard v. Atlantic Insurance Co.*, 1 Pet. 386, 439, 7 L. Ed. 189; *Brent v. Bank of Washington*, 10 Pet. 596, 611, 9 L. Ed. 547; *Field et al. v. United States*, 9 Pet. 182, 201, 9 L. Ed. 94. Where the debtor is divested of his property in one of the modes specified in the act, the person who becomes divested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property. *Beaston, Garnishee, v. Farmers' Bank of Delaware*, 12 Pet. 102, 133-135, 9 L. Ed. 1017. The priority given the United States cannot be impaired or superseded by state law. If priority in favor of the United States attaches at all, it takes effect immediately upon the taking over of the bank. The state has no lien on the assets of the bank before the taking of such possession by the bank commissioner.

[8, 9] Does section 3466 apply? It requires that there shall be an insolvent debtor "not having sufficient property to pay all his debts." The complaint does not allege that the bank's assets were not sufficient to pay all its debts. After stating that the bank examiner found that it was insolvent and unable to pay all its debts and unable to continue as a going banking concern, and that the bank commissioner pursuant to the authority vested in him by the laws of the state adjudged the bank insolvent and thereupon took charge and possession of its assets for the purposes of liquidation, the complaint does allege that the bank was and is insolvent. But the word "insolvent" is

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used in *different senses. Section 3466 makes it apply only in cases where the debtor "not having sufficient property to pay all his debts. * * *" The Bankruptcy Act of July 1, 1898, c. 541, § 1, 30 Stat. 544 (Comp. St. § 9585), provides:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

In section 302 of the Oklahoma law, the meaning of "insolvency" of a bank is not so limited, and, when regard is had to other provisions of the Oklahoma state depositors' guaranty fund law and its object—the full and prompt payment of depositors in banks unable to carry on as going banking concerns—it is clear that the meaning there intended is not the same as in section 3466 or in

the Bankruptcy Act. The bank commissioner under the Oklahoma law properly may "become satisfied" of the insolvency of a state bank whenever it is unable to pay its depositors in ordinary course of business and is unable to continue as a going banking concern, even though it has sufficient property to pay all its debts and is not insolvent within the meaning of section 3466 or the federal Bankruptcy Act. This view is in harmony with the meaning of insolvency as defined by the Supreme Court of Oklahoma:

"Independent of statute, it may generally be said that insolvency, when applied to a person, firm, or corporation engaged in trade, means inability to pay debts as they become due in the usual course of business. The definition is one generally accepted by both the state and federal courts." *Oklahoma Moline Plow Co. v. Smith*, 41 Okl. 498, 503, 139 Pac. 285, 287.

The allegations of the complaint do not show the debtor to be insolvent within the meaning of section 3466 or of the Bankruptcy Act.

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*It remains to be considered whether an act of bankruptcy was committed. In order to give the priority specified in section 3466, there must be a case of an insolvent debtor who makes a voluntary assignment of his property, or a case in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, or a case in which an act of bankruptcy is committed. In this case it is not alleged that the Oklahoma state bank voluntarily placed itself in the hands of the bank commissioner under section 302 or that it made a voluntary assignment of its property, but it is alleged that the bank commissioner adjudged it insolvent and took charge and possession of its assets. No action on the part of the bank was necessary, and none is alleged. And it is plain that the case is not within the absconding, concealed or absent debtor clause.

[10] The complaint does not expressly allege that the bank committed any act of bankruptcy or state any facts as constituting an act of bankruptcy. But it is claimed that the position of the bank commissioner in taking charge of the bank's affairs under section 302 is analogous to that of a receiver or a trustee in bankruptcy, or that of an assignee for the benefit of creditors. The facts set forth in the complaint do not constitute an act of bankruptcy as defined by the federal Bankruptcy Act (section 3a [Comp. St. § 9587]). There is not alleged any conveyance to defraud, or preference through transfer or through legal proceedings, or general assignment for the benefit of creditors. Nor is the case within the meaning of the last clause of section 3a (4):

"Or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state. * * *"

The allegations do not show insolvency within the meaning of section 3466 or of the Bankruptcy Act. The insolvency contemplated by section 302 of the state law is not the same or equivalent condition. The bank commissioner does not take possession be-

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cause of the existence of insolvency, *within the meaning of these federal laws. He is not a receiver or trustee put in charge because of any such insolvency. He acts as an arm or instrumentality of the state in the exercise of its police powers to effect the purpose of the law for the protection of depositors. It would defeat the purpose of that law to require that the bank must be insolvent within the meaning defined in section 3466 or in the Bankruptcy Law before the benefit of the state law can be made available to depositors. A primary purpose of his possession is the prompt payment of depositors by the use of the state guaranty fund to the extent necessary, and the case is to be distinguished from that defined in the Bankruptcy Act, and the commissioner is not a receiver or trustee within its meaning. The legislation of Oklahoma, so far as banks are concerned, does not define acts of bankruptcy or deal with bankrupt or insolvent banks otherwise than by the state law herein referred to.

As insolvency within the meaning of section 3466 was not necessary for the taking of possession by the bank commissioner and is not shown to exist, and as no act of bankruptcy as defined by applicable federal legislation on the subject of bankruptcies or as defined by any law of Oklahoma is shown to have been committed, and as the debtor bank was not divested of its assets in one of the modes specified in section 3466, the case is not within that section.

The state's motion to dismiss the complaint is granted.

Bill dismissed.

(261 U. S. 179)

PRICE FIRE & WATER PROOFING CO. v. UNITED STATES.

(Argued Jan. 22, 23, 1923. Decided Feb. 19, 1923.)

No. 257.

I. United States ☞99—Expense of operating plant at loss after withdrawal of government work not recoverable under statute.

Where a company, operating its plant for waterproofing and fireproofing cloth wholly on cloth received from the government prior to the Armistice, had no other business on which it could continue after the government work ceased, and expended considerable sums in operating at a loss, to keep its business alive and its organization existent, such expenditures were not recoverable, under Act March 2,

1919 (Comp. St. Ann. Supp. 1919, §§ 3115¹⁴/_{15a}–3115¹⁴/_{15e}), since they were not expenditures, obligations, or liabilities incurred in performing or preparing to perform the contract with the government, and they were not incurred prior to November 12, 1918.

2. Courts ☞389—Findings of Court of Claims conclusive, when no request for additional findings, or application for leave to reopen case, made.

Where there was no basis in the findings of the Court of Claims for awarding more on account of certain expenditures by one doing work for the government during the war than was awarded by the judgment, and the claimant did not request additional findings, or ask leave to reopen the case, so that additional evidence could be introduced, the findings were conclusive in the Supreme Court.

Appeal from the Court of Claims.

Suit by the Price Fire & Water Proofing Company against the United States. From a judgment for the claimant for an insufficient amount (56 Ct. Cl. 502), it appeals. Affirmed.

Mr. S. S. Ashbaugh, of Washington, D. C., for appellant.

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*Mr. Alfred A. Wheat, of New York City, for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

By the Dent Act (Act March 2, 1919, c. 94, 40 Stat. 1272 [Comp. St. Ann. Supp. 1919, §§ 3115¹⁴/_{15a}–3115¹⁴/_{15e}]), the Secretary of War was authorized to adjust and discharge, upon a fair and equitable basis, agreements, express or implied, made prior to November 12, 1918, in connection with the prosecution of the war, "when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law." If an adjustment offered by the Secretary was refused by the claimant, the Court of Claims was given jurisdiction to award fair and just compensation. But it was expressly provided that neither the Secretary nor the court should include in the award "prospective or

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possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform" the contract.

The claimant herein owned an establishment for fireproofing and waterproofing cloth. In 1917, an arrangement was made by which, after January 1, 1918, the plant, with increased facilities, was to be operated.

by the claimant, wholly on cloth to be delivered to it from time to time by the government. Payment was to be made at an agreed rate per yard. No agreement was executed in the manner provided by law. Thereafter many orders for finishing goods were given. There were serious delays and irregularities on the part of the government, both in delivering the goods for finishing and in removing them from the premises after the work had been done, and upon the signing of the Armistice all unfinished orders were canceled. For all goods finished the claimant was paid at the agreed price. But by the action of the government prior to November 12, 1918, and by its cancellation of the orders, it was subjected to large and unanticipated expenses. A claim for these expenses and the losses incurred was duly presented to the Secretary of War. An adjustment offered by him was rejected, and thereupon claimant brought this suit in the Court of Claims for \$641,313.64. The petition set forth ten distinct causes of action. On nine of these the court made the allowances set forth in the margin,¹ which aggregate \$47,700.08, and

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judgment was entered below for this *amount. The tenth cause of action, on which \$590,000 was claimed, was for loss to commercial business. On this no allowance was made. A motion for a new trial was asked for by

claimant (on which ground does not appear) was overruled. Whether the court erred in disallowing the claim on the tenth cause of action is the sole question for decision on this appeal.

The facts found by the court bearing especially on this cause of action were these:

"When in the latter part of 1917 this arrangement was made, the plaintiff's plant, its processes, business, and good will as a going concern, were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record.

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"When government work ceased in November, 1918, the plaintiff had no other business upon which it could continue the operation of its plant, and it became idle. The cessation of hostilities left the government with large quantities of goods on hand of the kind produced by the plaintiff company and by other concerns producing for the government the same general character of goods. These goods were sold by the government at different times in large lots at public auction, and generally at prices below cost of production, and the sale of these goods by the government supplied to a very considerable extent the demands of the trade for this class of goods. In an effort to reestablish its business and preserve the value attaching to its plant as an operating concern, and in the belief that, if normal conditions should be restored, it could again do a profitable business, it has expended considerable sums of money, by operating at a loss, in keeping its business alive and its organization existent, and by reason of such efforts since the cessation of Government work it has sustained an operating loss of \$125,000. It has not succeeded in re-establishing its business on a profitable basis, and its plant and business are now worth much less than before it took on government work and devoted its facilities thereto."

[1, 2] Claimant contends here that it should be allowed to recover this \$125,000, as expenses incurred in efforts to keep alive its business and organization to February, 1921, when the testimony was taken. The Dent Act does not permit any recovery on this ground. These were not "expenditures or obligations or liabilities incurred in performing or preparing to perform the contract." Nor were they made or incurred prior to November 12, 1918. There was no breach of contract or wrongful act on the part of the United States in this connection. Nor was there a taking of property for which compensation can be made.

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It is urged here that the full *amount should be allowed to reimburse claimant for expenditures incurred at the plant in the early months of 1918, when it was idle because of the government's delay in supplying goods for finishing. Some allowance for expenses incurred during that period was allowed under the fifth cause of action and is included in the \$47,700.08 for which judgment was entered. For awarding more there is no basis in the findings. No request for additional findings appears to have been made below.

1 (1) Storage and hauling charges on untreated gray goods: On this cause of action the Court of Claims awarded the plaintiff the sum of.....	\$ 2,147 05
(2) Storage charges on treated goods after notice of completion: On this cause of action the Court of Claims awarded the plaintiff the sum of.....	544 60
(3) Alterations and additions to the plant for storage purposes, including restoration: On this cause of action the Court of Claims awarded the plaintiff the sum of.....	11,249 16
(4) Extra protection demanded by the defendants: On this cause of action the Court of Claims awarded the plaintiff the sum of.....	2,953 11
(5) Wages paid unemployed labor from December 29, 1917, to March 23, 1918: On this cause of action the Court of Claims awarded the plaintiff the sum of	3,013 52
(6) Allowance on chemicals and materials left over after suspension of work: On this cause of action the Court of Claims awarded the plaintiff the sum of.....	3,877 87
(7) Increased plant facilities: On this cause of action the Court of Claims awarded the plaintiff the sum of....	20,000 00
(8) Deductions made by defendants because of increased yardage resulting from treatment and for alleged loss in shipment: On this cause of action the Court of Claims awarded the plaintiff the sum of.....	954 03
(9) Insurance premiums paid by plaintiff in excess of that provided for: On this cause of action the Court of Claims awarded the plaintiff the sum of	2,960 68

Total amount awarded by Court of Claims \$47,700 08

Nor was leave sought there, or here, to re-open the case, so that additional evidence could be introduced. The findings made are conclusive.²
 Affirmed.

(261 U. S. 17)

CHARLES NELSON CO. v. UNITED STATES.

(Argued Jan. 25 and 26, 1923. Decided Feb. 19, 1923.)

No. 287.

United States ⇨74—Contractor held to have waived claim for extra compensation for lumber delivered in excess of estimated quantities.

Even if a government contractor was not required by his contract to deliver to a navy yard its requirements of lumber in excess of the quantity estimated when the contract was made, he waived his right to claim the difference between the contract price and the market price for lumber delivered in excess of the estimate, where he made no protest against such deliveries, except to protest against being required to deliver at the time specified and accepted payment for all lumber delivered at the contract rate, without any protest or intimation that he claimed the right to payment for the excess at the market price.

Appeal from the Court of Claims.

Claim by the Charles Nelson Company against the United States. From a judgment of the Court of Claims, dismissing the petition (56 Ct. Cl. 448), the plaintiff appeals. Affirmed.

Messrs. Wm. C. Prentiss, of Washington, D. C., and Wm. E. Humphrey, of Washington, D. C., for appellant.

Mr. Alfred A. Wheat, of New York City, for the United States.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims dismissing the petition of the plaintiff, the Charles Nelson Company, after a hearing of the evidence and upon findings made. The plaintiff was the lowest and accepted bidder upon advertised solicitation

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of the Navy *Department for the furnishing and delivery of lumber at the Puget Sound Navy Yard for a period ending December 31, 1917. This suit is to recover the sum of \$20,321.33, the amount with interest of the difference between the market value and the price bid upon what the plaintiff claims was an unjust excess over and above the amount of lumber it should have delivered and that

which at the insistence of the Navy Department it did deliver.

The bids were opened January 3, 1917. The contract was signed February 23, 1917. Thereby the plaintiff agreed to furnish and deliver f. o. b. alongside wharf navy yard, Puget Sound, lumber of certain kinds in such quantities and at such times during the period ending December 31, 1917, as the supply officer of the Navy might direct. "All deliveries to be made promptly and orders of 50,000 ft. b. m. or less of assorted sizes, not more than 10,000 ft. b. m. of any one size except with the consent of the contractor, must be delivered within ten days after receipt of order. All other orders must be delivered within 25 days after date of receipt of order from the supply officer." The contract contained this provision which was evidently taken from the form of bids solicited:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service of the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the government not being obligated to order any specific quantity of Douglas fir contracted for."

Then follows:

"Class 5 (Continued).

"Stock Classification No. 39.

"Fir, Douglas, as follows:

"1. 1,675,000 feet b. m. (about), of such sizes or grades as may be ordered—per M feet."

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*The Navy Department on orders placed by it before December 31, 1917, received from the plaintiff 3,688,259 feet b. m. of Douglas fir. The amount furnished above 1,675,000 feet was worth at market price, delivered at the navy yard, \$18,310.21 more than the plaintiff was paid therefor at the prices bid and accepted.

After the execution of the contract and as a development of the World War the government entered upon the building of submarine chasers at this navy yard, a type of vessel never before built there, and much of the lumber required of the plaintiff under its contract was used in the construction of these vessels.

The plaintiff denies that the writing signed by it was a binding contract, because there was no mutuality of obligation. The government answers this by citing the case of *United States v. Purcell Envelope Co.*, 249 U. S. 313, 39 Sup. Ct. 300, 63 L. Ed. 620. In that case the Post Office Department invited bids—

"for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the department during a period of four years, beginning on the first day of October, 1898."

² There is nothing in *Roxford Knitting Co. v. Moore & Tierney* (C. C. A.) 265 Fed. 177, 11 A. L. R. 1415, or in *United States v. Russell*, 13 Wall. 623, 20 L. Ed. 474, which were relied upon by claimant, that lends support to its contention.

The bid of the Purcell Company was accepted. The formal contract was signed by the Company and bond given. Subsequently the Postmaster General refused to sign this contract, and bought the envelopes and wrappers elsewhere. This court held that the acceptance of the bid made the contract, that the words above quoted must be construed to mean that the company should furnish all the envelopes and wrappers of the specified sizes which the department would need during the four years' period, and that the government was as much bound to take the envelopes and wrappers as the bidder was bound to furnish them. Heavy damages for the breach of the contract were awarded against the United States. But it is to be observed that there was in the contract or invitation for bids no express denial of the

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obligation of the Post Office *Department to take the envelopes in that case, so that the question of a lack of mutuality did not arise in the Purcell Case as it does here.

But we are not obliged definitely to pass upon the question whether the instrument relied on by the government constituted a contract binding on the plaintiff for the whole amount ordered at the price bid, because under the findings of the Court of Claims, the plaintiff must be held to have waived any right to claim more than the price it bid for any part of the lumber it furnished.

The findings show that the plaintiff did not furnish the lumber itself but relied on two so-called subsidiary companies to do so. The manager of one of the companies, the Crown Company, was Scott. He was also a stockholder and officer in the plaintiff. Scott received an order for 1,675,000 feet b. m. of lumber from the plaintiff to be delivered to the navy yard. In May, there was delay in deliveries by the Crown Company of which the navy yard commandant made complaint to the plaintiff by telegram, to which plaintiff replied referring the commandant to Scott. Having delivered 950,000 feet, and accepted orders in addition thereto of 1,186,000 feet, Scott on May 21st, wrote to the navy yard supply officer calling attention to the fact that the orders received unfilled were for 1,186,000 feet whereas there were only 725,000 feet due on the original contract for 1,675,000 feet, and asking him to say which of the orders he wished to withdraw. It appeared that Scott was not then advised of the terms of the contract. The supply officer replied quoting from the contract the clause quoted above, refusing to withdraw any orders and insisting on fulfillment of all orders issued and to be issued. A copy of the letter was sent to plaintiff at its office in San Francisco. After further correspondence in which the supply officer threatened the plaintiff to buy in the open market against its account, the Crown Lumber Company by

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*Scott, June 7th, accepted another order "un-

der protest especially as to delivery date." On June 11th, Scott accepted another order "under protest." On June 26th and July 2d he accepted other orders "under protest, especially as to delivery." In June, Scott and Jackson, vice president of the plaintiff, held a conference with the supply officer at the navy yard to discuss the failure to keep up with the deliveries as the government needed them. During this conference Scott again protested at being compelled to deliver any more than 1,675,000 feet at the contract price. The supply officer stood upon the contract and made no promise to pay more than the contract price. Scott testified that in spite of the letter sent him by the supply officer, he did not know, until the next September, the terms of the contract except from the insufficient memorandum of order sent him by the plaintiff company soon after the contract was signed. The Court of Claims finds that it did not appear that Scott was directed by the company to make such a protest as at the June meeting or that he was acting within his authority in so doing. On June 18th the plaintiff company wrote the supply officer as follows:

"Dear Sir: Contract 28942. We have for acknowledgment your letter of the 14th, in which you transmit instructions received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., in which you are instructed as follows:

"Contract 28942, if contractor fails to make delivery, purchase authorized as requested."

"May we be permitted to state that it has never been our intention or aim to fail to make delivery of your requirements as we may be committed to under the contract above quoted? Mr. A. A. Scott, our resident agent on Puget Sound, has been instructed to give your business the right of way, both at the Mukilteo and Port Angeles plants.

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"Mr. H. W. Jackson, our vice president, was on the Sound recently, and he states that at both mills nothing is left undone in order to produce the lumber that you have ordered under the contract.

"By way of further explanation we might say that when we entered into this contract with your department we never dreamt that we would be expected to deliver extraordinary quantities of clear lumber of long lengths, such as planking, decking, etc., within the time limits specified in the contract. In connection with these orders we feel that we are entitled to some consideration and a little leniency. The contract itself states that we are committed to making deliveries on your orders 50 M feet per b. m. or less of assorted sizes, not more than 10 M b. m. of any one size except with the contractor's consent, which must be delivered within ten days after date of receipt of order, and that all other orders must be delivered within twenty-five days after date of receipt of order from the supply officer. Therefore we submit that when you order 100 M feet of decking or ship lumber of long lengths and ask us to furnish same within ten days you are requiring more of us than is specified in the written contract.

"For this special material, if you were to buy this in the open market to-day, you probably would penalize us \$10.00 per M. We feel sure that it is not the desire of your department to arbitrarily penalize us to that extent, in view of the fact that we are doing our utmost to execute your orders within the time limits.

"We feel that we are not responsible for the extraordinary conditions which have arisen since the contract was executed. We are reliably informed that the War Department has canceled their contracts and is now redistributing their requirements, having in view existing conditions. We also feel that your department should interpret our engagement in the same

way. We trust you *will accept this communication in the spirit in which it is sent. We are not asking to be relieved of any responsibility, but rather we submit the facts with a view of enlisting your co-operation to assist us in completing our engagements."

The Court of Claims further found that "no protest against furnishing more than 1,675,000 feet of lumber under the contract was ever made by the plaintiff company or any of its officers," and the seventh finding was as follows:

"The plaintiff company furnished to the defendant, on orders placed by the defendant under contract 28942, 3,688,259 feet of lumber, for which it was paid at the contract price, and it did not at the time of any payment make to the United States any protest against payment at that price, and so far as the United States was informed such payments were accepted as in full.

"The amount of lumber furnished over and above 1,675,000 feet was worth at market price, delivered at the navy yard, \$18,310.21 more than the plaintiff was paid therefor at contract price."

On these findings we can see no escape for the plaintiff from acquiescence by its conduct in the price bid for the whole amount of lumber delivered.

The plaintiff relies on the opinion of this court in *Freund v. United States*, 260 U. S. 60, 43 Sup. Ct. 70, 67 L. Ed. —, decided November 13, 1922. The facts of that case are very different from this. They involved conduct on the part of the representatives of the government of questionable fairness toward the contractors and showed no such acquiescence and absence of protest as here appear.

It may be, as counsel suggest, that the plaintiff's course was influenced by a patriotic wish to help the government when it was engaged in war. If so, it was to be commended. But this cannot change the legal effect of its evident acquiescence, seen in its

letter of June 18th, *and its failure to protest thereafter, and to put the government on notice that it intended to claim a recovery on a quantum valebat when it was delivering the extra 2,000,000 feet of lumber and re-

ceiving the payments therefor from the government at the prices named in the bid. The judgment of the Court of Claims is Affirmed.

(261 U. S. 165)

DOUGLAS et al. v. NOBLE.

(Argued Jan. 2, 1923. Decided Feb. 19, 1923.)

No. 159.

1. Constitutional law —318—Statute conferring on board arbitrary discretion to withhold license to practice profession denies due process of law.

A state statute purporting to confer arbitrary discretion on a board to withhold a license to practice the profession of dentistry, or to impose conditions which had no relation to qualifications to practice that profession, would violate the due process clause of Const. Amend. 14.

2. Courts —366(1)—State decision construing state statute followed on appeal from federal court.

Though the Supreme Court must consider the construction of the state statute, which is a state question, on appeal from a federal court, it will follow the applicable decisions of the highest court of the state on such question.

3. Constitutional law —48—State statute existing for long time not construed, so as to render it invalid.

Where a state statute has been in force for 30 years, during which time its construction as not conferring arbitrary authority on a state board has been unquestioned, the Supreme Court, even in the absence of controlling decision, would decline to give it a contrary construction, which would render it void, unless compelled to do so by unequivocal language in the act.

4. Physicians and surgeons —2—Washington statute for licensing dentists not invalid as giving examiners arbitrary authority.

Laws Wash. 1893, p. 88, now Rem. Code 1915, §§ 8412-8425, requiring a license from the board of examiners for the practice of dentistry, which license shall be issued by the board only to applicants possessing stated qualifications, who have passed an examination given by the board, is not invalid as conferring arbitrary discretion on the board, though it does not specifically require the examination to be limited to questions having relation to the applicant's fitness to practice.

5. Constitutional law —62—State Legislature may delegate to board power to determine facts as to applicant's fitness.

The federal Constitution does not prevent a state Legislature from delegating to an administrative board the function of determining what qualifications should be possessed by an applicant to practice a profession, as well as the function of determining whether the applicant complies with the detailed standard of fitness.

6. Constitutional law ⚡48 — Not presumed state board will exercise powers arbitrarily.

It is not presumed that powers conferred on the administrative boards of a state will be exercised arbitrarily.

7. Courts ⚡366(1)—Whether state Constitution permits delegation of discretion is state question.

Whether a state Constitution permits its Legislature to delegate to an administrative board the power to ascertain and fix the qualifications necessary for an applicant for license to practice a profession is wholly a state question.

Appeal from the District Court of the United States for the Western District of Washington.

Suit by Leon Noble against Malcolm Douglas and another. From a decree granting permanent injunction, as prayed for by plaintiff (274 Fed. 672), defendants appeal. Reversed.

Messrs. Malcolm Douglas, of Seattle, Wash., and Lindsay L. Thompson, of Olympia, Wash., for appellants.

Mr. C. E. Gates, of Seattle, Wash., for appellee.

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*Mr. Justice BRANDEIS delivered the opinion of the Court.

In 1893 the Legislature of Washington provided that only licensed persons should practice dentistry. It vested the authority to license in a board of examiners, consisting of five practicing dentists, and it required that persons desiring to practice should apply to that board and undergo examination before it. Every person of good moral character with a diploma from a reputable dental college was declared eligible, and, if he or she passed the examination, became entitled to a license. Laws of Washington 1893, c. 55. That statute, with amendments not here material (Laws of 1901, c. 152), has since been continuously in force. It is now embodied in Remington's 1915 Code and Statutes of Washington, §§ 8412-8425. The validity of the statute has been attacked on various grounds; and it has been repeatedly upheld by the highest court of the state.¹

In 1921 Noble brought this suit in the federal court for the Western District of Washington to enjoin the King county prosecuting attorney from proceeding criminally

against him for practicing dentistry without a license. Jurisdiction of that court was invoked solely on the ground that rights guaranteed plaintiff by the federal Constitution were being invaded. The bill charged that these were violated, both because the licensing statute was void and because the board in administering it had exercised its power arbitrarily. The case was heard by three judges upon application for an interlocutory

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injunction *under section 266 of the Judicial Code (Comp. St. § 1243). It was admitted that plaintiff was of good moral character; that he had a diploma from a reputable dental college; that he had submitted himself to the dental board for examination; that he had been examined, but had not passed the examination; and that, although refused a license, he had persisted in practicing dentistry. The board denied, by its answer, that it had acted arbitrarily in refusing a license; and this charge does not appear to have been further insisted upon.

Plaintiff rested his case solely on the claim that the statute violated the federal Constitution. It was conceded that a state may, consistently with the Fourteenth Amendment, prescribe that only persons possessing the reasonably necessary qualifications shall practice dentistry (*Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623), and that the Legislature may, if consistent with the state Constitution, confer upon an administrative board the power to determine whether an applicant possesses the qualifications which the Legislature has declared to be necessary. The contention is that the statute purports to confer upon the board arbitrary power to exclude applicants from the practice of dentistry, and thus violates the due process clause of the Fourteenth Amendment. The District Court held the act void on that ground, and issued a permanent injunction. *Noble v. Douglas*, 274 Fed. 672. Whether it erred in so holding is the only question presented for our consideration on this appeal.

The argument is that, since the act does not state in terms what the scope and character of the examination shall be, arbitrary power is conferred upon the board to grant or withhold licenses. It is pointed out that the statute does not in terms direct that the examination shall relate to the appellants' qualifications to practice dentistry; that it does not prescribe the subjects upon which applicants shall be examined, or whether

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proficiency shall be determined by knowledge of theory or by requiring applicants to demonstrate skill with the tools and materials of the profession; that it does not provide whether the examination shall be oral or written, or what percentages of correct answers shall be required to pass the examination; and that it does not require the keep-

¹State ex rel. Smith v. Dental Examiners, 31 Wash. 492, 72 Pac. 110; In re Thompson, 36 Wash. 377, 379, 78 Pac. 899, 2 Ann. Cas. 149; State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, 80 Pac. 544; State v. Littooy, 37 Wash. 693, 79 Pac. 1135; State ex rel. Thompson v. State Board, 48 Wash. 291, 93 Pac. 515; State v. Littooy, 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292; Brown v. State, 59 Wash. 195, 109 Pac. 802. See also State v. Brown, 37 Wash. 97, 79 Pac. 635, 68 L. R. A. 889, 107 Am. St. Rep. 798.

ing of records of the proceedings which could be used for purposes of review.

[1-3] What authority the statute purports to confer upon the board is a question of construction. If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment. Its construction is a question of state law. Since the case is here on appeal from a federal court, we must consider it. *Davis v. Wallace*, 257 U. S. 478, 42 Sup. Ct. 164, 66 L. Ed. 325. But in passing upon such questions we follow applicable decisions of the highest court of the state. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 154, 17 Sup. Ct. 56, 41 L. Ed. 369. The statutory provisions involved in the present case were construed 20 years ago by the Supreme Court of Washington in *Re Thompson*, 36 Wash. 377, 379, 78 Pac. 899, 2 Ann. Cas. 149. It was insisted there that the grant of the power to hold examinations was a delegation of arbitrary legislative power to the dental examiners. The court assumed that to delegate power to make such rules was consistent with the Constitution of the state, and that the statute had conferred upon the board power to make rules. It declared that the board must have adopted rules "in order to properly determine the good character of the applicant and the good standing of the college issuing his diploma, and to conduct the examinations upon subjects reasonably required in that profession." And it held that, if there was an abuse of authority, the remedy is to review, by some appropriate proceeding, the conduct of the

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board, *not to attack the validity of the act. Thus, the highest court of the state has construed this statute as not conferring arbitrary power upon the board in respect to the scope and character of the examination. The statute has been in force for 30 years. The correctness of the views expressed in *Re Thompson* do not appear to have been questioned by that court since. Under such circumstances, we should, even in the absence of controlling decision, decline to give the statute a construction which would render it void, unless compelled to do so by unequivocal language in the act. *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. 197, 205, 23 Sup. Ct. 108, 47 L. Ed. 139. Obviously there is none of that character.

[4-6] The statute provides that the examination shall be before a board of practicing dentists, that the applicant must be a graduate of a reputable dental school, and that he must be of good moral character. Thus, the general standard of fitness and the character and scope of the examination are clearly indicated. Whether the applicant possesses the qualifications inherent in

that standard is a question of fact. Compare *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, 394, 32 Sup. Ct. 152, 56 L. Ed. 240. The decision of that fact involves ordinarily the determination of two subsidiary questions of fact: The first, what the knowledge and skill is which fits one to practice the profession; the second, whether the applicant possesses that knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application. Hence it can be embodied in rules. The Legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law. When it does so, the function of the examining board is limited to determining whether the applicant complies with the requirements so declared. But the Legislature need not make this general finding. To determine the subjects of which one must

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have knowledge in order to be fit to practice dentistry, the extent of knowledge in each subject, the degree of skill requisite, and the procedure to be followed in conducting the examination—these are matters appropriately committed to an administrative board. *Mutual Film Corporation v. Ohio Industrial Commission*, 236 U. S. 230, 245, 246, 35 Sup. Ct. 387, 59 L. Ed. 552, Ann. Cas. 1916C, 296. And a Legislature may, consistently with the federal Constitution, delegate to such board the function of determining these things, as well as the functions of determining whether the applicant complies with the detailed standard of fitness. *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563. That the scope of the discretion here granted to the examining board was well within the limits allowed by the federal Constitution, and that it is not to be presumed that powers conferred upon the administrative boards will be exercised arbitrarily, is settled by *Lieberman v. Van de Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305.

[7] Appellees relied upon *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. There the licensing board habitually exercised its power arbitrarily, and discrimination was practiced. *Seattle v. Gibson*, 96 Wash. 425, 165 Pac. 109, and *State ex rel. Makris v. Pierce*, 113 Wash. 296, 193 Pac. 845, 12 A. L. R. 1428, strongly relied upon by appellees, are not inconsistent with *Re Thompson*. The ordinances involved in these later cases were construed by the state court to vest in the city officials an arbitrary discretion to grant or withhold, and to revoke, licenses. Whether the Constitution of the state permits delegation to the examining board of the power to ascertain and fix the essentials of fitness is wholly a state question. *Welch v. Swasey*, 214 U. S. 91, 104, 29 Sup. Ct. 567, 53 L. Ed. 923; *Bradley v. Richmond*, 227 U. S. 477, 482, 33 Sup.

Ct. 318, 57 L. Ed. 603. It is not contended that the statute violates the state Constitution in this respect.

Reversed.

(261 U. S. 236)

COLUMBIA RY., GAS & ELECTRIC CO. v. STATE OF SOUTH CAROLINA.

(Argued Jan. 26, 1923. Decided Feb. 19, 1923.)

No. 297.

1. Constitutional law —121(1)—Statutes concerning transfers of state canal and transfers based thereon held a contract.

Act S. C. Dec. 24, 1887 (19 St. at Large, p. 1090), providing for the transfer of a canal owned by the state to a board canal trustees, and Act S. C. Dec. 24, 1890 (20 St. at Large, p. 967), authorizing a sale of the canal by such trustees, and the transfers based thereon, constitute a contract between the state and a transferee of the canal within Const. U. S. art. 1, § 10.

2. Constitutional law —116—Constitution does not protect against impairment of contract by judicial decision.

The Constitution affords no protection as against impairment of a contract by judicial decision.

3. Courts —394(9)—If judgment impairing contract not based on statute, Supreme Court without jurisdiction.

If a judgment of a state court, though in effect impairing the obligation of a contract, proceeds on reasons apart from and without giving effect to a statute claimed to impair the obligation of the contract, the United States Supreme Court is without jurisdiction to review it.

4. Courts —394(9)—Supreme Court has jurisdiction, when effect given to statute claimed to impair contract.

Though a state court may have construed a contract and placed its decision distinctly on its own construction, if it appears on examination that, in substance and effect, force has been given to a statute complained of as impairing the obligation of the contract, the jurisdiction of the Supreme Court attaches.

5. Courts —394(9)—Jurisdiction not declined because extent to which decision based on statute claimed to impair contract not clear.

Where the basis for bringing an action was a statute claimed to impair the obligation of a contract, and the trial court gave effect to the statute to some extent, and its judgment was affirmed by the Supreme Court, though it was plainly wrong, unless based on the statute, jurisdiction will not be declined by the federal Supreme Court, because the extent to which the state Supreme Court's decision was based on the statute is obscure.

6. Deeds —155—Condition subsequent must be clearly created, and will be strictly construed.

Conditions subsequent, especially when relied on to work a forfeiture, must be created by

express terms or clear implication, and are construed strictly.

7. Deeds —145—Clauses construed as covenants rather than conditions, if reasonably possible.

Courts always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so.

8. Canals —20—Purpose of grant could not debase fee, when grant absolute and for valuable consideration.

Where the conveyance of a canal owned by the state of South Carolina, under Act S. C. Dec. 24, 1887 (19 St. at Large, p. 1090), and Act S. C. Dec. 24, 1890 (20 St. at Large, p. 967), was absolute and for a valuable consideration, a mere purpose to have the canal extended to the Congaree river, however much it may have influenced the legislation, could not have the effect of debasing the fee.

9. Deeds —125—Obligation to complete contained in statute authorizing grant held a covenant and not a condition subsequent.

Under Act S. C. Dec. 24, 1887 (19 St. at Large, p. 1090), providing for the transfer of a canal owned by the state to a board of trustees, which was subsequently authorized to convey to defendant's predecessor, and requiring the trustees to complete the canal to a certain point within the two years, to furnish certain horse power to the state and others, to keep the canal open, and to complete the canal as soon as practicable to the Congaree river, but containing no specific provision for forfeiture, except for failure to complete to a certain point within seven years, the obligation to complete the canal to the Congaree river was a covenant, and not a condition subsequent.

10. Constitutional law —121(1)—Statute forfeiting grant of canal for noncompliance with covenant impaired the contract.

As, under Act S. C. Dec. 24, 1887 (19 St. at Large, p. 1090), and Act S. C. Dec. 24, 1890 (20 St. at Large, p. 967), the obligation of one to whom the Columbia Canal was conveyed thereunder, to complete the canal to the Congaree river, was only a covenant, and not a condition subsequent, Act S. C. March 12, 1917 (30 St. at Large, p. 348), declaring all right, title, and interest in the canal forfeited for noncompliance with such requirement, impaired the contract, in violation of Const. U. S. art. 1, § 10.

11. Constitutional law —115—Impairment of contract may consist in increasing burdens.

The impairment of a contract may consist in increasing its burdens, as well as in diminishing its efficiency.

In Error to the Supreme Court of the State of South Carolina.

Action by the State of South Carolina against the Columbia Railway, Gas & Electric Company. A judgment for plaintiff was affirmed by the Supreme Court of South Car-

olina (129 S. C. 68, 123 S. E. 646), and defendant brings error. Reversed.

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*Messrs. Wm. Elliott, and Jo-Berry S. Lyles, both of Columbia, S. C., for plaintiff in error.

Messrs. S. M. Wolfe and J. Fraser Lyon, both of Columbia, S. C., for the State of South Carolina.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

This was an action brought by the state against the defendant (plaintiff in error) to recover possession of a certain canal property, known as the Columbia Canal, on the ground that the defendant had forfeited the same by reason of its failure to fulfill certain conditions subsequent upon which its continued title depended. Prior to the year 1887 a small canal, following the course of the one now in question was owned by the state; the title being vested in the board of directors of the state penitentiary. In 1887 the Legislature passed an act incorporating the board of canal trustees, to whom the penitentiary directors were required to and did transfer the canal. 19 Stat. S. C. 1090.

By section 1 of this act, the title to the canal was vested in the trustees for the use

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and benefit of the city of Co*lumbia, subject to the performance of certain obligations therein set forth, and to the proviso:

"That should the said canal not be completed to Gervais street within seven years from the passage of this act all the rights, powers and privileges guaranteed by this act shall cease, and the said property shall revert to the state."¹

By section 3 they were authorized to construct a dam across Broad river and raise the water in the river so as to get a fall of 37 feet at the south side of Gervais street, provided that the canal be so enlarged as to

¹"Section 1. That the board of directors of the South Carolina penitentiary are hereby authorized, empowered and required to transfer, assign and release to the board of trustees of the Columbia Canal, hereinafter created and provided for the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the General Assembly of this state with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the state of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's sluice through its whole length to the point where it empties into the Congaree river, together with all the appurtenances thereunto belonging, shall vest in the said board of trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said board of trustees and their assigns: Provided, that should the said canal not be completed to Gervais street within seven years from the passage of this act all the rights, powers and privileges guaranteed by this act shall cease, and the said property shall revert to the state."

carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and 10 feet deep and "develop at least 10,000 horse power at the south side of Gervais street."

By section 5 the canal was to be opened for navigation free of charge.

By section 7 the trustees were required to complete the canal within two years so as to

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carry a body of water of the di*mensions stated from the source of the canal down to Gervais street and to furnish free of charge 500 horse power to the state, 500 horse power to Sullivan Fenner and 500 horse power to the city of Columbia, and "as soon as is practicable, complete the canal down to the Congaree river, a few yards above the mouth of Rocky branch."²

By a subsequent act, passed in 1890, the trustees were authorized to "sell, alienate and transfer" the property subject "to all the duties and liabilities imposed thereby [that is, by the act of 1887], and subject to all contracts, liabilities and obligations made and entered into by said board. * * *" 20 Stat. S. C. 967, § 2. Under this statute the canal was sold to defendant's predecessor, whose title the defendant now has.

The case turns upon the provision contained in section 7, requiring the trustees, as soon as practicable, to complete the canal down to the Congaree river, and depends upon whether this is a condition subsequent, the failure to perform which incurs a forfeiture, or is a covenant the breach of which

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gives rise to another form of remedy. *That the provision has not been complied with is not disputed.

The Legislature, in 1917, passed an act (30 Stat. S. C. 348), which begins with a preamble reciting certain of the provisions of the act of 1887, including that relating to the completion of the canal down to the Congaree river, and declaring that there had been a failure to fulfill the conditions imposed by that act. By section 1 it is then enacted that these conditions have not been complied with but have been disregarded, by reason whereof the right, title and interest "transferred by virtue of said acts, have

²"Section 7. That the board of trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep, from the source of the canal down to Gervais street, and to furnish to the state, free of charge, on the line of the canal, 500 horse power of water power, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the Canal Commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is practicable, complete the canal down to Congaree river a few yards above the mouth of Rocky branch: Provided, that the right of the state to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the said board of trustees or their assigns shall always be subject to this right."

been forfeited and reverted to the state." By section 2 the Attorney General, and other officers named, are directed, within 90 days, to make such re-entry for the state as might be necessary and proper under the circumstances and to take such steps as might be lawful and proper to obtain possession and control of the property and improvements placed thereon, unless satisfactory arrangements be made by the claimants of the canal. By section 3 the Attorney General is directed, at the time of re-entry or thereafter, to commence such proceedings as might be proper in any of the courts of the state to assert the right of the state to said property and improvements.

In pursuance of the act last referred to this action was brought in a state court of common pleas. The complaint alleged that the defendant had failed to complete the canal as soon as practicable down to the Congaree river, and had failed to comply with the provisions of the act of 1887 in other particulars. The other alleged violations may be dismissed from consideration, since the judgment of the trial court is based alone upon the one just specified, and its judgment is affirmed by the state Supreme Court without reference to the others.

[1] That the legislation of 1887 and 1890, and the transactions based thereon, establish

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a contract between the state and the defendant is clear. The remaining inquiries are: (1) What is the pertinent obligation of this contract? and (2) has that obligation been impaired, in violation of article 1, section 10, of the Constitution?

We are met at the threshold with a challenge on the part of the state to our jurisdiction, and this must first be considered. The judgment of the state court, it is asserted, was based upon its own construction of the contract and not at all upon the act of 1917.

[2] As this court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision. *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 30, 8 Sup. Ct. 741, 31 L. Ed. 607; *Louisiana Ry. & Nav. Co. v. New Orleans*, 235 U. S. 164, 170, 35 Sup. Ct. 62, 59 L. Ed. 175, and cases cited.

[3] If, therefore, the judgment, although in effect impairing the obligation of the contract, nevertheless proceeds upon reasons apart from and without giving effect to the statute, this court is without jurisdiction to review it. *Bacon v. Texas*, 163 U. S. 207, 216, 16 Sup. Ct. 1023, 1027 (41 L. Ed. 132) wherein the doctrine is stated as follows:

"Where the federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error

to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court. *Lehigh Water Co. v. Easton*, 121 U. S. 388; *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18; *Central Land Co. v. Laidley*, 159 U. S. 103, 109. * * * If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract."

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[4] *But, although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of our jurisdiction attaches. In *Houston & Texas C. R. Co. v. Texas*, 177 U. S. 66, 77, 20 Sup. Ct. 545, 549 (44 L. Ed. 673), this court said:

"Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the state Constitution, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but, on the contrary, has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below. *Bridge Proprietors v. Hoboken Company*, 1 Wall. 116; *University v. People*, 99 U. S. 309; *Fisk v. Jefferson Police Jury*, 116 U. S. 131; *New Orleans Water Works Company v. Louisiana Sugar Refining Company*, 125 U. S. 18; *Central Land Company v. Laidley*, 159 U. S. 103, 109; *Bacon v. Texas*, 163 U. S. 207, 216; *McCullough v. Virginia*, 172 U. S. 102."

[5] The record before us in the present case plainly discloses that the basis for bringing the action against the defendant was the act of 1917. The complaint alleges at

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*considerable length the provisions of the Act of 1887 and the various transactions resulting in the acquisition of the property by the defendant and its consequent assumption of the obligations contained in that statute. The provisions of the act of 1917, as heretofore recited, are then set forth, followed by a statement of certain negotiations had with the defendant, and it is then alleged that the Attorney General and the other officers mentioned, not considering it appropriate and

proper to commit a breach of the peace by making forcible entry upon the property and taking possession thereof, have, therefore, by virtue of section 3 of said act instituted this action.

The sufficiency of the complaint was challenged by demurrer, upon the ground, among others, that the contract in question was impaired by the act of 1917. The demurrer having been overruled, an answer was filed, alleging such impairment and this claim was asserted and insisted upon at every stage of the proceedings to their conclusion in the state Supreme Court.

The trial court, in passing upon the demurrer, referred to the act of 1917 as authorizing a judicial proceeding and held that, coupled with a demand for possession and refusal, it was equivalent to the exercise of the right of re-entry. Upon the trial of the case that court said that the declaration in this act that there had been a failure to perform the conditions of the contract was entitled to some respect, but the court had the right to inquire into the facts and determine whether as found by the Legislature they were true. It further held that that act was binding on the court under the evidence. It is apparent that the trial court gave effect to the act of 1917, although the precise extent is not clearly disclosed. Whatever it was, it entered into and affected the judgment and this judgment was affirmed by the Supreme Court.

We accord to this ruling the respect which we must always give to the decisions of an

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appellate tribunal of a *state, but, as will presently appear, we have arrived at a result respecting the merits at variance with that pronounced, a result which seems to us manifestly right and forces us to conclude that the construction put upon the contract by the state courts could only have been reached by giving effect to the statute of 1917. What was said in *Terre Haute, etc., Railroad Co. v. Indiana*, 194 U. S. 579, 589, 24 Sup. Ct. 767, 769 (48 L. Ed. 1124) is apposite and controlling:

"The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court."

And see *Detroit United Ry. v. Michigan*, 242 U. S. 238, 246-248, 37 Sup. Ct. 87, 61 L. Ed. 268.

The jurisdiction of this court is, therefore,

upheld, and we proceed to the consideration of the case on its merits; and here the crucial question is: What is the nature of the contractual obligation with which the judgment of the state court deals?

By the act of 1887 numerous obligations were imposed on the canal trustees and their assigns, among them: (a) To complete the canal within two years so as to carry a designated body of water to Gervais street; (b) furnish a measure of 1,500 horse power to the state and others; (c) keep the canal open for navigation free of charge, and (d) complete the canal as soon as practicable down to the Congaree river. No provision is made in respect of the consequences to result in

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case of a failure to perform any *of these obligations. The only specific provision suggesting a forfeiture is:

"That should the said canal not be completed to Gervais street within seven years * * * all the rights, powers and privileges granted by this act shall cease and the said property shall revert to the state."

The effect of the acts of 1887 and 1890, and the subsequent transactions based on them, was to vest in the defendant title to the property in fee; and for this the consideration moving from the defendant was valuable and substantial. Did the failure to comply with the provision requiring completion of the canal to the Congaree river divest defendant of this title?

[5,7] We begin the inquiry with the general rule before us that "conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are construed strictly" (2 Washburn on Real Property [6th Ed.] § 942), and that "courts always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so" (Id. § 938). Here there are no express terms creating, and no words such as are commonly used to introduce, a condition; nor is there any provision giving the right of re-entry upon failure to perform. It is urged by the state Supreme Court that the legislative intention must be gathered from the statute as a whole, to be read in the light of its dominant purpose which was to connect the waters of the Broad and Congaree rivers above and below shoal water, so as to promote navigation; the other purposes, though important, being subsidiary. But the purpose to accomplish this result is equally consistent with the view which regards the provision in question as a covenant, the only difference being that the remedy for a breach would be different and less drastic. In *Oregon & California R. R. Co. v. United States*, 238 U. S. 393, 35 Sup. Ct. 908, 59 L. Ed. 1360, this court was called upon to construe the proviso in a land grant act to

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the *effect that the lands granted must be sold only to actual settlers, etc., and it was

held that this did not constitute a condition subsequent, but an enforceable covenant. In the course of the opinion (238 U. S. 419, 35 Sup. Ct. 919 [59 L. Ed. 1360]) it was said:

"It appears, therefore, that the acts of Congress have no such certainty as to establish forfeiture of the grants as their sanction, nor necessity for it to secure the accomplishment of their purposes—either of the construction of the road or sale to actual settlers—and we think the principle must govern that conditions subsequent are not favored but are always strictly construed, and where there are doubts whether a clause be a covenant or condition the courts will incline against the latter construction; indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so."

And see *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 353, 16 Atl. 4, 1 L. R. A. 380.

[8] Moreover, the conveyance was absolute and for a valuable consideration, and a mere purpose to attain a particular end, however it may have influenced the legislation, could not have the effect of debasing the fee. See *Stuart v. Easton*, 170 U. S. 383, 394-397, 18 Sup. Ct. 650, 655 (42 L. Ed. 1078) where this court said:

"While the proprietaries may have been mainly influenced in making the grant by a desire to advance the interests of the town, or were actuated by motives of charity, yet the transaction was not a mere gift, but was upon a valuable consideration, and it was the evident intention of the grantors to convey all their estate or interest in the land for the benefit of the county. The declaration in the patent of the purposes for which the land was to be held, conjoined as it was with a reference to the act of the assembly wherein the trust was created, could not have the effect of qualifying the grant of the fee simple, any more than if the declaration of the purposes for which the land was to be held had been omitted and a declaration of the trust made in an independent instrument."

[9] Not only does the statute contain no positive terms creating, or words requiring

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the provision in question to *be construed as, a condition subsequent, but the clear implication is to the contrary. The clause relating to the section of the canal down to Gervais street is expressly that upon failure to complete in seven years the property shall revert to the state. In contrast, it is significant that no forfeiture is specifically prescribed with respect to the noncompletion of the Congaree section of the canal. If this requirement, nevertheless, be construed as a condition subsequent, there can be no rational ground for holding that the other obligations of the contract are not susceptible of a like construction. Among these obligations is that requiring the completion of the canal to Gervais street in two years; but the express provision for a forfeiture for failure to complete it in seven years, negatives, as a matter of logical necessity, any suggestion that a

forfeiture would be incurred for a failure to complete in two years. The inference, as applied to the other obligations, including that now in question, while not so direct and obvious, is, nevertheless, one which naturally flows from the premises.

The proviso for a forfeiture in the one case is at least strongly persuasive of an intention not to impose it in other cases not so qualified. When, in addition to this, we consider all the circumstances, including the fact that the sale to the defendant was absolute and for a valuable consideration, that there are no express terms creating a condition, no clause of re-entry nor words of any sort indicating such purpose, the conclusion is unavoidable that the obligation in question is a covenant and not a condition subsequent. *Board of Commissioners v. Young*, 59 Fed. 96, 8 C. C. A. 27; opinion by Judge, afterward Justice, Lurton. We quote from page 105 of 59 Fed., from page 36 of 8 C. C. A.:

"That the grantor ever contemplated a reverter is not to be presumed, in the light of the presence of absolute words of conveyance and quitclaim, and the absence of any provision for a reverter or re-entry. If it had been intended that the conveyance should terminate

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on an *abandonment of the public use, it is strange that some language was not used indicative of such purpose. Too much weight was attached to the circumstance that the city wished the title in order to maintain a suit against a trespasser. Such suit could have been maintained without the title. Too little weight has been given to the fact that the deed was upon a valuable consideration; to the fact that it was a quitclaim of all right, title, and interest; to the fact of a previous common law dedication; and to the failure, under such circumstances, to make the title subject to an express right of re-entry. The minuteness of direction concerning the administration of property conveyed to a public use is insufficient to take the case out of the rule, supported by an overwhelming weight of authority, that the mere expression of a purpose or particular use to which property is to be appropriated will not make the estate a conditional one."

[10, 11] The effect of the act of 1917 is to convert that which we have held to be a covenant into a condition subsequent and to impose as a penalty for its violation the forfeiture of an extensive and valuable property. It requires no argument to demonstrate that this constitutes an impairment of the contract here involved, in violation of the Constitution. The impairment of a contract may consist in increasing its burdens as well as in diminishing its efficiency.

"Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation." *Green v. Biddle*, 8 Wheat. 1, 84 (5 L. Ed. 547).

See, also, *Boise City Co. v. Boise Artesian Hot & Cold Water Co.*, 230 U. S. 84, 90, 92, 33 Sup. Ct. 997, 57 L. Ed. 1400.

The judgment of the state Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

(261 U. S. 171)

BANK OF AMERICA v. WHITNEY CENT. NAT. BANK.

(Argued Jan. 15, 1923. Decided Feb. 19, 1923.)

No. 205.

1. Corporations ⚡668(7)—*New Orleans bank held not "doing business" in New York, so as to support service on its president while temporarily in New York.*

A New Orleans bank, whose New York correspondents transacted an extensive business for it, but which had no place of business in New York, and none of whose officers or employees resided there, was not "doing business" in New York, so as to warrant the inference that it was present there, and support service of process made on its president while temporarily in New York.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. Corporations ⚡665(1)—*Foreign corporation must be doing business in such manner and to such extent as to establish its actual presence.*

The jurisdiction taken of foreign corporation, in the absence of statutory requirement or express consent, does not rest on a fiction of constructive presence, but flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Bank of America against the Whitney Central National Bank. Service of process was set aside on motion, and plaintiff brings error. Affirmed.

Mr. Henry Root Stern, of New York City, for plaintiff in error.

Messrs. J. Blanc Monroe, of New Orleans, La., and Martin Conboy, of Riverdale on Hudson, N. Y., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Bank of America, a New York corporation, brought this action in the federal court for the Southern district of New York, against the Whitney Central National Bank, which has its banking house and usual place of business at New Orleans, La. Service of

process was made solely by delivering a summons to its president while temporarily in New York. Defendant appeared specially, challenged the jurisdiction of the court, and moved that the service be set aside. The questions of fact arising on the motion were referred to a special master to take proofs and make findings. The motion was heard upon his report, and the service was set aside

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*on the ground that defendant was not amenable to process within the district. The case is here under section 238 of the Judicial Code (Comp. St. § 1215); the question of jurisdiction having been duly certified. The sole question for decision is whether, at the time of the service of the process, defendant was doing business within the district in such manner as to warrant the inference that it was present there. *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 265, 37 Sup. Ct. 280, 61 L. Ed. 710; *Rosenberg Bros. & Co., Inc., v. Curtis Brown Co.* (No. 102, Jan. 2, 1923) 260 U. S. 516, 43 Sup. Ct. 170, 67 L. Ed. —.

The facts relied upon to establish presence of the defendant within the district consist wholly of its relations to the Hanover National Bank and five other banks, whose places of business are located in New York, and of transactions conducted through them. Each of these six banks is what is commonly called a correspondent of the defendant. In each the Whitney Central carries continuously an active, regular deposit account. But its transactions with these banks are not limited to making deposits and drawing against them. Superimposed upon the simple relation of bank and depositor are numerous other transactions which necessarily involve also the relationship of principal and agent. These additional transactions conducted by the correspondent banks include: Payment in New York of drafts drawn, with accompanying documents, against letters of credit issued by defendant at New Orleans; the receipt in New York from brokers and others of securities in which the Whitney Central or its depositors are interested, and the delivery of such securities; the making of payment to persons in New York for such securities; the holding of such securities on deposit in New York for long periods and arranging substitution of securities; the cashing, under specific instructions from defendant given in New Orleans, of checks drawn on it by third parties with whom it had no banking or deposit relations; the re-

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ceipt in New York *from third parties, with whom defendant apparently had no banking relations, of deposits of moneys for account of its customers.

[1, 2] The Whitney Central had what would popularly be called a large New York business. The transactions were varied, important and extensive. But it had no place

of business in New York. None of its officers or employees was resident there. Nor was this New York business attended to by any one of its officers or employees resident elsewhere. Its regular New York business was transacted for it by its correspondents—the six independent New York banks. They, not the Whitney Central, were doing its business in New York. In this respect their relationship is comparable to that of a factor acting for an absent principal. The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like “*qui facit per alium facit per se*.” It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established. That the defendant was not in New York, and hence was not found within the district, is clear.

Whether a national bank could under any circumstances be subjected, without its consent, to suit in a state or district, other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case.¹

Affirmed.

(261 U. S. 174)

LUMIERE v. MAE EDNA WILDER, Inc.

(Argued Jan. 18, 1923. Decided Feb. 19, 1923.)

No. 242.

1. Courts ☞ 274—Corporation cannot be sued in district in which it is found by serving executive officer there temporarily.

Jurisdiction over a corporation cannot be acquired, in a district in which it has no place of business and is not found, merely by serving process on an executive officer temporarily therein, even if he is there on the business of the company.

2. Copyrights ☞ 79—Service in copyright suit on president, while temporarily in district, not service on “agent.”

Within Act March 4, 1909, § 35 (Comp. St. § 9556), providing that copyright infringement suits may be instituted in the district of which defendant or his agent is an inhabitant, or in which he may be found, service of process on the president of a corporation in a district in which the corporation transacted no business,

¹ See Revised Statutes, § 5190 (Comp. St. § 9744) and other acts concerning the place in which a national bank may do business. 29 Op. Atty. Gen., 81, 98; and concerning the district in which a national bank may be sued. See Revised Statutes, § 5198 (Comp. St. § 9759); Act July 12, 1882, c. 290, § 4, 22 Stat. 162 (Comp. St. § 9668); Act August 13, 1888, c. 866, § 4, 25 Stat. 433; Judicial Code, § 24, subd. 16 (Comp. St. § 991); First National Bank of Charlotte v. Morgan, 132 U. S. 141, 145, 10 Sup. Ct. 37, 33 L. Ed. 282; Continental National Bank of Memphis v. Buford, 191 U. S. 119, 123, et seq., 24 Sup. Ct. 54, 48 L. Ed. 119.

and in which he was not in any way representing it, was not service upon an “agent,” as the meaning of that word as used in a statute is to be determined from the context and the subject-matter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agent.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Samuel Lumiere against Mae Edna Wilder, Inc. From an order quashing the service on motion, plaintiff appeals. Affirmed.

Mr. W. S. Evans, of New York City, for appellant.

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*Mr. F. F. Church, of Rochester, N. Y., for appellee.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The venue of suits for infringement of copyright is not determined by the general provision governing suits in the federal district courts. Judicial Code, § 51 (Comp. St. § 1033). The Copyright Act provides that suits “may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found.” Act March 4, 1909, c. 320, § 35, 35 Stat. 1075, 1084 (Comp. St. § 9556). Whether under this section a valid service was made upon defendant is the only question for decision.

New York is divided into four federal judicial districts. Judicial Code, § 97 (Comp. St. § 1084). Lumiere, a citizen and resident of New York City, in the Southern district, brought, in the federal court for that district, this suit to enjoin the infringement of a copyright by publications in that city. The defendant, Mae Edna Wilder, Inc., is a New York corporation, with its place of business in Rochester, in the Western district. It was not an inhabitant of the Southern district. It had no place of business there. It had no agent or employee there authorized to carry on business on its behalf. It transacted no business there. The only service of process made was by delivering to Mr. Adkin, who was its president, a copy of the summons while he was temporarily in New York City. He was not an inhabitant of the Southern district, and it was not shown that he was there on business of the company. The defendant, appearing especially for the purpose of objecting to the jurisdiction of the court, moved to quash the service on the ground that it was not amenable to process. The motion was granted;

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and the case is here on appeal *under section 238 of the Judicial Code (Comp. St. § 1215), the question of jurisdiction having been duly certified.

[1, 2] That jurisdiction over a corporation cannot be acquired in a district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the company, has been settled. *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; *Rosenberg Bros. & Co., Inc., v. Curtis Brown Co.* (No. 102, decided January 2, 1923) 260 U. S. 516, 43 Sup. Ct. 170, 67 L. Ed. —; *Bank of America v. Whitney Central National Bank* (No. 205, decided this day) 261 U. S. 171, 43 Sup. Ct. 311, 67 L. Ed. —. The contention here, is that jurisdiction was obtained over the defendant because its president is an agent within the meaning of the statute and was personally found in New York City. If such facts are sufficient to give jurisdiction, a suit upon a copyright may be brought in any district of the United States in which one who is an officer or an agent of a defendant is served with process, although neither plaintiff nor defendant has his residence or a place of business there, and although the copyright was not infringed there. It is not to be lightly assumed that Congress intended such a thing. Compare *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; *Macon Grocery Co. v. Atlantic Coast Line R. R. Co.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300; *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 31 Sup. Ct. 81, 54 L. Ed. 1069.

Ordinarily a civil suit to enforce a personal liability under a federal statute can be brought only in the district of which the defendant is an inhabitant. Judicial Code, § 51. In a few classes of cases, a carefully limited right to sue elsewhere has been given. In patent cases it is the district of which the defendant is an inhabitant or in which acts of infringement have been committed and the defendant has a regular and established place of business. Judicial Code, § 48 (Comp. St. § 1030); *W. S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808. In cases under the anti-trust laws, it is where the defendant "resides or is found or has an agent" (Act Oct. 15, 1914, c.

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323, § 4, 38 Stat. *730, 731; Comp. St. § 8835d), and, in the case of corporations, the "district whereof it is an inhabitant" or "any district wherein it may be found or transacts business." Section 12, p. 736 (Comp. St. § 8835k). It is not reasonable to conclude that Congress intended in copyright cases to give a right far greater than these. "Agent" is a word used in the law in many senses. What it means in a statute is to be determined from the context and the subject-matter. The president of a business corporation is, commonly, authorized to represent it for many purposes, and it may often be said properly that he is acting

as its agent. But induction into office does not impress upon a person the status of agent of the corporation, so that he must be deemed its agent in every jurisdiction which he happens to enter, although the corporation transacts no business there and he is not there in any way representing it. The service of process made upon Mr. Adkin was, clearly, not service upon an agent of the corporation within the meaning of the Copyright Act (U. S. Comp. St. § 9517 et seq.).

As there is in this case only one defendant, the provision concerning suits in states which contain more than one federal judicial district can have no application. See Judicial Code, § 52 (Comp. St. § 1034); *Camp v. Gress*, 250 U. S. 308, 314, 39 Sup. Ct. 478, 63 L. Ed. 997. Whether, under the Copyright Act, service upon an agent would be effective as upon one "found," if it appeared that the agent when served was transacting some business for defendant within the jurisdiction, but was there only temporarily, and had his residence and place of business elsewhere, is a question which we need not decide in this case.

Affirmed.

(261 U. S. 1)

**GORHAM MFG. CO. v. WENDELL, State
Comptroller of New York, et al.**

(Argued on Return to Rule Jan. 22, 1923.
Decided Feb. 19, 1923.)
No. 196.

1. Abatement and revival — Statute authorizing substitution of successors in actions against federal officers does not apply to state officers.

Act Feb. 8, 1899 (Comp. St. § 1594), permitting successors of United States officers, who go out of office pending litigation, to be substituted for them, which was enacted in compliance with suggestion from the Supreme Court, in an opinion holding that such substitution could not be made in the absence of statute, does not apply in the case of a suit against state officers.

2. Courts — Federal courts can follow state provision for substituting successors in office.

Federal courts can avail themselves of and state provision for substitution, for retiring state or county officers, of their successors in office in suits to enjoin them from action, under color of their offices, alleged to be unauthorized or unconstitutional.

3. Abatement and revival — Death of member does not abate suit against continuous commission.

Where the original suit was brought against a state commission, which was a continuous body, the retirement or death of its members would not effect the abatement of the suit, and the successors of those members could be substituted as parties.

4. Abatement and revival ⚡47 — Federal courts should not be astute to abate suits against officers, if there is any state authority for substituting successors.

A suit to enjoin state officers from enforcing a tax law of the state on the ground that it is unconstitutional, though in form a suit to restrain a personal wrong threatened by the officer, is practically a suit to determine whether the mode of enforcement of the laws is justified by the fundamental law of the state or nation, in which it is of importance to the state or county that the question shall be promptly determined, and in such case the federal courts need not be astute to enforce the abatement of suit because of the retirement from office of the original defendants, if any basis at all can be found in state law or the practice of the state courts for substitution of their successors in office, and the state officers consent to such substitution.

5. Appeal and error ⚡330(2) — New York practice permits substitution of successors in suits against officers.

The New York practice permits a successor in office to be substituted for the original defendant in a suit against a state or county officer to restrain the enforcement of a tax law, so that such substitution can be permitted on appeal from a decree of the United States District Court for the Southern District of New York.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Gorham Manufacturing Company against James A. Wendell, individually and as Comptroller of the state of New York, and Charles D. Newton, individually and as Attorney General of the state of New York. From a decree dismissing the bill, complainant appeals. On motions to substitute, in place of James A. Wendell, the State Tax Commission, and, in place of Charles D. Newton, Carl Sherman, his successor in office. Motions granted.

See, also, *Gorham Mfg. Co. v. Travis* (D. C.) 274 Fed. 975.

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*Messrs. Robert C. Beatty and George Carlton Comstock, both of New York City, for appellant.

Mr. Chief Justice TAFT delivered the opinion of the Court.

On December 11, 1922, appellant made a motion to substitute the State Tax Commission of the state of New York as appellee in place of James A. Wendell, former Comptroller of the state of New York, deceased. This was consented to by Charles D. Newton, then Attorney General of New York, the other appellee. On January 1st, Charles D. Newton ceased to be Attorney General, and was succeeded in office by Carl Sherman. A second motion is made to substitute the State

Tax Commission for Wendell, and Sherman, Attorney General, for Newton. The State Tax Commission and Attorney General Sherman consent to the granting of this motion; indeed, they ask that they be admitted as substituted parties. On consideration of the first motion, a rule was issued against appellant to show cause why the case as to the Comptroller should not be dismissed in view of *Irwin v. Wright*, 258 U. S. 219, 42 Sup. Ct. 293, 66 L. Ed. 573, and *United States v. Butterworth*, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. Ed. 873. The case comes on now for disposition of the two motions.

The suit here is a bill in equity filed by a corporation of Rhode Island in the United States District Court for the Southern District of New York, to enjoin the Comptroller and Attorney General of New York from collecting a corporation tax imposed on the complainant amounting to \$13,582.56, under ar-

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article 9-A of the Tax Law of the *state of New York, as amended by chapters 90 and 443 of the Laws of New York of 1921. The ground alleged for the right to relief is that these chapters of the Tax Laws of New York as applied to the complainant violate its rights under the Constitution of the United States. The bill was dismissed by the District Court, and this is a direct appeal from that decree under section 238 of the Judicial Code, as amended January 28, 1915, c. 22, § 2, 38 Stat. 803 (Comp. St. § 1215).

[1, 2] The question raised by the rule was considered by this court in *Irwin v. Wright*, 258 U. S. 219, 222, 42 Sup. Ct. 293, 66 L. Ed. 573, and the existing state of the law on the substitution of public officers in suits against their predecessors in this and other federal courts was stated. A suit to enjoin a public officer from enforcing a statute or to compel him to act by mandamus is personal, and, in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office. In *United States v. Butterworth*, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. Ed. 873, the suit was to compel Butterworth, the Commissioner of Patents, by mandamus to issue a patent. Butterworth died pending the suit, and this court refused to allow the plaintiff in error to substitute his successor, although that successor consented to the substitution. In compliance with a suggestion from this court, Congress enacted a statute under which successors of United States officers going out of office pending litigation may now be substituted for them. Act Feb. 8, 1899, c. 121, 30 Stat. 822 (Comp. St. § 1594). But the statute is not an enabling act in the case of state officers. Reference is made to *Long Sault Development Co. v. Call*, 242 U. S. 272, 37 Sup. Ct. 79, 61 L. Ed. 294, to show from the record that in the state Supreme

Court a New York State Treasurer was substituted for his predecessor in office and no objection was made here. That can hardly be regarded as an authority in this court on the point, for it passed here without notice. The same may be said of *Saranac Land & Timber Co. v. Roberts*, 177 U. S. 318, 20 Sup. Ct. 642, 44 L. Ed. 786, also cited. There

^{*4} is a plain intimation in *Irwin v. Wright*, supra, however, that the federal courts can avail themselves of any state provision for substitution, for retiring state or county officers, of their successors in office in suits to enjoin them from action under color of their offices, alleged to be unauthorized or unconstitutional. This intimation is confirmed in *City of Boston v. Jackson*, Treasurer of the Commonwealth of Massachusetts, 260 U. S. 309, 43 Sup. Ct. 129, 67 L. Ed. —, decided by this court December 4, 1922.

[3-5] It appears from chapters 90 and 443 of Laws of New York, 1921, that the powers and duties vested in the Comptroller have been transferred to the Tax Commission; but this does not, of itself, justify the substitution of the Commission for the Comptroller in a suit which is in its essence a personal suit to prevent his personal violation of law and the rights of the complainant. Had the original suit been brought against the Tax Commission, and if the Commission is a continuous body, the retirement or death of members would not effect the abatement of the suit and successors could be substituted as parties. *Irwin v. Wright*, supra, 258 U. S. 224, 42 Sup. Ct. 293, 66 L. Ed. 573; *Marshall v. Dye*, 231 U. S. 250, 34 Sup. Ct. 92, 58 L. Ed. 206; *Richardson v. McChesney*, 218 U. S. 487, 492, 31 Sup. Ct. 43, 54 L. Ed. 1121; *Murphy v. Utter*, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070. But that principle is not helpful here because the inherent difficulty in all these cases is not in the liability and suability of the successor in a new suit. It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no privity between them, as there is not if the officer sued is injuring or is threatening to injure the complainant without lawful official authority. There is no legal relation between the wrong committed or about to be committed by the one, and that by the other. Of course, practically, the question usually presented in such cases is not really a personal one at all. It is the question whether a mode of enforcement of tax laws favorable to the state or county is lawfully justified, or whether the state law is warranted by the fundamental law of the

^{*5} state or nation. In such cases it is, of course, of importance to the state or county that the question at issue be promptly disposed of, and that the incumbent officers charged with the defense of the state or county's in-

terests maintain and continue that defense whether they were in office at the beginning of the litigation or not. For this reason, where such officers on behalf of state or county consent to the substitution, the federal courts need not be astute to enforce the abatement of the suit if any basis at all can be found in state law or the practice of the state courts for substitution of the successors in office.

In the case before us, counsel have cited the new Civil Practice Act of New York, that took effect October 1, 1921, which indicates a broad policy of joining of all parties to any controversy who are necessary to, or proper for, a determination thereof at any stage of the cause and as the ends of justice may require. Sections 192, 193, and 211 are cited. Undoubtedly these sections are very liberal but it may be doubted whether they meet the requirement here or were intended to do so. We need not decide this question, however, for we find ourselves able to reach the right conclusion by accepting the declaration of the Court of Appeals of New York in *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. 791, 41 L. R. A. 231, 66 Am. St. Rep. 547. In that case a point was raised (though it must be admitted its disposition was not necessary to the ultimate conclusion of the court), as to whether an incoming state officer could be substituted as defendant in a mandamus suit brought against his predecessor. The law did provide for such substitutions in suits against county and municipal officers. Upon this point the Court of Appeals, at page 148 of 156 N. Y., at page 795 of 50 N. E. (41 L. R. A. 231, 66 Am. St. Rep. 547), said:

"But there is no apparent reason why the provisions of the Code controlling actions and special proceedings against county, town and municipal officers, should not apply as well to state officers. The practice therein provided for is simple and affords ample protection to

^{*6} all parties. Section 1930 provides: 'In such an action or special proceeding, the court must, in a proper case, substitute a successor in office, in place of a person made a party in his official capacity, who has died or ceased to hold office; but such a successor shall not be substituted as a defendant, without his consent, unless at least fourteen days' notice of the application for the substitution, has been personally served upon him.'"

We infer from this and from the substitution, already referred to, made by the Supreme Court of New York in *Long Sault Co. v. Homer D. Call*, Treasurer of New York, 242 U. S. 272, 37 Sup. Ct. 79, 61 L. Ed. 294; *Matter of Long Sault Development Co.*, 212 N. Y. 1, 105 N. E. 849, Ann. Cas. 1915D, 56, that such substitutions are a matter of state practice and law, and as already said, this enables us to avail ourselves in such a case as this of that practice. *City of Boston v. Jackson*, supra.

The motions for substitution of the State Tax Commission of New York for Wendell, Comptroller, and of Sherman, Attorney General, for Newton, Attorney General, will be granted.

(261 U. S. 119)

GREAT NORTHERN RY. CO. v. STEINKE et al.

(Argued Dec. 15, 1922. Decided Feb. 19, 1923.)

No. 152.

1. Public lands § 92—Statutory grant of railroad right of way effective, notwithstanding absence of provision for patent.

That Act March 3, 1875 (Comp. St. §§ 4921-4926), granting rights of way through the public lands to railroad companies, contains no provision for the issuance of a patent, does not detract from the efficacy of the grant; the approved map of the railroad being intended to be the equivalent of a patent.

2. Public lands § 92—Approved map of railroad relates back to date of filing with local land office.

The approved right of way map filed by a railroad under Act March 3, 1875 (Comp. St. §§ 4921-4926), relates back, as against intervening claims, to the date when the map was filed in the local land office for transmission through the General Land Office to the Secretary of the Interior.

3. Public lands § 92—Persons other than United States could not complain of railroad's change in selection of station grounds.

Where a railroad company surrendered station grounds first selected by it, under Act March 3, 1875 (Comp. St. §§ 4921-4926), and included other station grounds in its right of way map filed under that act, the Secretary of the Interior, by approving the map, assented to the change, and, as the United States did not object, others who had no interest in the premises at the time had no right to complain.

4. Evidence § 48—Judicial notice not taken of files of General Land Office respecting filing of railroad's right of way map.

The files of the General Land Office with respect to a railroad's right of way map, filed under Act March 3, 1875 (Comp. St. §§ 4921-4926), are not within the range of judicial notice, and, if there was any purpose to rely on them, they should have been produced in evidence.

5. Public lands § 92—Date of refileing of amended right of way map determines rights thereunder.

Where a railroad's right of way map, filed under Act March 3, 1875 (Comp. St. §§ 4921-4926), was returned to the company for amendment, and, after amendment, refiled, it cannot be assumed that the amendments were immaterial, and, in the absence of any proof of their nature and extent, the date of refileing is

the time to which rights under the approved map relate.

6. Public lands § 92—Approval of railroad map subject to existing rights did not exclude tract as to which rights existed.

The approval of a railroad's right of way map, filed under Act March 3, 1875 (Comp. St. §§ 4921-4926), "subject to all valid existing rights," did not exclude from the grant land covered by a preliminary homestead entry, but merely recognized that the grant was ineffective against such claims, unless extinguished through private negotiations or condemnation proceedings, under section 3 (Comp. St. § 4923), or Rev. St. § 2288 (Comp. St. § 4535).

7. Public lands § 92—On relinquishment of homestead entry existing when right of way map approved, railroad's right became perfect.

A railroad company's right of way map, When approved under Act March 3, 1875 (Comp. St. §§ 4921-4926), vested in the company a complete right to a tract selected for station purposes, subject to an inchoate right under a preliminary homestead entry, and, where the entryman thereafter voluntarily relinquished his entry, the company's rights were as if the homestead claim never had existed.

8. Public lands § 92—Right of way grant included lands covered by homestead rights, subject to duty of making compensation.

Act March 3, 1875 (Comp. St. §§ 4921-4926), granting railroad rights of way through the public lands, did not exclude lands covered by homestead or similar claims from the grant, but included them, subject only to the qualification that due compensation must be made to the claimants for their inchoate or possessory rights to make the grant operative against them, and an abandonment of a claim relieved the grant of the qualification.

9. Public lands § 92—Neglect to note grant of station grounds in local land office did not affect company's title.

The neglect of local land officers to note on the township plat and tract book that under railroad company's approved right of way map certain land was granted to it for station purposes did not prejudice or affect the company's title, or subordinate its title to a junior patent.

10. Public lands § 92—Persons claiming under homestead entry chargeable with notice of railroad's senior grant, though not noted in local land office.

Where a railroad had been constructed and was in operation across a subdivision when a homestead claim was initiated, and persons subsequently purchasing from the homestead entryman understood that the company was not claiming under him, and that its rights, whatever they were, were older than his, they were put on inquiry respecting the nature and extent of its claim, and chargeable with notice of the company's proceedings under Act March 3, 1875 (Comp. St. §§ 4921-4926), a record of which was kept in the General Land Office, and by which it acquired certain of the lands for station purposes.

11. Public lands  92—Laches or limitations cannot give right, without consent of United States, in land granted for railroad station purposes.

Under Act March 3, 1875 (Comp. St. §§ 4921-4926), granting railroad rights of way through the public lands, together with station grounds, etc., the grant is only for the quasi public uses named in the act, and the railroad receives the land on the implied condition that it shall be devoted to those uses, and subject to forfeiture for breach of the condition, and neither laches on the part of the company nor any local statute of limitations can invest individuals with any interest in the tract, or with a right to use it for private purposes, without the sanction of the United States.

On Writ of Certiorari to the Supreme Court of the State of North Dakota.

Suit by the Great Northern Railway Company against Vivian H. Steinke and others. A judgment for defendants was affirmed by the Supreme Court of North Dakota (183 N. W. 1013), and plaintiff brings certiorari. Reversed.

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*Messrs. C. J. Murphy, of Grand Forks, N. D., M. L. Countryman, of St. Paul, Minn., and Fred L. Fishback, of Washington, D. C., for petitioner.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the Great Northern Railway Company to determine conflicting claims to a small tract of land adjoining its right of way at Springbrook, N. D. That company claims the tract under a grant of station grounds made by the United States to the St. Paul, Minneapolis & Manitoba Railway Company, and the defendants claim the same under a patent from the United States to Philander Pollock. The defendants prevailed in the trial court and in the Supreme Court of the state. 183 N. W. 1013. A writ of certiorari brings the case here. 257 U. S. 629, 42 Sup. Ct. 92, 66 L. Ed. 405.

At a time when the lands in that vicinity were public lands, the St. Paul, Minneapolis & Manitoba Railway Company, being duly

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qualified so to do, sought and secured a right of way through the same under the Act of March 3, 1875, c. 152, 18 Stat. 482 (Comp. St. §§ 4921-4926), and constructed its road within and along such right of way. At the same time and in the same way it sought and secured certain lands two miles east of the present site of Springbrook for station grounds. Afterwards it changed its station to a point adjacent to such site, and proceeded to give up the original station grounds and to select others, including the tract in controversy, in their stead. It made the requisite survey of the new grounds, prepared a map thereof and on January 12, 1900, filed the map in the local land office, whence it was to be transmitted to the Gen-

eral Land Office and laid before the Secretary of the Interior. The map was returned to the company for amendment in particulars not shown in the record, was amended accordingly, and on July 18, 1900, was refiled in the local land office. The local officers then transmitted it to the General Land Office, and on October 18, 1900, the Secretary of the Interior approved it, "subject to all valid existing rights." On being advised of the Secretary's approval, the local officers should have noted the disposal on the township plat and tract book in their office, but this was not done. The approved map and all papers relating thereto were preserved in the General Land Office in the usual way, and a certified copy of the map and of some of the papers was produced in evidence at the trial.

On January 12, 1900, when the map was first filed in the local land office, the tract in question was public land and free from any claim; but before July 18, 1900, when the map was refiled, the tract was included, with other land, in a preliminary homestead entry made by John Welo. That entry remained intact until May 13, 1901, and was then relinquished by Welo and canceled. On August 19, 1902, the tract was included, with other land, in a preliminary homestead entry made by Philander Pollock, and on June 1, 1903, he released the 40-acre subdivision

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containing this tract from that entry, and made another and unrelated entry of the same subdivision. Under the latter entry a patent for the full subdivision was issued to him on February 28, 1906.

Pollock and others, whom he interested in the project, platted the greater part of the 40-acre subdivision, including the tract in question, as a town site. The defendants purchased from them some of the lots, which, as platted, cover part of this tract.

The station grounds shown on the map approved by the Secretary of the Interior consist of a long strip of land 100 feet wide extending along one side of the right of way at Springbrook. The tract in question is part of that strip and is in close proximity to the tracks and depot.

The rights of the St. Paul, Minneapolis & Manitoba Railway Company in the road, right of way, station grounds, etc., passed to the plaintiff, the Great Northern Railway Company, in 1907.

The Supreme Court of the state, in rejecting the plaintiff's claim under the grant of station grounds and sustaining the defendants' claim under the patent to Pollock, put its decision on two independent grounds. One was that, when the map was refiled in the local land office, and when it was approved by the Secretary of the Interior, the tract in question was included in Welo's preliminary homestead entry, and therefore was not subject to disposal under the act of 1875,

and that the Secretary excluded it from his approval by making the latter "subject to all valid existing rights." The other was that thereafter the land officers permitted Pollock to make an entry of the 40-acre subdivision containing this tract, issued to him a certificate of final entry making no reference to the railroad company's claim, and gave him a patent purporting to cover the entire subdivision, and that the defendants purchased from Pollock in good faith, relying on the final certificate and patent so issued to him.

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The pertinent provisions of the act of 1875 are as follows:

"Section 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; and also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

"Sec. 3. That the Legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled [an act to amend an act entitled] 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four."

"Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof

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by *the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats of said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

"Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way

shall be provided for by treaty-stipulation or by act of Congress heretofore passed."

Comp. St. §§ 4921, 4923-4925.

As with other public land laws, the Secretary of the Interior was empowered to prescribe regulations for carrying the act into effect. Such regulations were prescribed. Those in force at the times to which the controversy relates were promulgated November 4, 1898. 27 L. D. 663.

[1, 2] In some respects the act was loosely drafted, but through a long course of administration in the land department and many adjudications in the courts its meaning and effect have come to be pretty well settled. Its purpose was to enhance the value and hasten the settlement of the public lands by inviting and encouraging the construction and operation of needed and convenient lines of railroad through them. Nothing was granted for private use or disposal, nor beyond what Congress deemed reasonably essential, presently or prospectively, for the quasi public uses indicated. Because of this, the act has been regarded as requiring a more liberal construction than is accorded to private grants or to the extensive land grants formerly made to some of the railroads. *United States v. Denver &*

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Rio Grande Ry. Co., 150 U. S. 1, 8, *14, 14 Sup. Ct. 11, 37 L. Ed. 975; And see *Kindred v. Union Pacific R. R. Co.*, 225 U. S. 582, 596, 32 Sup. Ct. 780, 56 L. Ed. 1216; *Nadeau v. Union Pacific R. R. Co.*, 253 U. S. 442, 444, 40 Sup. Ct. 570, 64 L. Ed. 1002. There is no provision in the act for the issue of a patent, but this does not detract from the efficacy of the grant. The approved map is intended to be the equivalent of a patent defining the grant conformably to the intentment of the act (*Noble v. Union River Logging R. Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123), and to relate back, as against intervening claims, to the date when the map was filed in the local land office for transmission through the General Land Office to the Secretary of the Interior (*Stalker v. Oregon Short Line R. R. Co.*, 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027).

[3] In the state court the defendants sought to make the point that when the company secured the station grounds two miles east of the present site of Springbrook it exhausted its right under the act and therefore could not select or take the new grounds. But the point is without merit. The company did not try to hold the original grounds and also to secure the new ones. As shown by the map, it surrendered the former and sought the latter in their stead. By approving the map the Secretary of the Interior assented to the change—presumably because it appeared to be one which would subserve the interests of the public as well as those of the company. It was the practice of the land department to permit such changes. As the United States found no ground for objecting,

others who had no interest in the premises at the time are not in a position to complain. *Washington & Idaho R. R. Co. v. Cœur d'Alene Ry. Co.*, 160 U. S. 77, 97, 98, 16 Sup. Ct. 231, 40 L. Ed. 346.

[4, 5] The railway company contends that its rights under the approved map relate back to the time when the map was first filed in the local land office rather than to the time of the refileing; and, in furtherance of the contention, the company asks that we take judicial notice of the files in the General

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Land Office, which it says will show that the amendments made in the map between the filing and refileing were so unsubstantial that there was no real alteration. But we think the files in such a proceeding are not within the range of judicial notice and that if there was any purpose to rely on them in this connection they, or a certified copy of them, should have been produced in evidence at the trial. It cannot be merely assumed that the amendments were immaterial, and, in the absence of any proof of their nature and extent, the date of refileing, which was after they were made, must be taken as the time to which rights under the approved map relate.

We have seen that when the map was refiled, and when it was approved, the tract in question was included in Welo's preliminary homestead entry. The Supreme Court of the state thought this prevented any right in the tract from passing to the company under the approved map, and that the words, "subject to all valid existing rights," were inserted in the approval to show the tract was excluded. We reach a different conclusion.

[6] The words quoted were not peculiar to this map, but were commonly inserted in the approvals of that period. Their office was not to show that any of the land designated on the map was excluded from the grant, but to direct attention to what under the act would be true without them—namely, that the grant was to be effective as against the United States, but was not to impair valid existing claims of settlers or others, and that to make the grant effective against such claimants their rights should be extinguished through private negotiations or, if need be, through condemnation proceedings. See section 3 before quoted and section 2288, Rev. Stats. (Comp. St. § 4535).

[7] That Welo had a valid existing right in virtue of his preliminary entry must be conceded. But it was only an inchoate right to acquire the title by residing on the land and otherwise complying with the homestead

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law for a prescribed period. The title and real ownership were in the United States. Welo was under no obligation to perfect his claim. He could abandon it or relinquish it, but could not transfer it to another. Subject only to his claim the approved map vested in the company a complete right to the tract for station purposes. He voluntarily relinquished his entry and thus put an end to his

claim. Nothing then stood in the way of the company's right. It was as if Welo's claim never had existed.

[8] Unlike the lands grants considered in cases like *Kansas Pacific Ry. Co. v. Dunmeyer*, 113 U. S. 629, 639, 5 Sup. Ct. 566, 28 L. Ed. 1122, and *Hastings & Dakota R. Co. v. Whitney*, 132 U. S. 357, 361, 10 Sup. Ct. 112, 33 L. Ed. 363, the act of 1875 contains no provision whereby lands covered by homestead or similar claims when the grant attaches are excluded from it. On the contrary, a survey of all that the act does contain shows that the grant is intended to include lands of that class, but with the qualification, plainly implied in the third section, that due compensation must be made to the claimants for their inchoate or possessory rights to make the grant operative against them. *Washington & Idaho R. R. Co. v. Osborn*, 160 U. S. 103, 109, 16 Sup. Ct. 219, 40 L. Ed. 356. An abandonment of the claims relieves the grant of the qualification. On this question the decisions have been very plain. It was before the Supreme Court of North Dakota in *Jamestown & Northern R. R. Co. v. Jones*, 7 N. D. 619, 76 N. W. 227, which related to a right of way over which the railroad was constructed in advance of the filing and approval of the map. The part in controversy was included in an existing pre-emption claim when the road was constructed and also when the map was filed and approved. Afterwards the pre-emption claim was abandoned. Thereupon another claimant, who had settled on the land after the construction of the road and before the filing or approval of the map, made an entry of the same tract and received a patent—the entry papers and patent containing no ex-

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ception of the right of way. Two points were involved. One was whether the grant of the right of way attached as of the date when the road was constructed or as of the time when the map was filed or approved; and the other was whether the pre-emption claim which was in existence at all of these times operated to except the land from the grant. The decision on the latter point is shown in the following excerpt from the opinion:

"When the act of 1875 is construed as a whole, we believe that, as against the United States, the right of way is transferred, even when the land has been entered at the time the map is approved, and that, if such entry is subsequently abandoned or set aside, the grantee will enjoy an absolute easement in the land. The rights of the railroad company will be subject to all rights which have attached to the land before the filing and approval of the map of definite location. But, as against the United States, the grant is as effective in cases where the land has been entered as where it has not. Under any other view of the statute, the railroad company might be compelled to condemn successive rights of settlers, only to find that all its proceedings were futile, because in each case the settler's rights were, by cancellation or abandonment, destroyed. We think that it

was the purpose of Congress to make the grant operative as against the government, subject only to existing rights of settlers, and that the question whether a particular piece of land was within the terms of the grant, so far as the government was concerned, was not to depend upon the freedom of that land from settlement at the time the map was approved. Under this view of the statute, a railroad company could never be required to condemn any other than existing rights."

Other courts in the public land States have decided the question in the same way. *Hamilton v. Spokane & Palouse R. R. Co.*, 3 Idaho, 164, 28 Pac. 408; *Bonner v. Rio Grande*

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**Southern R. Co.*, 31 Colo. 446, 72 Pac. 1065; *Alexander v. Kansas City, Ft. Scott & Memphis R. Co.*, 138 Mo. 464, 40 S. W. 104.

The case of *Jamestown & Northern R. R. Co. v. Jones* was brought here on writ of error and the railroad company's claim to the right of way was upheld—the decision of the Supreme Court of North Dakota being disapproved as respects the time as of which the grant attached and sustained as respects the effect of the pre-emption claim which was in existence at that time and afterwards abandoned. 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698. The opinion in the present case does not refer to that case, and we assume it was overlooked. Otherwise it doubtless would have been followed, as it should have been.

We come, then, to the ruling that the defendants purchased from Pollock in good faith relying on the certificate and patent issued to him, and so are entitled to prevail.

[9] The claim on which Pollock received the certificate and patent was initiated more than two years after the new station grounds passed to the company under the approved map. True, the local land officers neglected to note that disposal on the township plat and tract book in their office; but this did not prejudice or affect the company's title. The noting was required by way of continuing a practice, which had long prevailed, of making the township plats and tract books in the land office of each district a fair and helpful index of all public land transactions in the district. Of course, a faithful adherence to the practice serves to prevent plural and conflicting disposals of the same lands, while a neglect of duty in that regard by the local officers sometimes, as here, results in confusing disposals. But the land department always has ruled that such a neglect of duty affords no justification for subordinating a senior to a junior claim or for making a second disposal in disregard of a prior one. *Edward R. Chase*, 1 Land Dec. 81; *Goist v.*

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Bottum, 5 Land Dec. 643; *Edward Young*, *9 Land Dec. 32; *Baird v. Chapman's Heirs*, 10 Land Dec. 210; *Linville v. Clearwaters*, 11 Land Dec. 356. In reason the point could not be ruled otherwise, for this would mean that a patent or its equivalent, although issued after full examination of the claim by the

Commissioner of the General Land Office and the Secretary of the Interior, could be thwarted or made of no avail by a subsequent omission on the part of the local land officers, notwithstanding this court has adjudged that such a conveyance, when regularly issued and recorded in the General Land Office, passes the title and cannot be recalled or canceled by even the Secretary of the Interior. *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167. The effect of such omissions often has been considered by this court and always has been determined along the lines just indicated. It will suffice to refer to two of the cases. In *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201, one party claimed under a land grant to a railroad company and the other under a patent issued on a cash entry. The grant was to attach when the route of the road was definitely fixed, and the Secretary of the Interior was then to withdraw from market all lands falling within the grant. A map definitely fixing the route was filed by the company with the Secretary and was accepted by him, but the intended withdrawal was not sent to the local land office for a half month or more. During that interval the cash entry was allowed and a patent certificate issued thereon. This court sustained the claim under the grant as being first in time, and, in defining the rights which the company acquired through the filing and acceptance of the map, said (106 U. S. at page 367, 1 Sup. Ct. 339 [27 L. Ed. 201]):

"No further action is required of the company to establish the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others."

In *Stalker v. Oregon Short Line R. Co.*, 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027,

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the railroad company was relying on a grant of station grounds under the act of 1875, which the local land officers neglected to note on their records, and the other party was claiming under a patent issued on a pre-emption claim. The Supreme Court of Idaho had sustained the claim of the railroad company because the map of the station grounds was filed in the local land office before the pre-emption claim was initiated (14 Idaho, 371, 94 Pac. 59), and that decision was affirmed by this court on the following grounds (225 U. S. at page 153, 32 Sup. Ct. 640 [56 L. Ed. 1027]):

"First, if we are right in holding that the grant vested in the company when the plat was approved, as of the date when filed, the failure of the officer in the district land office to properly mark the [township] plat could not operate to defeat the grant; and, secondly, the railroad company having done everything which it was required by law to do, should not be affected by the negligence of the register in not doing a duty upon which the vesting of title as against the United States did not depend."

And also (225 U. S. at page 154, 32 Sup. Ct. 640 [56 L. Ed. 1027]):

"We therefore conclude that the subsequent issue of a patent to the land entered by Reed [the pre-emptor] was subject to the rights of the railroad company theretofore acquired by approval of its station ground map. The patent is not an adjudication concluding the paramount right of the company, but, in so far as it included lands validly acquired theretofore, was in violation of law, and inoperative to pass title."

[10] When Pollock initiated his claim to the 40-acre subdivision, which includes the tract in question, the railroad was constructed and being operated across that subdivision, and this was true when the defendants purchased from him. Besides, the defendants understood, as did the community in general, that the company was not claiming under Pollock and that its rights, whatever they were, were older than his. These circumstances should have put the defendants on inquiry respecting the nature and extent of the company's claim and should have

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prompted *them to make the inquiry with particular regard to the situation before Pollock's claim was initiated—when the subdivision was public land. So far as appears they made no inquiry, but relied on the absence of any excepting clause in Pollock's certificate and patent, neither of which could bind the company or affect its prior rights. Among other sources of information they could have interrogated the company or its agent who was close at hand, but this was not done. In short they neglected the warning which inhered in the circumstances we have recited. The act of 1875 was a public statute applicable to public lands in that region and some notice should have been taken of it. We have seen that it made provision for acquiring a general right of way of a uni-

form width and for securing additional grounds for various station purposes; such grounds being in the nature of local extensions of the general right of way. A complete record of the company's proceedings under that act was kept in the usual way in the General Land Office, and it is reasonably certain that the defendants would have learned of those proceedings had they heeded the promptings of the situation in which they purchased. They therefore were chargeable with notice of those proceedings. *Brush v. Ware*, 15 Pet. 93, 111, 10 L. Ed. 672.

[11] The defendants interposed the defense of laches and also a local statute of limitations, but the Supreme Court of the state did not rule on either. Neither was applicable to the case. The tract in question was not granted for private use or disposal, but only for the quasi public uses named in the act. In other words, the company received the tract on the implied condition that it be devoted to those uses. A breach of the condition subjects the grant to a forfeiture by the United States; but neither laches on the part of the company nor any local statute of limitations can invest individuals with any interest in the tract, or with a right to use

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it for private purposes, *without the sanction of the United States. *Northern Pacific R. Co. v. Smith*, 171 U. S. 260, 275, 18 Sup. Ct. 794, 43 L. Ed. 157; *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044; *Northern Pacific Ry. Co. v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. Ed. 639; *Kindred v. Union Pacific R. R. Co.*, 225 U. S. 582, 597, 32 Sup. Ct. 780, 56 L. Ed. 1216; *Stuart v. Union Pacific R. Co.*, 227 U. S. 342, 353, 33 Sup. Ct. 338, 57 L. Ed. 535.

It follows that the judgment should have been for the company instead of for the defendants.

Judgment reversed.

(261 U. S. 45)

EIBEL PROCESS CO. v. MINNESOTA & ONTARIO PAPER CO.

(Argued Jan. 5-8, 1923. Decided Feb. 19, 1923.)

No. 178.

1. Patents  328—845,224, claims 1-3, 7, 8, 12, for improvement in paper-making machine, held valid and infringed.

The Eibel patent, No. 845,224, claims 1-3, 7, 8, 12, for an improvement in the Fourdrinier paper-making machine, which consisted essentially in placing the wire at such a slope that the flow of the stock by gravity would equalize the speed of the wire, so that the wire could be run at a higher rate of speed and still produce good paper, held to disclose invention in the discovery of the cause previously limiting the speed of the machine and of the means for removing the cause.

2. Patents  62—Oral evidence to prove anticipation must be clear and satisfactory.

In view of the temptation to remember in such cases, and the ease with which honest witnesses can convince themselves, after many years, of having had a conception of the basis of a valuable patent, oral evidence to prove prior discovery, and thereby overcome the presumption of novelty from the granting of the patent, must be clear and satisfactory.

3. Patents  174—Improvement patent, substantially advancing art, may be entitled to liberal treatment.

Even though an invention was not a pioneer patent, creating a new art, but was an improvement on an old machine, it is entitled to liberal construction to secure to the inventor the reward he deserves, if it was a very useful discovery which has substantially advanced the art.

4. Patents  118—Specifications for high and substantial elevation in machine held not too indefinite.

A specification for an improvement in a paper-making machine is not too indefinite, where it stated the improvement to consist in elevating one end of the wire in such machine, without specifying the degree of elevation, except by stating it was high and substantial, where the purpose to be accomplished by the elevation was stated, and a different elevation would be necessary under varying circumstances to accomplish that purpose, especially where the immediate and successful use of the invention showed that the description was sufficient to disclose the improvement.

5. Patents  52—Effecting result under unusual condition and without intention is not anticipation.

The accidental production of the result attained by the patented improvement under unusual conditions, when the result was not intended and not appreciated, does not constitute anticipation.

Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Suit by the Eibel Process Company against the Minnesota & Ontario Paper Company for infringement of patent. Decree for complainant (267 Fed. 847) was reversed by the Circuit Court of Appeals, with directions to dismiss the bill (274 Fed. 540), and complainant brings certiorari. Decree of Circuit Court of Appeals reversed, and decree of District Court affirmed.

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*This was a bill in equity charging the infringement of a patent and seeking an injunction, an accounting and damages. The patent, No. 845,224, issued to William Eibel, February 26, 1907. The application was filed August 22, 1906. The specifications describe the patent as for an improvement for Fourdrinier machines for paper making, and say that "it has for its object to construct and arrange the machine whereby it may be run at a very much higher speed than heretofore and produce a more uniform sheet of paper which is strong, even and well formed." The contention of the plaintiff, the petitioner here, is that his improvement was an important step in the art of paper making, and increased the daily product from 20 to 30 per cent.

The patent was held void by the District Court for the Western District of New York in the Case of Eibel Process Co. v. Remington-Martin Co., 226 Fed. 766 (1914). On appeal, the Circuit Court of Appeals for the Second Circuit reversed the decree of dismissal in the District Court, sustained the patent, and found infringement of claims Nos. 1, 2 and 3, but did not pass upon claims Nos. 7, 8 and 12. 234 Fed. 624, 148 C. C. A. 390 (1916). The bill in the present case was filed in the District Court for Maine, January 1, 1917. That court in 1920 held the patent valid and entered a decree of injunction and for

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damages. 267 *Fed. 847. On appeal, the Circuit Court of Appeals for the First Circuit reversed the decree and directed the dismissal of the bill. 274 Fed. 540 (1921). Because of the conflict in the two circuits, certiorari was granted to review the latter decree.

The Fourdrinier machine has for many years been well known and most widely used for making news print paper. Its main feature is an endless wire cloth sieve passed over a series of rolls at a constant speed. The sieve known as the "wire" is woven with 60 or 70 meshes to the inch. It may be 70 feet or more in length, and is often more than 100 inches in width. Its working surface, with the total length of 70 feet, is about 30 feet; the rest being taken up in the return of the wire underneath. At what is called the "breast roll," at one end of the machine, there is discharged upon the wire, from a flow box or pond, a constant stream of paper-making stock of fibers of wood pulp mixed with from 135 to 200 times their weight of water of the consistency and fluidity of di-

luted milk. As this stream moves along the wire, the water drains through its meshes and the fibers are deposited thereon. The process is stimulated by a device to shake the wire with constant and rapid side-wise thrusts, forward and back, which insures the proper interlocking and felting of the stock as it progresses; the water continuing to drain from it. At the end of the surface length of the wire, the stock reaches what are called the "couch rolls," between which it is pressed, and then in the form of a sheet of uniformly distributed pulp, felted sufficiently to hold together, it leaves the wire and is carried through a series of rolls or calendars by which the sheet is pressed and dried, and from which it emerges to be rolled up as finished paper.

In the flow box, or "pond," where the stream of pulp stock is stored, there is a gate or door, forming the end of the flow box, called the "slice," by lifting which the stock

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*is given the opportunity to flow upon the wire. The stream thus issuing is given a width of the desired sheet of paper and a depth regulated by the height to which the slice is lifted. The stream on the wire is prevented from flowing off the sides by "deckle straps," which are thick rubber bands, resting on each side of the wire at each side of the pulp. Traveling with the wire, they form lateral walls confining the stock till it is too dry to flow. Between the breast roll, where the stream of liquid stock strikes the wire, and the couch rolls, at the end of the surface length of the wire, there is a series of parallel horizontal rolls supporting the wire, called table rolls, and 20 feet from the breast roll there are placed, under the wire and in contact with it, three suction boxes in succession, in which a partial vacuum is maintained, and through them is sucked out the greater part of the water remaining in the wet sheet of the pulp. Placed above the wire, and just beyond the first suction box, is what is called the "dandy roll," which is faced with wire cloth. Its office is to impress the upper surface of the forming sheet of paper and give it a texture similar to that which the lower surface of the paper has from its contact with the wire. It may also carry the design which is to give the watermark to the sheet, if such a mark is desired. Beyond this is a larger roll, called the "guide roll," arranged with an automatic device varying its axis, so as to keep the wire straight. From the guide roll the wire drops below the plane to the couch rolls, already referred to.

These machines are very large, some of them weighing more than 1,000,000 pounds, and their cost will range as high as \$125,000. They are run night and day, in order that the capital invested in them may yield a proper return. Speed, which increases production, is therefore of the highest im-

portance. Eibel's patent had for its avowed purpose of increase of this speed.

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*Eibel says in his specifications:

"My invention is embodied, essentially, in the first part or element of the machine having the Fourdrinier wire or paper-making wire, and consists in causing the stock to travel by gravity in the direction of movement of the making wire and approximately as fast as the making wire moves, thereby resulting in a 'gravity feed' for the machine. The stock may be and preferably is caused to travel more rapidly than the normal or usual speed of the making wire for a certain grade of stock, and means are provided for increasing the speed of the machine, so as to cause the making wire to move at a higher rate of speed than usual, being substantially equal to the speed of the rapidly moving stock. To accomplish this result in a simple manner, the breast roll end of the paper-making wire is maintained at a substantial elevation above the level, thereby providing a continuous downwardly moving paper-making wire, and the declination thus given to the wire is such that the stock is caused to travel by gravity in the direction of the movement of the wire and substantially as fast as the wire moves. The declination of the paper-making wire may be adjustable, or the speed of the wire may be variable, or both the declination and speed of the wire may be adjustable, in order that the velocity produced by gravity in the stock on the declining wire will approximately equal the speed of the wire. By this arrangement the speed of the machine may be increased to such an extent as to bring the speed of the making wire up to the maximum velocity of the rapidly moving stock and a strong, even, and well-formed sheet produced, which is more uniform than usual."

Two figures accompany the specifications of the Eibel patent. Figure No. 1 shows the wire of the Fourdrinier machine in outline from the breast roll to the guide and couch rolls, with a screw device for raising and

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lowering *the breast roll and wire from the horizontal. The outline shows an elevation of the breast roll and wire, so that the angle between the wire and the horizontal at the guide roll is about 4 per cent., which in a surface length of 30 feet would mean an elevation of 12 inches at the breast roll. The other figure, No. 2, shows a device for regulating the speed of the wire applied at the lower couch roll.

Again the patentee says:

"For the purpose of increasing the speed of the machine to the maximum I maintain the breast roll end of the making wire at a high elevation above the level, so that the stock travels by gravity much faster than the making wire ordinarily runs for a certain grade of stock, and I then increase the speed of the machine to such extent as to bring the rate of speed of the making wire up to the speed of the rapidly moving stock, and as a result the capacity of the machine is largely increased.

"I find in practice that by providing a gravity feed operating substantially as herein describ-

ed, the stock runs smoothly and evenly without wavin or rippling, and the fibers are thereby permitted to settle with great uniformity as regards their distribution over the wire, so that the paper in addition to being well formed is very uniform. Furthermore, as the stock is moving with the paper-making wire, instead of being moved by the wire, or essentially by the wire, the formation of the paper will begin at the start, and will continue to the end of the travel of the stock with the wire."

The claims in question are:

1. A Fourdrinier machine, having the breast roll end of the paper-making wire maintained at a substantial elevation above the level, whereby the stock is caused to travel by gravity, rapidly in the direction of movement of the wire, and at a speed approximately equal to the speed of the wire, substantially as described.

2. A Fourdrinier machine having the breast roll end of the paper-making wire maintained

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at a high elevation, whereby the stock is caused to travel by gravity faster than the normal speed of the wire for a certain grade of stock, and having means for increasing the speed of the machine to cause the wire to travel at substantially the same rate of speed as the rapidly-moving stock, substantially as described.

3. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, the breast roll end of the wire being maintained at a substantial elevation above the level, whereby the stock is caused to travel by gravity, rapidly, in the direction of movement of the wire and at a speed approximately equal to the speed of the wire, substantially as described.

7. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, and the suction boxes supported at a corresponding declination, substantially as described.

8. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, and the several suction boxes arranged at different elevations, substantially as described.

12. In a Fourdrinier machine, a downwardly moving paper-making wire, the declination and speed of which are so regulated that the velocity of the stock down the declining wire, caused by gravity, is so related to the velocity of the wire in the same direction, that waves and ripples on the stock are substantially avoided and the fibers deposited with substantial uniformity on the wire, substantially as described.

Messrs. Frederick P. Fish and Harrison F. Lyman, both of Boston, Mass., for petitioner.

Mr. Amasa C. Paul, of Minneapolis, Minn., for respondent.

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*Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The evidence in the case establishes that, before Eibel entered the field, continued high speeds in the wire of the Fourdrinier machine much beyond 500 feet a minute resulted in defective paper. Eibel concluded that

this was due to the disturbance and ripples in the stock as it was forming at a point between the breast roll and the first suction box, caused by the fact that at that point the wire was traveling much faster than the stock, and that if at that point the speed of the flowing stock could be increased approximately to the speed of the wire, the disturbance and rippling in the stock would cease, and the defects would disappear from the paper product. Accordingly he proposed to add to the former speed of the stock by substantially tilting up the wire and giving the stock the added force of the down hill flow. He thought that as long as he could thus maintain equality of speed between stock and wire at the crucial point, and prevent the disturbance and rippling there, a further increase in the speed of the wire would not result in a defective product. He confirmed this by actual trial.

The first and most important question is whether this was a real discovery of merit. The Circuit Court of Appeals thought not. The prior art and the obvious application of the principle that water will run down hill in their opinion robbed it of novelty or discovery. The issue is one largely of evidence.

[1] The plaintiff below introduced the patent and some evidence of infringement, and a single expert to explain the discovery and invention, and rested. Then the defendant brought in a mass of evidence to show prior discovery and use, to impeach the utility of plaintiff's alleged invention, and to demonstrate the indefiniteness of specification and claims. The fact that the adjudication of

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the *validity of the patent would impose a royalty on many of the paper manufacturers of the country who were not already licensees of the plaintiff led to the defendant's sending a circular letter to awaken the interest and secure the help of all so situated. This, as the record shows, had the effect to invoke offers of testimony on the critical points in the case from the unlicensed part of the trade. The plaintiff introduced a few witnesses in rebuttal as to particular details and the same expert as in chief. The plaintiff's case as presented on the record is largely the presumption of validity and novelty attaching to the patent and such evidence as comes from defendants' witnesses. A case that can be made out in all its elements by cross-examination of opposing witnesses is a strong case. Implication of facts and conditions falling from the mouths of witnesses when only collateral to the exact point of inquiry for which they are called is generally the most trustworthy evidence because the result of the natural, so to say, subconscious adherence to truth uninfluenced by a knowledge or perception of the bearing of the implication on the ultimate issue in the case.

A thorough examination of the whole voluminous record produces a satisfying conviction

tion first that for years news print paper makers and manufacturers of paper-making machinery were engaged in seeking a method of increasing the speed of the news print machines, and that they had succeeded by improving the stock and by strengthening the parts in bringing the speed of the wire and the delivered paper up to between 500 and 600 feet a minute, but that when these high speeds were attained and maintained for any length of time, though they served to enable manufacturers to advertise such maximums, their continued and regular operation showed defects in the paper, which were only overcome by a reduction of speed to something less than 500 feet. As against

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advertisement, and the exuberant *memory of witnesses, the actual contemporaneous record of daily figures of production whenever brought to light justifies this conclusion. A leading manufacturer, one of the most enthusiastic witnesses on the subject of speed before Eibel produced a memorandum of a visit he made in October, 1904, less than two years before Eibel's application, to see the operation of a machine he had manufactured which he called "the banner installation of the world" and made an entry in his diary, "Grand sight—475 feet." There is the usual unconscious straining of memory without written record carried back 10 or 15 years, but the evidence on the whole is satisfying that the practical speed for the regular production of good news print paper never much exceeded that speed which had gratified the pride of this witness. A typical case is in that of machines made by Bagley & Sewall, large manufacturers of paper-making machines for the Laurentide Paper Company. The president of Bagley & Sewall testified that the speed of the machine was 552 feet a minute with satisfactory paper, and that he visited Laurentide in October, 1904, and counted the revolutions himself. He produced a letter from Mr. Chahoon, of the Laurentide Company, of about the same date confirming his statement of the count and the satisfactory product and an advertisement of Bagley & Sewall to the same effect of January, 1905. In rebuttal, a monthly record of the work of the machine is produced by the foreman at Laurentide for this same machine from January, 1905 to December, 1906, showing the speed to vary from a maximum of 518 in 1905, to 475 in 1908, with a general average of less than 500, and an explanation that the high speeds did not make a good product and were reduced. Our conclusion is confirmed, and indeed the importance of the issue of fact as to maximum speed before Eibel is minimized by the circumstance, uncontroverted, that the owners of these fastest machines, at once upon Eibel's publi-

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cation of his discovery, adopted his pitch and increased their product.

What Eibel tried to do was to enable the paper maker to go to 600 or 700 feet and above in speed and retain a good product. Did he do it? Eibel was the superintendent of a paper mill at Rhinelander, Wis. Before August, 1906, he raised the pitch of the wire from 2 or 3 inches to 12 inches, and greatly increased the speed, with a satisfactory product, and in that month he applied for a patent. The defendant's witnesses without exception refer to that disclosure as something that surprised and startled the paper-making trade. It spread, to use the expression of one witness, like wildfire. There were those who hesitated to take the venturesome step to give such an unheard-of pitch to the wire, and waited until others assumed the risk, but the evidence is overwhelming that within a short interval of a year or two all of the fast machines were run with wires at a pitch of 12 inches and that this pitch has been increased to 15 and 18, and even 24, inches; that the speed of the machines with satisfactory product has increased to 600, 650, and even 700 feet, with plans now even for 1,000 feet and that the makers of two-thirds of the print paper of the country are licensees of Eibel.

Defendant attempts to break the effect of this evidence by showing that five of the largest paper manufacturers who are licensees of Eibel are also shareholders in the Eibel Process Company, the plaintiff, and that they make 2,200 tons of the 5,000 tons of paper made daily in the United States. This circumstance seems to have had influence with the Circuit Court of Appeals. There are, however, 10 other paper-making companies, not shareholders, who are licensees and use the Eibel pitch, and whose aggregate production is 1,200 tons a day; and what is equally significant, 13 other compa-

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nies have contributed to a fund to help in resisting the establishment of the right of Eibel to claim a royalty for the use of this high or substantial pitch of the wire in the making of paper. Presumably they, too, find it wise to use the Eibel pitch. The paper makers in this country, who do not use the Eibel pitch, therefore, are few. It can hardly be that dividends on the shares of stock in the Eibel Company held by the five large companies would furnish motive enough for them to continue to be licensees, and to use something that was not of great advantage to them in their chief business of making of paper, and certainly no such motive would explain the action of the licensees, who are not stockholders, or that of the infringers, in continuing to use the Eibel pitch. It should be said that one of the large manufacturers of paper-making machinery called by the defendant said that since 1907 he had not installed a single machine without the Eibel pitch.

The fact that the Eibel pitch has thus been generally adopted in the paper-making business, and that the daily product in paper making has thus been increased at least 20 per cent. over that which had been achieved before Eibel, is very weighty evidence to sustain the presumption from his patent that what he discovered and invented was new and useful. Of course, although very persuasive, it is not conclusive, and may be explained. This brings us to the consideration of the evidence of the prior art, and the contention of the defendant and the conclusion of the court below, that the step taken by Eibel, so far as he took one, was a mere obvious application of fully developed devices in the prior art.

Eibel in his patent gives this measure of the prior art:

"The Fourdrinier wire has usually been arranged to move in a horizontal plane, although I am aware that means have been provided for adjusting the breast roll and of the wire to different elevations usually below the level, to provide for running with different grades of

*stock—as, for instance, with quick stock and slow stock; but so far as I am aware the making wire has always had to perform the work of drawing along the stock, and as the wire moved much faster than the stock the stock waved or rippled badly near the breast roll end of the wire, which gradually diminished until an equilibrium was established, and a smooth, even, glassy surface presented, and not until the waving or rippling ceased did the fibers lay down uniformly and produce a well-formed sheet of paper. The machine has been run necessarily at a slow rate of speed to give ample time for the water to escape and for the fibers to lay down, so as to make a uniform sheet, and in case the time was insufficient, the breast roll end of the wire has been lowered still further until the desired result was accomplished. In accordance with my invention I operate entirely above the level, to cause the stock to travel by gravity at a velocity approximately equal to the speed of the making wire, which I believe to be a new principle of operation."

It is important that the stock, when it reaches the "dandy" roll beyond the first suction box of the machine, shall be, on the one hand, free enough of water to be a formed sheet and take an impression from the dandy roll, and on the other that it shall not be so dry that it will not retain the impression. Paper of such a heavy composition of fiber and water that it holds water long is said to be "slow stock." Paper of lighter and thinner composition, parting with water easily and drying quickly, is called "quick stock." Various means were adopted to give the stock the proper degree of dryness at the dandy roll, usually by adjustment of the composition of the stock. What Eibel describes in this reference was another means. It was not widely used, however. It was a slight depression or elevation in the wire at the breast roll, so that slow stock could be made

to run up hill from the flow box to the dandy

roll, lengthening the time of *the movement, and thus giving more opportunity in its progress for the needed draining of the stock. On the other hand, fast or thin stock, from which the water flowed too easily, could be made to retain sufficient water by hastening its progress to the dandy roll by the downhill tilt of the wire. This tilt was obtained by raising the breast roll end of the wire, either by putting shimming blocks under that end of the machine or by special devices to be described. The sole object was greater or less drainage of stock for the dandy roll. The Eibel invention is distinguished from the prior art in two ways: First, in that the pitch of the wire was for a different purpose, to be accomplished, not at the dandy roll, some 20 or more feet from the breast roll, but at a point only 9 or 10 feet from there; and, second, by the fact that to achieve his purpose a high or substantial pitch must be given to the wire, while only a small or trivial pitch was needed for the drainage of the prior art.¹

This difference in purpose and degree of pitch between Eibel's device and the prior art is quite clearly shown by reference to a patent granted to Barrett and Horne, assignors to J. H. Horne & Sons, one of the important manufacturers of paper machinery of the country, in 1899. Their specifications showed a device capable of elevating the breast roll less than 3 inches, and its sole purpose was for drainage. Their specifications say:

*"In certain kinds of pulp, notably the wood pulp which is now largely used in making paper, the water drains away very rapidly, so that the pulp may become nearly dry before it leaves the shake frame, and thus not be properly laid when it reaches the rollers. This tendency may be obviated to a considerable extent by downwardly inclining the shake frame toward the rollers, so that the water tends to travel along with the pulp, and will not, therefore, drain out through the wire so rapidly. It is further desirable that the amount of inclination or slope should be variable, so as to adapt the machine for pulp of different kinds or grades."

The Bayliss Austin machine, one of three chiefly relied on to show prior use, was made by the Horne Company and was designed by Barrett and Horne on the model of this pat-

¹ It is true that defendant's expert, Carter, points out that in some of the machines of the prior art, in which means were provided for tilting up the wire, the tilting was confined to that part of the surface length covered by the shake frame, say 18 feet, and did not extend to the first suction box; whereas, Eibel's tilting involved the entire surface length of 30 feet. It would follow from this that the elevation of 3 inches in such machines would mean a greater angle of declination than 3 inches for the full surface length and that the disparity between 3 inches and 12 inches was not so great as the figures would lead one to think. But, whatever difference this might make, the fact remains that Eibel's pitch was substantially greater than anything in the prior art.

ent. It is very clear, from an examination of the design and contract for this machine, that the pitch of the wire in it could not have exceeded 3 inches, and that it was used for drainage. Other patents were set up in defense; some of them showing devices for raising the breast roll and wire above the level, and lowering them below the level for the purpose of drainage. The angle of elevation and depression was always small. There was a constant straining by the witnesses for the defense to increase the elevation before Eibel. On the direct examination they began with a positive assertion that a pitch of 4, 5, and even 6 inches, had been used in certain machines before Eibel's time; but written records, contracts, and specifications brought out on cross-examination show nothing more than 3 inches provided for purpose of drainage, and not more than that was used. This is not to say that witnesses in the face of such records did not testify to a higher elevation; but in such cases the amount of elevation rested in memory running back more than 10 or 15 years, a memory stimulated by the subsequent high pitches of Eibel and the retrospect of the

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*progress that now seems so easy and clear to every one. There was, too, always indefiniteness as to when such increase in elevation of the wire had taken place, whether before or after August, 1906, Eibel's date, and there was no evidence of weight, we think, after a full examination of the record, sufficient to justify a finding that such elevations had ever exceeded 3 inches before his application.

[2] This is confirmed by the fact that greater elevation was not needed for the purpose of drainage for which it was devised and used. It is true that some witnesses testify that they realized, before Eibel's application, that speeding up the stock to equal velocity with the wire would solve the difficulty and aid the speed. But there is not a single written record, letter, or specification of prior date to Eibel's application that discloses any such discovery by any one, or the use of the pitch of the wire to aid the speed of the machine. The oral evidence on this point falls far short of being enough to overcome the presumption of novelty from the granting of the patent. The temptation to remember in such cases and the ease with which honest witnesses can convince themselves after many years of having had a conception at the basis of a valuable patent, are well known in this branch of law, and have properly led to a rule that evidence to prove prior discovery must be clear and satisfactory. *Barbed Wire Patent Case*, 143 U. S. 275, 284, 12 Sup. Ct. 443, 36 L. Ed. 154; *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177. Indeed, when we consider the indisputable fact that Eibel's successful experiment at Rhinelander and his application

for a patent surprised the whole paper trade, and that for a short time many held back from risking so radical a change and then all adopted it, oral evidence that some persons had discovered the source of trouble and the means of remedying it some years before Eibel is incredible. We are confirmed in this conclusion by the finding of Judge

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Hale in the District Court, which is not offset by the reversal of his decree in the Circuit Court of Appeals, because that court seems to have reached its conclusion chiefly on other grounds yet to be considered.

The defendant's counsel contend that the specifications of the Eibel patent require that the only force to be used in giving speed to the stock shall be the force of gravity created by the angle of down-hill inclination of the wire. They say that the patentee mentions no other means of acceleration, that he must be confined to this, and that a machine which uses other factors for this purpose does not infringe. We do not understand the Circuit Court of Appeals to go quite so far, but it does seem to give a construction requiring the force of gravity caused by the pitch of the wire to be the predominating cause of the increased speed of the stock. The factors of speed of the stock in such a machine, before the factor of pitch was applied to increase it, were the head or hydraulic pressure of the stock in the flow box behind the slice, imparting movement to it as it came out onto the wire under the lifted slice, and the carrying effect of the moving wire upon the fluid stock as it fell upon the wire and proceeded gradually to form into a web as the fibers were laid and the water drained.

Many calculations were made by defendant's expert Carter, based on the laws of hydraulic pressure and flow, to show that, under varying conditions of head and pitch and the speed of the wire, the chief factor would be head, the next the "drag" or carrying effect of the wire, and the least in degree and importance in making the velocity of the stock and the wire equal would be the pitch, and that Eibel's invention could not be present, because the "drag" of the wire and its influence upon the speed of the stock must be eliminated under Eibel's specifications. We do not so understand it. As the stock descends upon the wire with the head of the flow box, it is thin and liquid, the wire at its greater speed necessarily

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imparts additional speed to the stock, and in its unformed fluidity the added speed does not disturb or ripple the stock to the injury of the process of paper making. It is only after the stock proceeds a third or a half of the surface length of the wire that the point is reached where the overspeed of the drag becomes troublesome in the felting or formation of the web of the pulp. Before that point is reached, the "drag" may be useful

in bringing the speed of the stock nearer to that of the wire without injury. The truth seems to be, and this is brought out with force in the testimony of the defendant's expert witness Livermore, that while it is possible to calculate to a nicety the velocity of the free flowing liquid stock due to head and pitch, when unaffected by drainage, variation in viscosity and fluidity, and the like, yet, when these conditions are present, as they always are, and the other less calculable factor of the drag of the wire enters the problem, there is no means, short of actual experiment, to enable one to anticipate results, and it is quite impossible to apportion to each factor its real influence. This fact reflects on the question whether Eibel's discovery was invention rather than the mere obvious and simple application of known natural forces.

The defendant introduced expert evidence to show that with a head of $2\frac{1}{4}$ inches in the flow box and a speed of 585 feet to the minute in the wire, and excluding the factor of "drag" of the wire, it would require an elevation of 48 inches to make up the difference in speed of the stock given by the head and the speed of the wire at a distance 10 feet from the point of discharge on the wire. The conclusion drawn from this seems to be that, as no practical machine uses 48 inches pitch, the Eibel invention has never been used or infringed. Disregarding its error in omitting necessary factors already adverted to, this reasoning seems to us to depend on too narrow a construction of the patent.

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[3] *In administering the patent law, the court first looks into the art, to find what the real merit of the alleged discovery or invention is, and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent, to secure to the inventor the reward he deserves. If what he has done works only a slight step forward, and that which he says is a discovery is on the border line between mere mechanical change and real invention, then his patent, if sustained, will be given a narrow scope, and infringement will be found only in approximate copies of the new device. It is this differing attitude of the courts toward genuine discoveries and slight improvements that reconciles the sometimes apparently conflicting instances of construing specifications and the finding of equivalents in alleged infringements. In the case before us, for the reasons we have already reviewed, we think that Eibel made a very useful discovery, which has substantially advanced the art. His was not a pioneer patent, creating a new art; but a patent which is only an improvement on an old machine may be very meritorious, and entitled to liberal treatment. Indeed, when one notes the

crude working of machines of famous pioneer inventions and discoveries, and compares them with the modern machines and processes exemplifying the principle of the pioneer discovery, one hesitates in the division of credit between the original inventor and the improvers, and certainly finds no reason to withhold from the really meritorious improver, the application of the rule "*ut res magis valeat quam pereat*," which has been sustained in so many cases in this court. *Winans v. Denmead*, 15 How. 338, 341, 14 L. Ed. 717; *Corning v. Burden*, 15 How. 265, 269, 14 L. Ed. 683; *Turrill v. Railroad Co.*, 1 Wall. 491, 510, 17 L. Ed. 668; *Rubber Co. v. Goodyear*, 9 Wall. 783, 795, 19 L. Ed. 566; *McClain v. Ortmayer*, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800.

Eibel was an avowed improver, not in the art of paper making generally, but upon

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a well-known and universally *used machine. In that machine, the speed of the stock, which was the subject-matter of his improvement, had always been controlled by two factors, the head of the stock in the flow box, and the carrying effect of the under-moving wire. He says nothing in his specifications to exclude these factors; he merely adds another factor of speed to secure the equality of speed of the stock with the wire. He says:

"For the purpose of increasing the speed of the machine to the maximum I maintain the breast roll end of the making wire at a high elevation above the level, so that the stock travels by gravity much faster than the making wire ordinarily runs for a certain grade of stock, and I then increase the speed of the machine to such an extent as to bring the rate of the making wire up to the speed of the rapidly moving stock, and as a result the capacity of the machine is largely increased."

We agree fully with Judge Hale in the District Court in his comment on this:

"The process invented by him [Eibel] begins to operate after the stock has entered upon the wire. His apparent attempt was to get rid of bubbles and wrinkles, before he got to the place on the machine where the paper is formed. To do this, he allowed gravity to work with 'drag' and with 'head.' He harnessed all the elements he could find. He brought gravity in with the other elements, and so brought the speed of the stock up to equality with that of the wire. By this means he achieved high speed and also freed the stock on the wire from waves and ripples." 267 Fed. 855.

The Circuit Court of Appeals questions the assumption that gravity was a new factor with Eibel, because the head of the flow box is only another application of the force of gravity. This is a mere criticism of a term, which, whether accurate or not, is not misleading. What Eibel was dealing with in his patent as a new factor was the addi-

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tional *force acquired by the pitch of the wire, and that he called gravity; and Judge Hale, in the passage quoted, uses the word with the same meaning, and without any confusion to the reader.

We think, then, that the Eibel patent is to be construed to cover a Fourdrinier machine in which the pitch of the wire is used as an appreciable factor, in addition to the factors of speed theretofore known in the machine, in bringing about an approximation to the equal velocity of the stock and the wire at the point where, but for such approximation, the injurious disturbance and ripples of the stock would be produced.

[4] The next objection to the patent, which prevailed in the Circuit Court of Appeals, is that its terms are too vague, because the extent of the factor of pitch is not defined, except by the terms "substantial" and "high." The figure accompanying the specification and illustrating the improvement indicates an angle of 4 per cent., or an elevation of 12 inches, and the reference to the small elevations for drainage shown in earlier devices indicated that the patentee had in mind elevations substantial as compared with them, in order to achieve his purpose of substantially increasing the speed of the stock. It was difficult for him to be more definite, due to the varying conditions of speed and stock existing in the operations of Fourdrinier machines and the necessary variation in the pitch to be used to accomplish the purpose of his invention. Indefiniteness is objectionable, because the patent does not disclose to the public how the discovery, if there is one, can be made useful, and how its infringement may be avoided. We do not think any such consequences are involved here. This patent and its specifications were manifested to readers who were skilled in the art of paper making and versed in the use of the Fourdrinier machine. The evidence discloses that one, so skilled, had

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no diffi*culty, when his attention was called to their importance, in fixing the place of the disturbance and ripples to be removed, or in determining what was the substantial pitch needed to equalize the speeds of the stock and wire at that place. The immediate and successful use of the pitch for this purpose by the owners of the then fastest machines and by the whole trade is convincing proof that one versed in paper making could find in Eibel's specifications all he needed to know, to avail himself of the invention. Expressions quite as indefinite as "high" and "substantial," in describing an invention or discovery, in patent specifications and claims, have been recognized by this court as sufficient. In *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279, the claim sustained was for "the manufacturing

of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure." See, also, *Rubber Co. v. Goodyear*, 9 Wall. 788, 794, 19 L. Ed. 566; *Mowry v. Whitney*, 14 Wall. 620, 629, 20 L. Ed. 860; *Lawther v. Hamilton*, 124 U. S. 1, 9, 8 Sup. Ct. 342, 31 L. Ed. 325; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 436, 22 Sup. Ct. 698, 46 L. Ed. 968; *Abercrombie & Fitch Co. v. Baldwin*, 245 U. S. 198, 205, 38 Sup. Ct. 104, 62 L. Ed. 240.

[5] It is contended on behalf of the defendant that, whether Barrett and Horne perceived the advantage of speeding up the stock to an equality with the wire, yet the necessary effect of their devices was to achieve that result, and therefore their machine anticipated Eibel. In the first place, we find no evidence that any pitch of the wire, used before Eibel, had brought about such a result as that sought by him, and, in the second place, if it had done so under unusual conditions, accidental results, not intended and not appreciated, do not constitute anticipation. *Tilghman v. Proctor*, 102 U. S. 707, 711, 26 L. Ed. 279; *Pittsburgh Reduction Co. v. Cowles Electric Co. (C. C.)* 55 Fed. 301, 307; *Andrews v. Carman*, 13 Blatchford, 307, 323, Fed. Cas. No. 371.

It is next objected that the alleged invention covers only a matter of degree in pitch, which cannot be the subject of a patent. The

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prior art showed the application *of gravity by use of the pitch of the wire to the improvement of the Fourdrinier machine, and Eibel, it is said, merely increased degree of pitch and gravity for the same general purpose. We think this attack upon the patent cannot prevail. Eibel's high or substantial pitch was directed toward a wholly different object from that of the prior art. He was seeking thereby to remove the disturbance and ripples in the formation of the stock about 10 feet from the discharge, while the slight pitches of the prior art were planned to overcome the dryness in the formed web of the stock at double the distance from the discharge. It would seem that the greater speed of the stock produced by Eibel would make difficult the joint application of the principles of Eibel and Barrett and Horne, and that the function of adjusting the drainage for the dandy roll must be carried on by some of the other methods known to the art when Eibel's pitch is used. But, however this may be, the object of the one was entirely different from that of the other. Livermore, an expert witness called by the defendant, when asked the question whether the purpose of the Barrett and Horne patent had anything in common with the theory of the Eibel patent answered:

"I should say not. It looks to me as if Barrett and Horne referred to the adjustment of inclination with one effect in mind, and that Eibel referred to like adjustment with another

effect in mind. * * * In this particular case, the two effects have, so far as I can see, no special correlation to one another, and an adjustment made with one effect in mind might or might not produce a desirable effect as to the other function or phenomenon."

In considering this phase of the controversy, we must not lose sight of the fact that one essential part of Eibel's discovery was that the trouble causing the defective paper product under high machine speed was in the disturbance and ripples some 10 feet from

the discharge, and that *they were due to the unequal speeds of stock and wire at that point and could be removed by equalizing the speeds. The invention was not the mere use of a high or substantial pitch to remedy a known source of trouble. It was the discovery of the source not before known, and the application of the remedy, for which Eibel was entitled to be rewarded in his patent. Had the trouble which Eibel sought to remedy been the well-known difficulty of too great wetness or dryness of the web at the dandy roll, and had he found that a higher rather than a lower pitch would do that work better, a patent for this improvement might well have been attacked on the ground that he was seeking monopoly for a mere matter of degree. But that is not this case. On the other hand, if all knew that the source of the trouble Eibel was seeking to remedy was where he found it to be, and also knew that increased speed of the stock would remedy it, doubtless it would not have been invention on his part to use the pitch of the wire to increase the speed of the stock, when such pitch had been used before to do the same thing, although for a different purpose and in less degree. We cannot agree with the Circuit Court of Appeals that the causal connection between the unequal speeds of the stock and the wire, and the disturbance and rippling of the stock, and between the latter and the defective quality of the paper in high speeds of the machine, was so obvious that perception of it did not involve discovery which will support a patent. The fact that in a decade of an eager quest for higher speeds this important chain of circumstances had escaped observation, the fact that no one had applied a remedy for the consequent trouble until Eibel, and the final fact that, when he made known his discovery, all adopted his remedy, leave no doubt in our minds that what he saw and did was not obvious, and did involve discovery and invention.

The Circuit Court of Appeals dwells on the fact that the use of the pitch of the wire

was not really the introduction of a new factor in the solution of the problem, because the same result would have followed

if the head of the flow box had been made greater, in order to increase by gravity the speed of the stock. Doubtless this could have been done. There were difficulties, however, in such a method, when Eibel's application was filed, because in the then machines the flow box was supported by an apron over the wire, and the necessary addition to the weight of the stock in the flow box, in increasing the head, would have interfered with the free working of the wire. Since that time an improvement has been adopted, by which the flow box does not rest on the wire, and additional head can be imparted to the stock. The defendant invites attention to the fact that one or two paper makers are increasing this head and giving up the pitch, for the purpose of increasing the speed of the stock. We do not see that these circumstances in any way affect the validity of the Eibel patent. If defendant or others can do what Eibel accomplished in another way, and by means he did not include in his specifications and claims, i. e., by additional head and the abandonment of a substantial pitch, they are at liberty to do so and avoid infringement.

We come finally to the question of infringement. If the Eibel patent is to be construed as we have construed it, there can be no doubt that the defendant uses the Eibel invention. The device which the defendant uses for tilting the wire—i. e., by shimming blocks—and that for regulating and increasing the speed of the wire are plainly equivalents of the same elements in the new combination, which Eibel shows in his drawings and specifications. The defendant uses a Fourdrinier machine having the breast roll end of the paper-making wire maintained at an elevation of 15 inches above the level whereby the stock is caused to travel by gravity rapidly in the direction of the movement of the wire, and at a speed

approximately *equal to the speed of the wire substantially as described. This brings the defendant's machines within the first claim of the patent, if 15 inches is a substantial elevation of the making wire, as all the witnesses concede that it is. The same conclusion must be reached as to the second claim, because the defendant uses a machine "having the breast roll end of the paper making wire maintained at a high elevation, whereby the stock is caused to travel by gravity faster than the normal speed of the wire for a certain grade of stock, and having means for increasing the speed of the machine to cause the wire to travel at substantially the same rate of speed as the rapidly moving stock, substantially as described." The same thing is true of the third claim.

Question has been made whether these three claims are for a machine or a process.

We think they are claims for a machine, i. e., for an improvement on a machine, and that the devices for such improvement, to wit, the elevation by a screw or other equivalent method, and the control of the speed of the wire, are shown by the specifications and the figures, together with a sufficient description of their operation.

The seventh and eighth claims are for the same improvement, with the suction boxes changed from their usual position in the unimproved machine, to make them effectively function on the pitched wire. They are machine claims, and are infringed by the defendant. Their new adjustment is part of a new combination, and the words "substantially as described" limit them to a combination including the elements included in the first three claims.

Claim No. 12 is as follows:

"12. In a Fourdrinier machine, a downwardly moving paper-making wire, the declination and speed of which are so regulated that the velocity of the stock down the declining wire,

^{*71} caused by gravity, is so related to the *velocity of the wire in the same direction that waves and ripples on the stock are substantially avoided and the fibers deposited with substantial uniformity on the wire, substantially as described."

This comes nearer to being a process claim, but, whether it is or not, the defendant infringes it.

The evidence discloses that, after the suit was brought, the defendant reduced the pitch of one of its machines to 6 inches, and the contention of defendant is that the machine ran as well and gave as good results as when its pitch was 15 inches. We are not called upon to decide whether this contention can be sustained, because the reduction was after the bill was filed. It may be noted, however, that the admissions of witnesses seem to show that this reduction was made for purposes of the suit, and that, immediately after the defendant won the suit in the Circuit Court of Appeals, it restored the pitch of this machine to 15 inches, and, when the decree of the Circuit Court of Appeals proved not to be final, the wire was lowered again to a 6-inch pitch. Much evidence was taken, and much discussion has followed, upon the point whether a 6-inch pitch, accomplishing in whole or in part what Eibel sought to do, would infringe a patent for a substantial pitch. We do not find it necessary to pass definitely on the question, because it is not before us on the record, though we cannot prevent the natural inferences upon this point to be drawn from the conclusions we have reached.

The decree of the Circuit Court of Appeals, dismissing the bill, is reversed, and the decree of the District Court is affirmed.

(231 U. S. 6)

VANDENBURGH v. TRUSCON STEEL CO.

(Argued Jan. 17, 1923. Decided Feb. 19, 1923.)

No. 273.

1. Patents ~~328~~—Reissue, 14,182, claims 1 and 2, for reinforcing bar for concrete, held void.

The Vandenburg reissue patent, No. 14,182, claims 1 and 2, which were issued nine years after the original patent, and which substituted for the word "rigidly," as used in the original claims, the word "permanently," held void as an afterthought, to make the patent applicable to devices made by others subsequent to the original patent.

2. Patents ~~328~~—Reissue, 14,182, claims 3 and 5, for reinforcing bar for concrete, held not infringed and void.

The Vandenburg reissue patent, No. 14,182, claims 3 and 5, for reinforcing bar for concrete, held not infringed by defendant's structure, and void for want of invention.

3. Patents ~~27(1)~~ — Introduction into concrete reinforcing art of elements known in metal art is not invention.

It was not invention to introduce into the concrete reinforcing art the kerf and spur as a means of attaching the spiral coils to the reinforcing bar, which elements were old in the metal arts, where they had been used for a similar purpose.

Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

Suit by George E. Vandenburg against the Truscon Steel Company for infringement of patent. A decree dismissing the bill was affirmed by the Circuit Court of Appeals (277 Fed. 345), and complainant brings certiorari. Affirmed.

^{*7} *This was a bill in equity by Vandenburg, praying an injunction and accounting for the infringement of a patent granted him January 22, 1907, No. 841,741, and reissued to him August 15, 1916, reissue No. 14,182. The patent is for a reinforcing bar to be used in concrete construction.

The patent, since reissue, has been the subject of litigation in the Second, Third, and Sixth circuits. In all the circuits, the first and second claims of the reissue have been held void, because too broad, and because secured nine years after the original issue, for the purpose of covering intervening devices. In the Second circuit, Judge Hough, sitting on the District Court, found that claim 3 must be so narrowly construed that defendant's device did not infringe. The Circuit Court of Appeals sustained the third claim and found infringement, reversing the District Court's decree, and sent the case back for assessment of profits, which have been found to be about

\$15,000. *Vandenburgh v. Concrete Steel Co.*, 258 Fed. 143, 169 C. C. A. 138.

In the Third circuit (259 Fed. 579), Judge Orr found claim No. 3 invalid for lack of invention. The Circuit Court of Appeals sustained the decree of dismissal by the District Court, but on the ground of noninfringement. *Vandenburgh v. Electric Welding Co.*, 263 Fed. 95.

In the Sixth circuit, Judge Westenhaver took the same view as Judge Orr and dismissed the bill. The Circuit Court of Appeals (277 Fed. 345) affirmed the action of the District Court on the ground that, if valid, claim No. 3 must be so narrowly construed that the defendant did not infringe.

The drawings accompanying the specifications of the patent are the same in the reissue and appear below:

The specifications say:

"The invention has for an object to provide a reinforcing bar with one or more spirally disposed coils secured to the bar, so as to provide an extended area of contact adapted to

the two meshing coils used for girder and column construction.

"The bar may be provided with a primary coil 6, extending in one direction, as shown in Fig. 4, which is sufficient in light construction; but when a heavier construction is to be used a secondary coil 7 is provided, which extends in the opposite direction to the coil 6 and through the same, so as to cross beneath the coil 6 at a point directly above the bar, thus providing a construction in which all lateral pull or strain of the coil is avoided, owing to the equalization thereof by the oppositely extending coils and the tendency of the coils to move or flatten toward the face of the bar resisted. This preferred construction is shown in Figs. 1 and 3, and it is also desirable that both of the coils be deflected away from the center of the bar, as shown in Fig. 1, as the greatest supporting strain carried by the arch is at the center thereof, and this deflection therefore resists such strain and tends to draw the coils upward into a position at right angles to the bar.

Fig.1

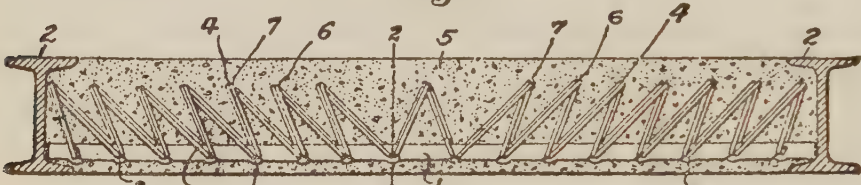


Fig.3.

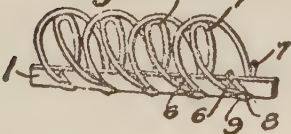


Fig.4.

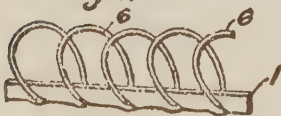


Fig.5.

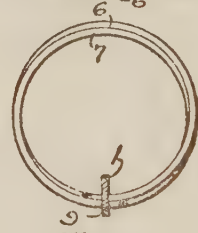


Fig.2.

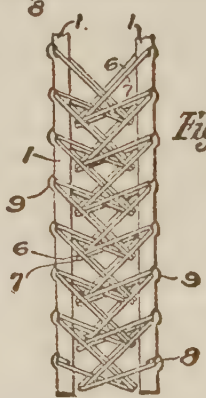


Fig.6.

resist strain longitudinally and laterally of the bar and to form a truss within the body of concrete or other plaster material which provides the maximum of supporting strength in the arch or surface to be formed.

"Other and further objects and advantages of the invention will be hereinafter set forth, and the novel features thereof defined by the appended claims.

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"In the drawings, Figure 1 is a vertical section showing the bar applied to supporting girders or beams. Figure 2 is an enlarged vertical section on the line 2-2, Fig. 1. Fig. 3 is a detailed perspective of the primary and secondary coils shown in Fig. 1. Fig. 4 is a similar view of a modified form using one coil. Fig. 5 is a detailed plan of the form shown in Fig. 3, and Fig. 6 is an elevation of

"As a preferred means of securing the coils to the bar I have shown a series of kerfs 8 in one face of the bar inclined away from the center of the bar toward the opposite ends thereof, and the coils are seated within these kerfs and held therein by means of the integral spurs 9, which are forced downward upon the coils when inserted and permanently retain them in position.

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"In Fig. 6 a modified application of the invention is shown where two of the bars are disposed parallel to each other, with their coils intermeshing, for use in column or girder construction, wherein such a construction provides the maximum of strength with the minimum of weight in the reinforcing material.

"In the operation of the invention it will be seen that the bar supporting the coil resists

any movement thereof longitudinally of the bar and provides the necessary strength upon which the truss structure formed by the coils is carried."

The first four claims of the original patent were as follows:

1. In a reinforcing bar, a spiral coil rigidly secured thereto at two points in each convolution thereof and extended beyond and free of said bar at the opposite side therefrom to the securing point.

2. In a reinforcing bar, a spiral coil rigidly secured thereto at two points in each convolution thereof and extended beyond and free of said bar at the opposite side therefrom to the securing point, said coils being deflected in opposite directions from the center of the bar toward the ends thereof.

3. A reinforcing bar provided upon one end with a series of kerfs each having an integral overlapping spur, and a coil disposed in said kerfs, each convolution thereof being retained beneath one of said spurs.

4. A reinforcing bar provided upon one edge with a series of kerfs disposed diagonally to the length of the bar each having an overlapping integral spur projected toward the center of the bar, and a coil disposed in said kerfs and retained beneath said spurs.

The first and second claims of the reissued patent were as follows:

1. A concrete reinforcing consisting of a bar having a plurality of integral spurs, and a

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spiral coil permanently secured thereto by having the spurs bent down on the several coils, the coils extending beyond and free of the bar at the opposite side therefrom to the securing point.

2. A concrete reinforcing consisting of a bar having integral means to secure a coil thereto, and a spiral coil permanently secured to the bar in each convolution and extended beyond and free of said bar at the opposite side therefrom to the securing point.

The third and fifth claims of the reissue patent were the same as the third and fourth of the original.

The defendant makes and sells a collapsible spiral, or cylindrical helix, used in strengthening concrete columns or pillars. It consists of a cylindrical spiral of steel wire fitted to two T-bars or spacers. Each convolution of the spiral engages the leg or outside edge of the T-spacers at regular intervals. The engagement is loose-fitting, so that this construction, which is normally stovepipe-shaped, can be made flat for shipment by moving the metal rods or spacers longitudinally in opposite directions. The method by which the spiral is attached to the spacer bar is a rectangular notch in the edge of the T-bar with one or both corners peened or hammered down so as to retain and loosely hold the spiral. This is said to infringe the claims of plaintiff's reissued patents Nos. 1 and 2 and also claims 3 and 5, which were in the reissue as in the original patent, except

that in claim 3 the word "end" was changed to "edge" to correct an obvious error.

Messrs. O. Ellery Edwards, of New York City, and Carlos P. Griffin, of San Francisco, Cal., for petitioner.

Mr. W. F. Guthrie, of Youngstown, Ohio, for Truscon Steel Co.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The expansion and improvement of the art of reinforcing concrete began several decades

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ago. There were two different needs, one was for strengthening concrete beams, and the other for strengthening concrete columns. The term "reinforcing bar" is usually applied in the art to a rod or bar used to reinforce a concrete beam against the tension longitudinal of the beam itself. The concrete itself has great power of resisting compression, but it has not tensile strength, and its weakness manifests itself in cracking along the lower half of the beam. A steel bar placed below the middle of the beam furnishes the useful tensile resistance. But it was found that certain diagonal cracks developed in the beam toward the respective ends of the beam, and it was sought to prevent these by minor auxiliary rods attached to the main reinforcing bar. This was the field which Vandenburg entered and devised an arrangement, shown in Figure 1 of his drawings, of a reinforcing bar imbedded in the lower part of the beam with transverse loops or spirals, part on one side of the center of the bar and part on the other and fitted rigidly into the bar so that those on each side leaned at an angle away from the center and in an opposite inclination from those on the other. In strong construction, these spiral loops were doubled by a second spiral which meshed with the first. Now, as the specifications show, this arrangement of the bar and opposing spirals was to apply the truss principle to the strengthening of the beam, and to give it the tensional resistance along the lower part of the beam and against the diagonal tensions near the ends of the beam. No one can read the specifications and examine the drawings without perceiving that this was the gist of the Vandenburg invention. Reference is made to the use of the plan for column construction, but the only use of it for that purpose is shown in Figure 6, which discloses two upright reinforcing bars with their spirals meshing, but connected in no other way.

The truss formation was not especially adapted to the needs and strains of the con-

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crete column. The history of that field in the art shows that one of the pioneers was a Frenchman named Considere, who some years before the plaintiff's patent had shown that the tendency of concrete in a column was to expand outwardly under the vertical

pressure to which it was chiefly exposed and the best way of reinforcing columns was by pouring the liquid concrete into a hooping made of a series of independent hoops, or into a continuous helicoidal spiral or cylindrical helix of a steel wire or rod, of a stovepipe form. After him, column hooping became common in the art as the only practical method of column reinforcing and the convolutions of the spiral were spaced and supported by steel uprights with which they engaged in various ways. In one French patent the convolutions were tied with steel wire to the spacers. It is the form of this engagement between the uprights and the spirals which is the crux of the present suit.

[1] The preferred form of Vandenburg for the engagement between his reinforcing bar and the spiral loops of his truss arrangement is by a kerf or cut in the edge of bar, inclined away from its center, in which the coil rod is placed, and held therein by an integral spur forced downward upon the coil when inserted, which permanently retains it in position. The defendant has a rectangular cut in the edge of the T-spacer or upright and retains the spiral rod in it by peening or hammering down the edges of the cut, so as to keep the rod from slipping out, but leaving play enough to permit the collapsing of the spiral and shipment in its collapsed form. Others had adopted a similar form of engagement. Observing this, Vandenburg, who had not used or exploited his original patent in any way, went back to the Patent Office and secured a reissue in which he was permitted to broaden his first and second claims with respect to the kerfs and spurs, so as to change the word "rigidly," used in the original claim, to "permanently." Having done

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this, he *proceeded to sue in the Second, Third, and Sixth circuits persons using what he insisted were equivalents of his form of engagement in their column hooping reinforcement of concrete columns. All the courts, and there are six of them, have held these changed claims of the reissued patent to be void, and to give him no right to claim infringement in the collapsible feature of the column hooping. The original specifications leave no doubt that the patentee used the word "rigidly" deliberately and properly, because his truss, as he portrayed it, required rigid connection between the spiral loops and the main reinforcing bar. His making his form of engagement loose was an afterthought, to catch makers who had not been advised in his specifications that there was anything collapsible in his truss formation. The reissue as to the first two claims was in the teeth of the admonitions of this court, speaking through Mr. Justice Bradley in *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783. They are therefore void.

[2] Counsel for the patentee say now that the collapsible feature was only an incidental matter, and that what they now rely on is

the combination under claims 3 and 5 of the reinforcing bar provided upon one edge with a series of kerfs, each having an integral overlapping spur and a coil convolution thereof being beneath one of the spurs. We do not think the respondent has this combination. We think the patentee's combination must be limited to a spiral with one bar in the truss formation, or at least one in which the spiral is free at one end and has no second support or spacer such as respondent uses. Patentee relies on Fig. 4 of his drawing, and says that to add another spacer or bar is only the work of a mechanic; but he cannot properly say so, because Fig. 4 is only a detail of Fig. 1 of the drawings, and was intended to be a lighter construction of the same beam, with the same truss combina-

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tion as shown in Fig. 1. Moreover, it is *perfectly obvious, from the description and some of the claims, that the spiral of Vandenburg was intended to be free of all but the bar shown. This is made certain by Fig. 6, which is the only application of the device to column use shown, and in that we have two bars standing upright, each engaged with convolutions of a spiral; the loops of each spiral meshing with those of the other spiral, but free of the other bar. It is clear to us that Vandenburg, having secured a patent for a truss form of reinforcement and finding it unworkable, for it never has been adopted in the trade or in any structure, is through reissue seeking to expand the paper combination he claims into a field in which it does not belong.

[3] But it is insisted that Vandenburg was the first to introduce into the field of concrete reinforcing the kerf and integral spur to clamp the spiral rod, that this involved invention, and that claim No. 3 should be construed to secure him a reward for this. It may be true that in the field of reinforcing concrete the kerf and spur had not been used before as Vandenburg used it, but the kerf and spur were old in the art in kindred fields. They were old in metal-working art. Exactly the equivalent is shown in sand screens for mixing the materials of concrete and in sustaining fence wires. It is difficult to differentiate the field of metal working from this art of reinforcing concrete, because the problem was only one of spacing firmly the convolutions of the metal spiral, and that was a well-known device for such a need. We do not think the principle of *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, applies in this case. More than this, in the very field itself, there was a prior German patent of Kesserling & Moller, showing the use of the kerf for spacing a spiral in reinforcing concrete. It does not seem to us that it involved real invention merely to add a spur or clamp, or to peen or hammer down the edges of the kerf, so as to fix the spiral rod firmly. We find, therefore, that

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claims 3 and *5 were without merit as involv-

ing invention, and that the action of the Circuit Court of Appeals should be Affirmed.

(261 U. S. 16)

CONCRETE STEEL CO. v. VANDENBURGH.

(Argued Jan. 17, 1923. Decided Feb. 19, 1923.)

No. 238.

Certiorari to the Circuit Court of Appeals for the Second Circuit.

Suit for infringement of a patent by George E. Vandenburg against the Concrete Steel Company. A decree for defendant was reversed by the Circuit Court of Appeals, and decree rendered for complainant (278 Fed. 607), and defendant brings certiorari. Reversed.

Mr. Thomas J. Johnston, of New York City, for Concrete Steel Co.

Messrs. O. Ellery Edwards, of New York City, and Carlos P. Griffin of San Francisco, Cal., for Vandenburg.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a review of the decree of the Circuit Court of Appeals of the Second Circuit, sustaining the validity of claim No. 3 of the Vandenburg patent, just considered in the previous case of Vandenburg v. Truscon Steel Co., 261 U. S. 6, 43 Sup. Ct. 331, 67 L. Ed. — and awarding \$15,000 for profits to Vandenburg for defendant's infringement. The two cases cannot be distinguished. We must there-

fore reverse *the decree of the Circuit Court of Appeals of the Second Circuit, and direct the dismissal of the bill.

Reversed.

(261 U. S. 267)

CITY OF PADUCAH et al. v. PADUCAH RY. CO.

(Argued Jan. 18, 1923. Decided Feb. 19, 1923.)

No. 243.

1. Municipal corporations —593—Surrender of power to regulate street railroad fares must clearly appear.

The surrender by a city of its power to prescribe just and reasonable street railroad fares is a very grave act, and authority to make it must be plain, and the intention so to do must clearly and unmistakably appear.

2. Carriers —12(1)—Company's right to just compensation is protected by Constitution.

The right of a street car company to just compensation, that is, a reasonable return on the value of its property used in the public

service, is protected by constitutional safeguards, which may not be overridden by legislative enactment or considerations of public policy.

3. Carriers —12(9)—Street railroad company contracting for fixed fare cannot complain it is not remunerative.

Where a street railroad company accepted a franchise which amounted to a contract binding the company to accept the fare stated therein as a maximum for the whole franchise term, the company cannot thereafter complain that the rates so contracted are too low to give a reasonable return.

4. Carriers —12(9)—Ordinance held not to fix maximum fares beyond power to change.

An ordinance granting a street car franchise, which fixed the fare for the first 12 months under the franchise, provided that at the end of the period the company should submit a statement of its receipts and expenditures and return to the city any excess over a reasonable compensation, that at the expiration of each 12 months during the life of the franchise, for the purpose of regulating the fares and to prevent excessive fares, the company should submit a similar verified statement, and if, from such statement, it appears that the fare fixed is more than necessary to provide a reasonable return, the fare shall be reduced accordingly, and that the valuation of the company's property may be appraised in the manner therein prescribed, does not show a contract binding on the company to accept the rate of fare prescribed for the first year as a maximum fare for the life of the franchise, and therefore does not prevent it from attacking an ordinance fixing the same fare for subsequent years.

5. Carriers —18(6)—Injunction against enforcement of fare ordinance should permit future regulation under changed conditions.

An injunction against the enforcement of an ordinance fixing street railway fares, which were too low to produce a reasonable return under conditions then prevailing, should safeguard the right of the city under its charter and the franchise properly to exercise its power to prescribe just and reasonable fares, if conditions subsequently change.

Appeal from the District Court of the United States for the Western District of Kentucky.

Suit by the Paducah Railway Company against the City of Paducah and others, to restrain enforcement of an ordinance fixing street car fares. From a decree granting the injunction, defendants appeal. Decree modified.

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*Messrs. W. A. Berry and James D. Mocquot, both of Paducah, Ky., for appellants.

Mr. Charles K. Wheeler, of Paducah, Ky., for appellee.

Mr. Justice BUTLER delivered the opinion of the Court.

The appellee, the Paducah Railway Company, is the owner of an electric street car system in Paducah, Ky., and is operating it under a franchise ordinance adopted April 29, 1919. Section XV thereof (printed in the margin)¹ relates to fares to be charged. The company

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*commenced operation under this ordinance October 1, 1919, charging the fare therein specified, 6 cents for adults, half fare for children under 12 and over 5 years of age. On September 17, 1920, the company notified the city that it would fail to earn enough to meet operating expenses, taxes, depreciation, and a reasonable rate of return upon its investment by \$72,350.10, and furnished the city a statement showing (for 11 months, actual and September estimated) that operating expenses, including depreciation and taxes, exceeded the total revenue by \$4,055.86, and that the additional amount required to provide an 8 per

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cent. return on *the investment of \$854,303 was \$72,350.10; that the number of passengers carried was 2,979,654, and the average fare 5.32 cents; that to provide sufficient revenue on the basis of then existing price

¹Section XV.

The fare for one continuous trip for twelve (12) months from the commencement of operation under this franchise is hereby fixed as follows:

Cash fare for adults.....6¢
Children under twelve and over five.....Half fare.
Children under five when accompanied by guardianNothing.

At the end of such period the purchaser shall submit a verified statement of the receipts and expenditures to the mayor and commissioners of the city of Paducah and if it appear therefrom (after investigation and verification of such report) that the purchaser has received more than a sufficient sum to pay expenses and a reasonable rate of return on the capital invested, such purchaser shall repay to the city of Paducah the difference between the amount necessary for such expenses and a reasonable rate of return upon invested capital and the amount actually received.

At the expiration of each twelve months during the life of this franchise, for the purpose of regulating fares to be charged by the purchaser, and to accomplish that purpose, and to prevent excessive fares, the purchaser shall, at the expiration of each twelve months during the life of this franchise submit to the commissioners of the city of Paducah a verified statement of the receipts and expenditures and if from any of such reports it appears the fare as fixed is more than sufficient to provide a reasonable rate of return upon the invested capital, the city shall reduce such fare accordingly.

For the purpose of ascertaining the rate of fare to be charged hereunder the city may cause said property to be appraised as follows: The city shall appoint a disinterested street railway expert, and the purchaser shall appoint such expert appraiser for its part, and the two so appointed shall select a third expert appraiser. * * * Said experts shall report in writing to the mayor and commissioners of the city of Paducah within three months after their appointment the total valuation of the property owned, controlled or used by the purchaser, in connection with the operation of a street car system in Paducah and its vicinity, but this franchise shall not be estimated or considered in its value. The cost of such appraisal to be borne equally by the city and the purchaser hereof.

levels it would require a cash fare of 13.5 cents, and stated that in the hope that during the ensuing year prices would decline, it was willing to operate for the 12 months beginning October 1, 1920, at a lower fare. It notified the city that, effective on that day, the rates of fare would be: Cash fare, 10 cents; tokens, 7.5 cents; half fare, 5 cents. On September 20, 1920, the company, supplementing its earlier communication, requested the city, if dissatisfied with the value of the property as shown in the statement theretofore furnished, to have an appraisal of the property as provided in section XV of the franchise ordinance. On September 21, 1920, claiming that the company was limited to the fares specified in section XV as maximum, the city, without any investigation of the facts reported by the company or any appraisal of the property, passed an ordinance prescribing the same fare and imposing penalties for the violation of the ordinance.²

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*The company thereupon brought this suit to restrain and enjoin the enforcement of the ordinance on the ground that the rates specified are unremunerative and confiscatory, and that the enforcement of the ordinance would take the company's property without due process of law and deny it equal protection of the laws in violation of the Fourteenth Amendment.

After hearing the parties, the District Court, on September 30, 1920, granted a temporary injunction.

On October 12, 1920, the company furnished a statement of receipts and expenditures for the first 12-months period in form similar to that submitted September 17, 1920, shortly before the expiration of the year, showing that operating expenses including depreciation and taxes exceeded the total revenue by \$4,338.21, and that the additional amount of revenue required to provide an 8 per cent. return on the investment as claimed was \$72,862.45.

²Section I. That commencing immediately after 12 o'clock midnight on September 30, 1920, the fares that may be charged and collected for passage upon any street car within the city of Paducah, and upon any electric street car system operating under any franchise granted by the city of Paducah, shall be as follows:

Cash fare for adults.....6 cents.
For children under 12 years of age and over 5 years of age.....Half fare.
For children under 5 years when accompanied by any person who is over 5 years of ageNothing.

Section II. Any person, firm or corporation operating any electric street railway or car within the city of Paducah, or under any franchise granted by the city of Paducah, who shall charge or attempt to collect any greater rate of fares for transportation upon any such electric street car than is provided in section I hereof, shall be guilty of a violation of this ordinance, and each person, firm or corporation so violating said ordinance shall be fined in any sum not less than ten (\$10.00) dollars, nor more than twenty (\$20.00) dollars for each violation thereof.

At the trial of the case on the merits, the company offered evidence sufficient to sustain the allegations of the complaint. The city offered no evidence and made no serious contention that the rates fixed in the ordinance complained of were sufficient, but insisted that the franchise ordinance was a contract binding the company to the fares specified in section XV as the maximum never to be exceeded during the 20-year term.

The District Court held that the franchise fixed rates for the first year only, and final decree was entered enjoining the enforcement of the ordinance.

On this appeal, the city's only contention is that, under the franchise, the company has no right at any time to have fares in excess of those specified in that section, and because of the contract, it may not invoke constitutional protection against the enforcement of the specified rates, even if shown to be too low to yield a reasonable return.

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*Before considering the language, it is appropriate to take note of the situation existing at the time the passage of the franchise was being considered. The plaintiff's predecessor, the Paducah Traction Company, had operated the system for many years. Until July 1, 1918, there was a 5-cent fare. The city and company agreed upon a fare of 7 cents to commence on that date. On September 1, 1918, a receiver was appointed and that fare continued in force until October 1, 1919, the date of the commencement of the term of the present franchise. The District Judge in his opinion on granting the motion for a temporary injunction said:

"The predecessor of the plaintiff had failed to accomplish either an adequate transportation system for the city or the making of anything resembling profits for itself."

Operating expenses greatly increased between 1914 and the adoption of the franchise ordinance.

[1] That the city had power under its charter to prescribe just and reasonable fares from time to time was stated by counsel on the argument and is assumed. The surrender of this power or any part of it is a very grave act; authority to make it must be plain, and the intention so to do must clearly and unmistakably appear. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. Ed. 176, and cases there cited.

[2] The company was entitled to just compensation—i. e., a reasonable return on the value of its property used in the public service—and, unless contracted away, that right is protected by constitutional safeguards which may not be overridden by legislative enactment or considerations of public policy. *Southern Iowa Electric Co. v. City of Chariton et al.*, 255 U. S. 539, 542, 41 Sup. Ct. 400,

65 L. Ed. 764, and cases there cited; *San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, 41 Sup. Ct. 428, 65 L. Ed. 777.

[3] On the argument, it was stated by counsel that the city and company have power to contract as to rates and we so assume. If the franchise here amounts to a contract

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*binding the company to the fare stated therein as a maximum, as claimed by the city, for the whole franchise term of 20 years, it cannot complain, and there is no ground for relief; and the question whether such rates are too low to give a reasonable return or sufficient is immaterial. *Southern Iowa Electric Co. v. City of Chariton et al.*, supra, 255 U. S. 543, 41 Sup. Ct. 400, 65 L. Ed. 764; *San Antonio v. San Antonio Public Service Co.*, supra.

[4] In the construction of section XV, regard properly may be had to the facts, the situation of the parties at the time of the adoption of the ordinance and to their respective powers and rights liable to be effected by the franchise.

The first clause is as follows:

"The fare for one continuous trip for twelve (12) months from the commencement of operation under this franchise is hereby fixed as follows:

Cash fare for adults.....	6¢
Children under twelve and over five..	Half fare
Children under five when accompanied by guardian.....	Nothing."

By this provision a definite fare for a specified period is fixed. There is nothing indicating any intention that the fares are to continue beyond the 12 months or that they are to be taken as maximum and not to be exceeded after the expiration of that period.

The second clause is as follows:

"At the end of such period the purchaser, shall submit a verified statement of the receipts and expenditures to the mayor and commissioners of the city of Paducah and if it appear therefrom (after investigation and verification of such report) that the purchaser has received more than a sufficient sum to pay expenses and a reasonable rate of return on the capital invested, such purchaser shall repay to the city of Paducah the difference between the amount

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necessary for such expenses and a *reasonable rate of return upon invested capital and the amount actually received."

The purpose of this is plain. The parties here provided for payment to the city by the company of any excess that might result from possible decline of operating expenses or other causes. There is no support here for the city's contention that the fares specified in the section were fixed as the permanent maximum fares for the whole period.

The third clause, commencing the second paragraph of the section, is as follows:

"At the expiration of each 12 months during the life of this franchise, for the purpose of regulating fares to be charged by the purchaser, and to accomplish that purpose, and to prevent excessive fares, the purchaser shall at the expiration of each 12 months during the life of this franchise submit to the commissioners of the city of Paducah a verified statement of the receipts and expenditures and if from any of such reports it appears the fare as fixed is more than sufficient to provide a reasonable rate of return upon the invested capital, the city shall reduce such fare accordingly."

The reports required are for the purpose of regulating fares, and were intended to furnish the city facts in aid of the exercise of its power to prescribe just and reasonable fares and to prevent excessive fares; and by this provision there is evidenced a definite understanding that, if in any 12 months period the revenue yielded by the fares established and in effect for that period is more than sufficient, as defined in the ordinance, the city will reduce the fares accordingly. There is nothing here to indicate an intention that the fare prescribed in the first clause shall be deemed maximum for the term of the franchise.

The third paragraph commences with the following language:

"For the purpose of ascertaining the rate of fare to be charged hereunder the city may cause
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said *property to be appraised as follows."

The remaining part of the section relates to the valuation. It gives the city authority to require an appraisal of property to be made in the manner specified and imposes upon the company one-half of the expense thereof. This is a further aid to the exercise of the city's power to prescribe just and reasonable fares.

The conclusions to be drawn as to the matter in controversy are obvious. The parties agreed to and were bound to the specified fares for the first 12 months. These fares were not agreed to be maximum for any other part of the franchise term. The right of the company thereafter to have fares sufficient to provide a reasonable rate of return upon its invested capital was not contracted away. The power and duty of the city thereafter to prescribe fares that are just and reasonable was not contracted away; it was definitely understood that, if from any of such reports it appears that "the fare as fixed" (meaning, as established and in effect) was excessive, the city will reduce such fare accordingly.

We have examined the record and are satisfied that the fares prescribed by the ordinance of September 21, 1920, were shown to be too low under the conditions existing at the time of the trial, and that the company is entitled to the injunction.

[5] The decree entered is general in form

and is not limited as to time. The terms of the ordinance prescribing the fare in question are general and fix no time limit. It is obvious that conditions may have so changed or hereafter may so change that these or even lower fares may be just and reasonable. The decree appealed from should be modified to safeguard the right of the city under its charter and the franchise properly to exercise its power to prescribe just and reasonable fares.

The decree is modified in accordance with this opinion, and, as so modified, is affirmed.

(261 U. S. 204)

UNITED STATES v. BHAGAT SINGH THIND.

(Argued Jan. 11, 12, 1923. Decided Feb. 19, 1923.)

No. 202.

1. Aliens  61—"White person" in Naturalization Act must be given popular meaning.

In Rev. St. § 2169 (Comp. St. § 4358), extending the provisions of the Naturalization Act to aliens who are free white persons, the term "white persons" is a popular and not a scientific term, and must be given its popular meaning, and as such is not to be construed as identical with "Caucasian," unless the latter term is given its popular meaning, as referring to recognized racial distinctions existing at present, and not to possibly common ancestry of dissimilar races.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, White Person.]

2. Aliens  61—High-caste Hindu is not a "white person," within Naturalization Act.

In the popular meaning, "white persons," within the Naturalization Act, refers to immigrants from the British Isles and Northwestern Europe, who composed most of the population when the Naturalization Act was adopted, and the later immigrants from Eastern, Southern, and Middle Europe, who were unquestionably akin to those already here and readily amalgamated with them, and does not include a high-caste Hindu, even though some authorities class such Hindus as members of the Caucasian race, and this construction is fortified by the provision of Immigration Act Feb. 5, 1917, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289½b), excluding all inhabitants of India.

3. Statutes  216—Debate can be considered in construction, though not basis therefor.

Though the debates in Congress during the consideration of an act form no basis for its judicial construction, they cannot be altogether ignored in the search for the true meaning of words which are in themselves historic.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the United States against Bhagat Singh Thind to cancel a certificate of nat-

uralization. From a decree of the District Court dismissing the bill (268 Fed. 683), the United States appealed to the Circuit Court of Appeals, which certified to the Supreme Court the question whether a high-caste Hindu was a white person, and whether the Immigration Act of 1917 disqualified him from naturalization. First question answered in the negative.

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*Mr. Solicitor General Beck, of Washington, D. C., for the United States.

Mr. Will R. King, of Washington, D. C., for Thind.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

This cause is here upon a certificate from the Circuit Court of Appeals requesting the instruction of this Court in respect of the following questions:

"1. Is a high-caste Hindu, of full Indian blood, born at Amritsar, Punjab, India, a white person within the meaning of section 2169, Revised Statutes?

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*"2. Does the Act of February 5, 1917 (39 Stat. 875, § 3), disqualify from naturalization as citizens those Hindus now barred by that act, who had lawfully entered the United States prior to the passage of said act?"

The appellee was granted a certificate of citizenship by the District Court of the United States for the District of Oregon, over the objection of the Naturalization Examiner for the United States. A bill in equity was then filed by the United States, seeking a cancellation of the certificate on the ground that the appellee was not a white person and therefore not lawfully entitled to naturalization. The District Court, on motion, dismissed the bill (In re Bhagat Singh Thind, 268 Fed. 683), and an appeal was taken to the Circuit Court of Appeals. No question is made in respect of the individual qualifications of the appellee. The sole question is whether he falls within the class designated by Congress as eligible.

Section 2169, Revised Statutes (Comp. St. § 4358), provides that the provisions of the Naturalization Act "shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

[1] If the applicant is a white person, within the meaning of this section, he is entitled to naturalization; otherwise not. In *Ozawa v. United States*, 260 U. S. 178, 43 Sup. Ct. 65, 67 L. Ed. —, decided November 13, 1922, we had occasion to consider the application of these words to the case of a cultivated Japanese and were constrained to hold that he was not within their meaning. As there pointed out, the provision is not that any particular class of persons shall be excluded, but it is, in effect, that only white persons shall be included within the privilege of the statute. "The intention was to confer the

privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these par-

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ticular *races been suggested the language of the act would have been so varied as to include them within its privileges"—citing *Dartmouth College v. Woodward*, 4 Wheat. 518, 644, 4 L. Ed. 629. Following a long line of decisions of the lower Federal courts, we held that the words imported a racial and not an individual test and were meant to indicate only persons of what is popularly known as the Caucasian race. But, as there pointed out, the conclusion that the phrase "white persons" and the word "Caucasian" are synonymous does not end the matter. It enabled us to dispose of the problem as it was there presented, since the applicant for citizenship clearly fell outside the zone of debatable ground on the negative side; but the decision still left the question to be dealt with, in doubtful and different cases, by the "process of judicial inclusion and exclusion." Mere ability on the part of an applicant for naturalization to establish a line of descent from a Caucasian ancestor will not ipso facto and necessarily conclude the inquiry. "Caucasian" is a conventional word of much flexibility, as a study of the literature dealing with racial questions will disclose, and while it and the words "white persons" are treated as synonymous for the purposes of that case, they are not of identical meaning—*idem per idem*.

In the endeavor to ascertain the meaning of the statute we must not fail to keep in mind that it does not employ the word "Caucasian," but the words "white persons," and these are words of common speech and not of scientific origin. The word "Caucasian," not only was not employed in the law, but was probably wholly unfamiliar to the original framers of the statute in 1790. When we employ it, we do so as an aid to the ascertainment of the legislative intent and not as an invariable substitute for the statutory words. Indeed, as used in the science of ethnology, the connotation of the word is by no means clear, and the use of it in its scientific

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sense as an equivalent for the words of the statute, other considerations aside, would simply mean the substitution of one perplexity for another. But in this country, during the last half century especially, the word by common usage has acquired a popular meaning, not clearly defined to be sure, but sufficiently so to enable us to say that its popular as distinguished from its scientific application is of appreciably narrower scope. It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be ob-

viously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken. See *Maillard v. Lawrence*, 16 How. 251, 261, 14 L. Ed. 925.

They imply, as we have said, a racial test; but the term "race" is one which, for the practical purposes of the statute, must be applied to a group of living persons *now* possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote, common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another. It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either. The question for

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deter*mination is not, therefore, whether by the speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons. In 1790 the Adamite theory of creation—which gave a common ancestor to all mankind—was generally accepted, and it is not at all probable that it was intended by the legislators of that day to submit the question of the application of the words "white persons" to the mere test of an indefinitely remote common ancestry, without regard to the extent of the subsequent divergence of the various branches from such common ancestry or from one another.

The eligibility of this applicant for citizenship is based on the sole fact that he is of high-caste Hindu stock, born in Punjab, one of the extreme northwestern districts of India, and classified by certain scientific authorities as of the Caucasian or Aryan race. The Aryan theory as a racial basis seems to be discredited by most, if not all, modern writers on the subject of ethnology. A review of their contentions would serve no use-

ful purpose. It is enough to refer to the works of Deniker (*Races of Man*, 317), Keane (*Man, Past and Present*, 445, 446), and Huxley (*Man's Place in Nature*, 278) and to the *Dictionary of Races*, Senate Document 662, 61st Congress, 3d Sess. 1910-1911, p. 17.

The term "Aryan" has to do with linguistic, and not at all with physical, characteristics, and it would seem reasonably clear that mere resemblance in language, indicating a common linguistic root buried in remotely ancient soil, is altogether inadequate to prove common racial origin. There is, and

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can be, no assurance that the so-called *Aryan language was not spoken by a variety of races living in proximity to one another. Our own history has witnessed the adoption of the English tongue by millions of negroes, whose descendants can never be classified racially with the descendants of white persons, notwithstanding both may speak a common root language.

The word "Caucasian" is in scarcely better repute.¹ It is at best a conventional term, with an altogether fortuitous origin,² which under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example (*The World's Peoples*, 24, 28, 307, et seq.), it includes not only the Hindu, but some of the Polynesians³ (that is, the Maori, Tahitians, Samoans, Hawaiians, and others), the Hamites of Africa, upon the ground of the Caucasian cast of their features, though in color they range from brown to black. We venture to think that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.⁴

¹ *Dictionary of Races*, supra, p. 31.

² *Encyclopædia Britannica* (11th Ed.) p. 113: "The ill-chosen name of Caucasian, invented by Blumenbach in allusion to a South Caucasian skull of specially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races. Again, two of the best marked varieties of mankind are the Australians and the Bushmen, neither of whom, however, seems to have a natural place in Blumenbach's series."

³ The United States Bureau of Immigration classifies all Pacific Islanders as belonging to the "Mongolic grand division." *Dictionary of Races*, supra, p. 102.

⁴ Keane himself says that the Caucasian division of the human family is "in point of fact the most debatable field in the whole range of anthropological studies." *Man: Past and Present*, p. 444.

And again: "Hence it seems to require a strong mental effort to sweep into a single category, however elastic, so many different peoples—Europeans, North Africans, West Asiatics, Iranians, and others all the way to the Indo-Gangetic plains and uplands, whose complexion presents every shade of color, except yellow, from white to the deepest brown or even black."

"But they are grouped together in a single division, because their essential properties are one,

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*The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has 5 races; Keane following Linnaeus, 4; Deniker, 29.⁵ The explanation probably is that "the innumerable varieties of mankind run into one another by insensible degrees,"⁶ and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. The type may have been so changed by intermixture of blood as to justify an intermediate classification. Something very like this has actually taken place in India. Thus, in Hindustan and Berar there was such an intermixture of the "Aryan" invader with the dark-skinned Dravidian.⁷

In the Punjab and Rajputana, while the invaders seem to have met with more suc-

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cess in the effort to preserve *their racial purity,⁸ intermarriages did occur producing an intermingling of the two and destroying to a greater or less degree the purity of the "Aryan" blood. The rules of caste, while calculated to prevent this intermixture, seem not to have been entirely successful.⁹

[2] It does not seem necessary to pursue the matter of scientific classification further. We are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization under section 2169. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of

* * * their substantial uniformity speaks to the eye that sees below the surface * * * we recognize a common racial stamp in the facial expression, the structure of the hair, partly also the bodily proportions, in all of which points they agree more with each other than with the other main divisions. Even in the case of certain black or very dark races, such as the Bejas, Somali, and a few other Eastern Hamites, we are reminded instinctively more of Europeans or Berbers than of negroes, thanks to their more regular features and brighter expression." Id. 448.

⁵ Dictionary of Races, supra, p. 6. See, generally, 2 Encyclopedia Britannica (11th Ed.) p. 113.

⁶ 2 Encyclopedia Britannica (11th Ed.) p. 113.

⁷ 13 Encyclopedia Britannica (11th Ed.) p. 502.

⁸ Id.

⁹ 13 Encyclopedia Britannica, p. 503. "In spite, however, of the artificial restrictions placed on the intermarrying of the castes, the mingling of the two races seems to have proceeded at a tolerably rapid rate. Indeed, the paucity of women of the Aryan stock would probably render these mixed unions almost a necessity from the very outset; and the vaunted purity of blood which the caste rules were calculated to perpetuate can scarcely have remained of more than a relative degree even in the case of the Brahman caste."

And see the observations of Keane (Man, Past and Present, p. 561) as to the doubtful origin and effect of caste.

that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to "any alien being a free white person" it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these,

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and *other immigrants of like origin, who constituted the white population of the country when section 2169, re-enacting the naturalization test of 1790, was adopted, and, there is no reason to doubt, with like intent and meaning.

[3] What, if any, people of primarily Asiatic stock come within the words of the section we do not deem it necessary now to decide. There is much in the origin and historic development of the statute to suggest that no Asiatic whatever was included. The debates in Congress, during the consideration of the subject in 1870 and 1875, are persuasively of this character. In 1873, for example, the words "free white persons" were unintentionally omitted from the compilation of the Revised Statutes. This omission was supplied in 1875 by the act to correct errors and supply omissions, 18 Stat. c. 80, p. 318. When this act was under consideration by Congress efforts were made to strike out the words quoted, and it was insisted upon the one hand and conceded upon the other, that the effect of their retention was to exclude Asiatics generally from citizenship. While what was said upon that occasion, to be sure, furnishes no basis for judicial construction of the statute, it is, nevertheless, an important historic incident, which may not be altogether ignored in the search for the true meaning of words which are themselves historic. That question, however, may well be left for final determination until the details have been more completely disclosed by the consideration of particular cases, as they from time to time arise. The words of the statute, it must be conceded, do not readily yield to exact interpretation, and it is probably better to leave them as they are than to risk undue extension or undue limitation of their meaning by any general paraphrase at this time.

What we now hold is that the words "free white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as

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that *word is popularly understood. As so understood and used, whatever may be the

speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

It is not without significance in this connection that Congress, by the Act of February 5, 1917, 39 Stat. 874, c. 29, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants.

It follows that a negative answer must be given to the first question, which disposes of the case and renders an answer to the second question unnecessary, and it will be so certified.

Answer to question No. 1, No.

(261 U. S. 219)

CRAMER et al. v. UNITED STATES.

(Argued Jan. 15, 16, 1923. Decided Feb. 19, 1923.)

No. 207.

1. Public lands ☞75—Land occupied by individual Indians was reserved from railroad grant; "reserved or otherwise disposed of."

Though the right of an Indian to acquire title to public lands by entry was not recognized prior to Act March 3, 1875, extending the homestead privilege to Indians, lands in possession of individual Indians at the time of the railroad land grant by Act July 25, 1866, were "reserved or otherwise disposed of," within the meaning of the reservation of such lands from the lands granted by that act, in accordance with the settled governmental policy to

respect the Indian right of occupancy which could only be interfered with, or determined by the United States, and the rulings of the land department protecting the rights of individual Indians, and thereby encouraging their adoption of the habits of civilization.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reserve—Reserved.]

2. Public lands ☞106(1)—Rulings of Interior Department in land matters have weight.

The Supreme Court has always given much weight to rulings of the Interior Department in respect to land matters.

3. Public lands ☞217—Statute requiring Spanish claims to be presented does not bar Indian claim by occupancy.

The provisions of Act March 3, 1851, requiring claimants of land in California by virtue of any title derived from the Spanish or Mexican governments to present the same for settlement within a specified time, does not apply to a claim by Indians to land occupied by them, which had no reference to any Spanish or Mexican grant, and which was not shown to have been in existence when that act was passed.

4. Indians ☞27(5)—Public lands ☞120—United States can maintain suit to cancel patent for benefit of individual Indian occupants.

The duty and authority of the United States to act as guardian for Indians extends to the protection of individual Indians, even though they may have become citizens, and authorizes the United States to bring a suit to cancel a patent on behalf of individual Indians, who were occupants of the land at the time it was granted to a railroad.

5. Public lands ☞120—Limitation of time to annul patents does not apply to suits for benefit of Indians.

Act March 3, 1891, c. 561, § 8, limiting the time within which suits may be brought by the United States to annul land patents, was intended to extinguish any right the government might have in the land which is the subject of the patent, not to foreclose claims of third parties, and does not bar the right of the United States to remove the patent as a cloud upon the possessory rights of its Indian occupants.

6. Estoppel ☞62(2)—Government not estopped by unauthorized acts of agents from protecting Indian occupants.

The government is not estopped from maintaining a suit to cancel a patent for the protection of Indian occupants of the land, who were occupying it with the implied consent of the government, by the unauthorized acceptance of leases for the land from the patentee by agents of the government, since such unauthorized acts could not bind the government, much less deprive the Indians of their rights.

7. Public lands ☞75—Right of Indian occupants extends only to actual possession.

The right of Indian occupants of land subsequently granted to a railroad to have the land

excluded from the railroad grant extends only to the land actually occupied by them, and not to the legal subdivisions, parts of which were occupied; there being no showing of any claim by the Indians to those legal subdivisions, aside from the bare occupancy of portions of them.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the United States against Fred W. Cramer and others for the cancellation of a land patent, in so far as it purported to convey certain legal subdivisions of land. A decree of the District Court, affirming the right of possession of the Indians for whose benefit the suit was brought to the land actually occupied by them, but not canceling the patent, was reversed by the Circuit Court of Appeals, with instructions to extend the right of possession and to cancel the patent in respect of the entire tracts (276 Fed. 78), and defendants appeal. Decree of Circuit Court of Appeals reversed, and cause remanded to the District Court, with instructions to amend its decree, so as to cancel the patent in respect of the lands possessed by the Indians.

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*Messrs. C. F. R. Ogilby, of Washington, D. C., and Frank Thunen, of San Francisco, Cal., for appellants.

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*Mr. Assistant Attorney General Riter, for the United States.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

This appeal brings up for review a decree of the Circuit Court of Appeals, directing the cancellation of a land patent issued in 1904 by the United States to the defendant, the Central Pacific Railway Company, in so far as it purports to convey certain legal subdivisions of land in sections 13 and 23, township 43 north, range 8 west, M. D. M., Siskiyou county, Cal. 276 Fed. 78.

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*The suit was brought in the federal District Court for the Northern District of California by the United States, acting in behalf of three Indians, who, it was claimed, had occupied the lands continuously since before 1859. The Act of July 25, 1866, 14 Stat. 239, c. 242, granted to the predecessor of the defendant company a series of odd-numbered sections of land, including those named, but excepted from the grant such lands as "shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed

of." ¹ The obligations of the grant were complied with, and patent conveying the sections mentioned above, with others, was issued to the defendant company, as successor in interest of the legislative grantee.

The original complaint alleged an actual occupancy by the individual Indians, but sought cancellation of the patent primarily on the ground that the lands formed part of an Indian reservation provided for in a treaty which was pending for ratification when the act of 1866 was passed; but this last contention was abandoned on the trial, it appearing that the treaty had been rejected by the Senate prior to that date.

But the District Court found for the plaintiff upon the issue of actual occupancy and entered a decree confirming the right of possession in the Indians, which, however, was confined to the land actually inclosed, being an irregular body of about 175 acres and which did not in terms cancel the patent.

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*After the submission of the case plaintiff was allowed, over defendants' objection, to amend its bill by reciting that in bringing the suit the government proceeded in its own right and as guardian of its Indian wards, thereafter named in the bill, by omitting all reference to the treaty, and by making the allegations respecting the Indian occupancy somewhat more specific.

The District Court refused to reopen the case on the defendants' application to allow further proof on the issue last stated, holding that, as the occupation by the Indians was alleged in the original bill, defendants should have offered their evidence on that issue at the trial. The court found that as early as 1859 the Indians named lived with their parents upon the lands described and had resided there continuously ever since; that they had under fence between 150 and 175 acres in an irregularly shaped tract, running diagonally through the two sections, portions of which they had irrigated and cultivated; that they had constructed and maintained dwelling houses and divers outbuildings, and had actually resided upon the lands and improved them for the purpose of making for themselves homes. These findings have support in the evidence and will be accepted here. *Adamson v. Gililand*, 242 U. S. 350, 353, 37 Sup. Ct. 169, 61 L. Ed. 356.

The decree of the Circuit Court of Appeals agreed with that of the District Court generally, but extended the right of possession to the whole of each of the legal subdivisions which was fenced and cultivated in part, and reversed the decree with instructions to enter one canceling the patent in respect of the entire 360 acres.

A reversal of this decree is now sought upon several grounds.

[1, 2] 1. It is urged that the occupancy of land by individual Indians does not come within the exceptive provision of the grant.

¹ Sec. 2. * * * And when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections. * * *

Until the Act of March 3, 1875, 18 Stat. 402, 420, c. 131, extending the homestead

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privilege to Indians, the right *of an individual Indian to acquire title to public lands by entry was not recognized. It cannot, therefore, be said that these lands were occupied by homestead settlers nor were they granted, sold or pre-empted, but the question remains, were they "reserved * * * or otherwise disposed of?" Unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. *Beecher v. Wetherby*, 95 U. S. 517, 525, 24 L. Ed. 440; *Minnesota v. Hitchcock*, 185 U. S. 373, 385, 22 Sup. Ct. 650, 46 L. Ed. 954. It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this court has always given much weight. *Midway Co. v. Eaton*, 183 U. S. 602, 609, 22 Sup. Ct. 261, 46 L. Ed. 347; *Hastings, etc., R. R. Co. v. Whitney*, 132 U. S. 357, 366, 10 Sup. Ct. 112, 33 L. Ed. 363. That department has exercised its authority by issuing instructions from time to time to its local officers to protect the holdings of nonreservation Indians against the efforts of white men to dispossess them. See 3 Land Dec. 371; 6 Land Dec. 341; 32 Land Dec. 382. In *Poisal v. Fitzgerald*, 15 Land Dec. 19, the right of occupancy of an individual Indian was upheld as against an attempted homestead entry by a white man. In *State of Wisconsin*, 19 Land Dec. 518, there had been granted to the state certain swamp lands within an Indian reservation, but the right of Indian occupancy was upheld, although the grant in terms was

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not subject *thereto. In *Ma-Gee-See v. Johnson*, 30 Land Dec. 125, Johnson had made an entry under section 2289, Revised Statutes (Comp. St. § 4530), which applied to "unappropriated public lands." It appeared that at the time of the entry and for some time thereafter the land had been in the possession and use of the plaintiff, an Indian. It was held that under the circumstances the land was not unappropriated within the meaning of the statute, and therefore not open to entry. In *Schumacher v. State of Washington*, 33 L. D. 454, 456, certain lands, claimed by the state under a school grant, were occupied and had been improved by

an Indian living apart from his tribe, but application for allotment had not been made until after the state had sold the land. It was held that the grant to the state did not attach under the provision excepting lands "otherwise disposed of by or under authority of an act of Congress." Secretary Hitchcock, in deciding the case, said:

"It is true that the Indian did not give notice of his intention to apply for an allotment of this land until after the state had made disposal thereof, but the purchaser at said sale was bound to take notice of the actual possession of the land by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for allotment should be made."

Congress itself, in apparent recognition of possible individual Indian possession, has in several of the state enabling acts required the incoming state to disclaim all right and title to lands "owned or held by any Indian or Indian tribes." See 25 Stat. 676, c. 180, § 4, par. 2; 28 Stat. 107, c. 138, § 3, par. 2.

The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating, and improving the soil and establishing fixed homes thereon, was in harmony with the well-understood desire of

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the government which *we have mentioned. To hold that by so doing they acquired no possessory rights to which the government would accord protection would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.

The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy. *Broder v. Water Co.*, 101 U. S. 274, 276, 25 L. Ed. 790, furnishes an analogy. There this court, holding that the Act of July 26, 1866, 14 Stat. 251, c. 262, § 9 (Comp. St. § 4647), acknowledging and confirming rights of way for the construction of ditches and canals, was in effect declaratory of a pre-existing right, said:

"It is the established doctrine of this court that rights of * * * persons who had constructed canals and ditches * * * are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

Then, referring to the land grant to the Pacific Railroad Companies, which was made expressly subject to "pre-emption, homestead, swamp-land, or other lawful claims," and which antedated the act of 1866, the court

held that defendant's right of way for its canal, independent of that act, was within the excepting provision of that grant and said:

"We have had occasion to construe a very common clause of reservation in grants to other railroad companies, and in aid of other works of internal improvements, and in all of them we have done so in the light of the general principle that Congress, in the act of making these donations, could not be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect, were

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*still meritorious, and had just claims to legislative protection."

We are referred to *Buttz v. Northern Pacific Railroad*, 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330, but that case affords no aid to the defendant. There the railroad ran through a section of the country where the original right of Indian occupancy had not been extinguished and this court held 119 U. S. 66, 7 Sup. Ct. 104 (30 L. Ed. 330):

"The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance."

The United States, however, undertook to extinguish the Indian title as rapidly as might be consistent, etc., and when this was done the right of the company, it was held, immediately attached free from the Indian title.

In our opinion the possession of the property in question by these Indians was within the policy and with the implied consent of the government. That possession was definite and substantial in character and open to observation when the railroad grant was made, and we have no doubt falls within the clause of the grant excepting from its operation lands "reserved * * * or otherwise disposed of."

[3] 2. It is insisted that any rights these Indians might otherwise have had are barred by the provisions of the Act of March 3, 1851, 9 Stat. 631, c. 41. This statute required every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments to present the same for settlement to a commission created by the act. There was a provision directing the commission to ascertain and report the tenure by which the mission lands were held and those held by civilized Indians, and other Indians describ-

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ed.² *The act plainly has no application.

²"Sec. 8. * * * That each and every person, claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to de-

The Indians here concerned do not belong to any of the classes described therein and their claims were in no way derived from the Spanish or Mexican governments. Moreover, it does not appear that these Indians were occupying the lands in question when the act was passed.

Barker v. Harvey, 181 U. S. 481, 21 Sup. Ct. 690, 45 L. Ed. 963, does not support the defendants' contention. There the Indians whose claims were in dispute were Mission Indians claiming a right of occupancy derived from the Mexican government. They had failed to present their claims to the Commission, and this, it was held, constituted an abandonment. The Indians here concerned have no such claim and are not shown to be within the terms of the act of 1851 in any respect. It further appeared in that case that prior to the cession to the United States the Mexican authorities, upon examination, found that the Indians had

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abandoned the lands and thereupon made an absolute grant to the plaintiff's predecessors, and, this grant having been confirmed by the Commission, a patent for the lands had issued.

[4] 3. The contention that the United States was without authority to maintain the suit in the capacity of guardian for these Indians is without merit. In *United States v. Kagama*, 118 U. S. 375, 383, 384, 6 Sup. Ct. 1109, 1114, 30 L. Ed. 228, the general doctrine was laid down by this court that the Indian tribes are wards of the nation, communities dependent on the United States. "From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." This duty of protection and power extend to individual Indians, even though they may have become citizens. *United States v. Nice*, 241 U. S. 591, 598, 36 Sup. Ct. 696, 60 L. Ed. 1152, and cases cited; *Heckman v. United States*, 224 U. S. 413,

decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered. * * *

"Sec. 13. * * * That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States. * * *

"Sec. 16. * * * That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians."

436, 32 Sup. Ct. 424, 56 L. Ed. 820; *United States v. Gray et al.*, 201 Fed. 291, 119 C. C. A. 529; *United States v. Fitzgerald*, 201 Fed. 295, 119 C. C. A. 533. In *United States v. Gray*, supra, the capacity of the United States to sue for the breach of a lease made by an Indian allottee was asserted and upheld. After pointing out the fact that it was the policy of the government to protect all Indians and their property and to teach and persuade them to abandon their nomadic habits the court said:

"The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power nor relieve it of its duty. * * *

In *United States v. Fitzgerald*, supra, it was held that the United States had capacity to sue for the taking of personal property from an Indian held by him subject to the management of an Indian agent, on the ground, among others, that such taking obstructs the execution of its governmental policy. At page 296 of 201 Fed., at page

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534 of 119 C. C. A. the *court said:

"The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies. It may maintain such suits, although it has no pecuniary interest in the subject-matter thereof, for the purpose of protecting and enforcing its governmental rights and to aid in the execution of its governmental policies."

Congress may, if it thinks fit, emancipate the Indians from their wardship wholly or partially, *United States v. Waller*, 243 U. S. 452, 459, 37 Sup. Ct. 430, 61 L. Ed. 843; but in respect of the Indians here concerned that has not been done. It results, from the conclusion we have reached to the effect that these Indians had occupied the lands in dispute with the implied consent of the United States and in accordance with its policy, that the United States sustains such a relation to the subject matter and persons that its authority to maintain the suit cannot be questioned.

[5] 4. The suit is not barred by the Act of March 3, 1891, c. 561, § 8, 26 Stat. 1095, 1099, limiting the time within which suits may be brought by the United States to annul patents.

The object of that statute is to extinguish any right the government may have in the land which is the subject of the patent, not to foreclose claims of third parties. Here the purpose of the annulment was not to establish the right of the United States to the lands, but to remove a cloud upon the possessory rights of its wards. As stated by this court in *United States v. Winona, etc.*, R. R. Co., 165 U. S. 463, 475, 17 Sup. Ct. 368,

371 (41 L. Ed. 789) the statute was passed in recognition of—

"the fact that when there are no adverse individual rights, and only the claims of the government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration."

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After the *lapse of the statutory period, the patent becomes conclusive against the government, but not as against claims and rights of others, merely because the relation of the government to them is such as to justify or require its affirmative intervention. See *Northern Pacific Ry. Co. v. United States*, 227 U. S. 355, 367, 33 Sup. Ct. 368, 57 L. Ed. 690; *La Roque v. United States*, 239 U. S. 62, 68, 36 Sup. Ct. 22, 60 L. Ed. 147.

[6] 5. Neither is the government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the government was, under the circumstances, unauthorized and could not bind the government; much less could it deprive the Indians of their rights. See and compare *Lee v. Munroe and Thornton*, 7 Cranch, 366, 3 L. Ed. 373; *Whiteside et al. v. United States*, 93 U. S. 247, 257, 23 L. Ed. 882; *Dubuque, etc., R. R. Co. v. Des Moines Valley R. R. Co.*, 109 U. S. 329, 336, 3 Sup. Ct. 188, 27 L. Ed. 952; *Pine River Logging Co. v. United States*, 186 U. S. 279, 291, 22 Sup. Ct. 920, 46 L. Ed. 1164.

[7] 6. We think, however, the Circuit Court of Appeals erred in holding that the right of the Indians extended to the entire area of each legal subdivision, irrespective of the inclosure, and we agree with the District Court in confining the right to the lands actually inclosed, including the whole of the northeast quarter of the southwest quarter of section 13, the small portion thereof which had not been enclosed having been improved. The Court of Appeals, in support of its conclusion, relied upon *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800. In that case Conlan had entered upon a quarter section of land, occupied a portion thereof, and declared his purpose to acquire a pre-emption right to the whole, and soon thereafter had filed his

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declaratory *statement in legal form, claiming the whole as a pre-emptor. This court sustained Conlan's claim as against Quinby, a subsequent settler. Here the claim for the Indians is based on occupancy alone, and the extent of it is clearly fixed by the inclosure, cultivation and improvements. The evidence

does not disclose any act of dominion on their part over, or any claim or assertion of right to, any lands beyond the limits of their actual possessions as thus defined. Under the circumstances, their rights are confined to the limits of actual occupancy and cannot be extended constructively to other lands never possessed or claimed, simply because they form part of the same legal subdivisions. See *Garrison v. Sampson*, 15 Cal. 93, 95, where the Supreme Court of California said:

"A fatal objection to the judgment consists in the finding of the judge in favor of the plaintiff for the whole tract of land sued for. The plaintiff claims by force of prior possession and a contract or consent on the part of the defendant, whom he mediately or immediately let into possession, to hold the premises for him or subject to his order. The land is public land. It was not taken up by the plaintiff under the Possessory Act of this state, nor was it inclosed. There was a house and corral on the land. Of these he may be said to have been in the actual occupancy. But we cannot see from the proofs any right of possession to the whole of the quarter section, or even any claim to it. We do not understand that the mere fact that a man enters upon a portion of the public land, and builds or occupies a house or corral on a small part of it, gives him any claim to the whole subdivision, even as against one entering upon it without title. The case would be different if he claimed under the Possessory Act, and pursued the necessary steps prescribed by it, or if he had made his entry under the pre-emption laws of the United States. But merely going on waste and uninclosed land, and building a

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house and corral, and even subsequently cutting hay on a part, did not extend his possession to the whole of the 160 acres."

This is in accordance with the general rule that possession alone, without title or color of title, confers no right beyond the limits of actual possession. See *Green v. Litter*, 8 Cranch, 229, 250, 3 L. Ed. 545; *Watkins v. Holman et al.*, 16 Pet. 25, 55, 10 L. Ed. 873; *Marine Ry. Co. v. United States*, 257 U. S. 47, 65, 42 Sup. Ct. 32, 66 L. Ed. 124; *Humphries v. Huffman*, 33 Ohio St. 395, 401; *Langdon v. Templeton*, 66 Vt. 173, 179, 28 Atl. 866; *Ryan v. Kilpatrick*, 66 Ala. 332, 337.

Certain other contentions of defendants we deem it unnecessary to review, although they have been carefully considered. Aside from that stated in the last paragraph we find no error, but for the reasons there given, the decree of the Circuit Court of Appeals is reversed, and the cause remanded to the District Court, with instructions to amend its decree, so as to cancel the patent in respect of the lands possessed by the Indians, and, as so amended, that decree is affirmed. Reversed.

MUNTER v. WEIL CORSET CO., Inc.

(Argued Jan. 22, 1923. Decided Feb. 26, 1923.)

No. 255.

1. Courts ⇨326—Action between citizens of different states for more than \$3,000 within jurisdiction of District Courts.

An action between citizens of different states, involving more than \$3,000, exclusive of interest and costs, is within the general jurisdiction of the District Courts, under Judicial Code, § 24 (Comp. St. § 991).

2. Courts ⇨272—Defendant cannot object to bringing of suit between citizens of different states in district of plaintiff's residence.

Under Judicial Code, § 51 (Comp. St. § 1033), where an action was within the jurisdiction of the District Courts, because it was between citizens of different states and plaintiff was a resident of the district in which the suit was brought, defendant could not object to the venue.

3. Courts ⇨344—Motion to erase case for insufficient service should have been granted, notwithstanding Conformity Act.

Where service on the defendant in an action brought in the district of Connecticut was made in New York City, defendant's motion to erase the case from the docket should have been granted, notwithstanding the Conformity Act (Rev. St. § 914 [Comp. St. § 1537]), and Connecticut statutes requiring pleas to the jurisdiction to contain a prayer for judgment, especially as the objection to the motion was more verbal than real, as the motion necessarily meant that the case should be dismissed for want of jurisdiction.

4. Courts ⇨344—Service of process outside the state held void.

In an action brought in the District Court for Connecticut, service on defendant in New York City was void, as the court had no power to send its process to New York for service.

5. Courts ⇨344—Objection to service outside the state in which suit brought held not waived.

Where defendant, sued in the District Court for Connecticut, was served in New York, he might have waived his right to object; but, where there was no pleading to the merits or general appearance, and no action or conduct tantamount to either, the objection was not waived by delay following the denial of defendant's motion to erase the case from the docket, when such delay was participated in by plaintiff, and counsel at all times strenuously insisted on the objection.

In Error to the District Court of the United States for the District of Connecticut.

Action by the Weil Corset Company, Inc., against Charles Munter. Order denying a motion to vacate an earlier order and to erase the case from the docket, and defendant

brings error. Reversed and remanded, with directions.

Mr. Elijah N. Zoline, of New York City, for plaintiff in error.

Mr. Benjamin Slade, of New York City, for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Action in the District Court for the District of Connecticut, by the Weil Corset Company, a corporation of Connecticut, against Charles Munter, a citizen and resident of New York, for breach of contract; damages being laid at \$7,273.26, with interest from November 13, 1914. Service upon Munter was made in New York City.

[1, 2] The case is between citizens of different states and involves more than \$3,000,

^{*277} exclusive of interest and costs. It therefore is within the general jurisdiction of the District Courts, Section 24 of the Judicial Code (Comp. St. § 991). The plaintiff being a resident of the district in which the suit was brought, the defendant could not object to the venue or place of suit. Section 51, Judicial Code Comp. St. § 1033). *Camp v. Gress*, 250 U. S. 308, 39 Sup. Ct. 478, 63 L. Ed. 997; *Lee v. Chesapeake & Ohio Ry. Co.* (January 22, 1923) 260 U. S. 653, 43 Sup. Ct. 230, 67 L. Ed. —.

[3] But service of process was made upon Munter in New York, and he availed himself of the fact by filing on August 30, 1918, before the return day, by his attorney, the following motion:

"The defendant moves that the above-entitled case be erased from the docket, because it appears from the writ and complaint therein that the defendant was at the time of the commencement of said action a resident of the state of New York, and it appears from the return thereon that service of said writ and complaint was not otherwise made upon him than by leaving a copy of said writ and complaint with him in the borough of Manhattan, city, county, and state of New York."

The court denied the motion, on the ground that it "contained no prayer for judgment"; a prayer for judgment, it was held, being necessary under the statutes of Connecticut in pleas "to the jurisdiction, or in attachment, or both," and that the condition was made applicable to the District Court by the Conformity Act (Section 914, Revised Statutes of United States [Comp. St. § 1537]). That act provides:

"That the practice, pleadings, and forms and modes of proceeding in * * * other than equity and admiralty causes in the Circuit and District Courts [of the United States] shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

It may well be contended that the objection to the motion was more verbal than real.

^{*278} There was substantially a prayer for judgment, the only judgment that could be granted; that is, that the "case be erased from the docket," which, necessarily, meant dismissed for want of jurisdiction in the court over the defendant, because the "service of said writ and complaint was not otherwise made upon him than by leaving a copy of said writ and complaint with him in the borough of Manhattan, city, county, and state of New York."

We have decided, in cases which concern the jurisdiction of the federal courts, that, notwithstanding the Conformity Act, neither the statutes of the states nor the decisions of its courts are conclusive upon the federal court, the determination of such questions being "in this court alone." *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 443, 30 Sup. Ct. 125, 128 (54 L. Ed. 272). The motion of Munter, therefore, should have been granted, and the action dismissed.

It is, however, contended that he, by his subsequent conduct, submitted to the ruling and waived his right of objection. The motion was made August 30, 1918. The case was assigned for trial for November 28, 1921. After some correspondence with counsel for plaintiff and some conversation with the court, Munter, through other counsel, moved the court "for an order vacating and setting aside the decision of June 12, 1919, and directing that the above-entitled action be erased from the docket of the court."

The court denied the motion. The court took pains to review the prior proceedings, and distinguished between the objections to the jurisdiction that cannot be waived, and those that can be waived, assigning the objection of Munter to the latter, and when they are waived, "the jurisdiction of the court is complete."

The court deduced a waiver from the conduct of counsel, notwithstanding the court conceded that counsel had strenuously insisted upon the objection. The conclusion was reached because, in view of the court,

^{*279} the defective service had not been properly taken advantage of, and that "by failing to follow up the ruling made on June 12, 1919," the defendant was "guilty of gross laches, and by his laches" had "waived his right," and this was "equivalent to an actual waiver under the statute accorded him—to object to the jurisdiction."

[4, 5] We are unable to concur. The service on Munter was void. The District Court of Connecticut had no power to send its process to New York, for service. *Toland v. Sprague*, 12 Pet. 300, 330, 9 L. Ed. 1093; *Herndon v. Ridgway*, 17 How. 424, 15 L. Ed. 100; *New York Life Insurance Co. v. Bangs*, 103 U. S. 435, 26 L. Ed. 580. That Munter might have waived his right to object to the service is established by the cases

cited by the court. They are all to the effect that pleading to the merits or a general appearance without objecting to the service is a waiver. There is no such pleading or appearance in the present case and no action or conduct tantamount to either. There was delay, it is true, but it was as much the delay of the Corset Company as of Munter, and to this situation the company brought its action. It subjected its action to the indulgence of Munter, and he, in the exercise of his right, immediately declared his opposition to the invalid service made in another district and state. He did all that was incumbent upon him to avail of his right. The court erred by denying it, and erred again in refusing to set aside the order denying it.

Reversed and remanded, with directions to dismiss the action.

(261 U. S. 280)

DAVIS, Director General of Railroads, etc.,
v. L. N. DANTZLER LUMBER CO.

(Argued and Submitted Jan. 17, 1923.
Decided Feb. 26, 1923.)

No. 228.

1. Railroads Ⓒ5½, New, vol. 6A Key-No. Series—Procedure in suit on cause accruing before federal control must be in accordance with acts of Congress.

Though liability of a railway company continued after the property of another company sought to be held as garnishee had passed under federal control, and the company liable was subject to suit after assumption of such control, the procedure had to be in accordance with the acts of Congress.

2. Railroads Ⓒ5½, New, vol. 6A Key-No. Series—Garnishment during federal control unauthorized.

Under the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a-3115¾p), providing that no process, mesne or final should be levied against property under federal control and that suits on causes of action arising prior to such control might be instituted or continued to judgment, but with immunity of physical property from levy, and the proclamation of the President prohibiting attachment by mesne process or on execution, a railroad whose property was under federal control could not be made a defendant through garnishment, and such garnishment proceedings were not permitted, because authorized by the statutes of the state.

3. Railroads Ⓒ5½, New, vol. 6A Key-No. Series—Defense by garnishee under federal control held seasonably made.

Where a railway company, sued by garnishment proceedings, admitted an indebtedness, but attacked the jurisdiction of the court under the presidential proclamation exempting property of railroads under federal control

from process, and under Federal Control Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), and, after reversal of a judgment in its favor the Director General filed an answer contesting the jurisdiction and power of the court to proceed against property under the control of the United States, the defense was seasonably and properly made.

On Writ of Certiorari to the Supreme Court of the State of Mississippi.

Suit by the L. N. Dantzler Lumber Company against the Texas & Pacific Railway Company and others. A decree against the Mobile & Ohio Railroad Company was reversed by the Supreme Court of Mississippi (126 Miss. 812, 89 South. 148), but decree was ordered against James C. Davis, Director General of Railroads, as Agent, under section 206 of the Transportation Act of 1920, etc., and he brings certiorari. Reversed and remanded.

Messrs. R. C. Beckett and Carl Fox, both of St. Louis, Mo., for petitioner.

Mr. W. A. White, of Gulfport, Miss., for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

This case presents an asserted conflict between the laws of Mississippi, subjecting property to attachment, and the statutes of the United States which empowered the President to take control of the railroad transportation systems of the United States, and exempt their property from state processes. Act August 29, 1916, 39 Stat. 619, 645; 40 Stat. 451 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a-3115¾p). See, also, 41 Stat. 456.

The respondent, the L. N. Dantzler Lumber Company, herein called the lumber company, is a corporation of Mississippi. It filed a bill for attachment under the Code of Mississippi of 1906 against the Texas & Pacific

*Railway Company, a nonresident of Mississippi, and certain other railroads, including the Mobile & Ohio Railroad Company, a Mississippi corporation, having officers and agents in the state.

The purpose of the bill was to subject the indebtedness of the defendant railroads to the Texas & Pacific Railway Company to the satisfaction of a claim for damages to a shipment of cattle from Fort Worth, Tex., to a station in Harrison county, Miss. The shipment was evidenced by a bill of lading dated October 10, 1917.

The charge is that, by reason of the negligence of the railroad companies, the lumber company was damaged in the sum of \$5,600, and for the payment of this amount a claim was rendered by the lumber company to the Texas & Pacific Railway Company. Payment was refused.

It is further charged that the several railroad companies are indebted to the Texas & Pacific Railway Company, and that the lumber company has the right to subject such sums to the satisfaction of its claim against the Texas & Pacific Railway Company, that company being a nonresident of Mississippi, and having no officer in the state upon whom service of process can be had. Personal service is prayed against those companies upon which it can be had, and service by publication upon those companies upon which personal service cannot be had, and that they make answer stating what funds of the Texas & Pacific Railway Company they have in their hands, and in what amounts they will be indebted to that company in the future, and that the respective funds in their hands be subjected to the demand of the lumber company.

The Mobile & Ohio Railroad Company alleged that the suit is one in attachment and that the company was made a party simply as garnishee in order that any indebtedness from it to the Texas & Pacific Railway Com-

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pany might be condemned to pay the demand of the lumber company, and that the service for that process is mesne process and within the prohibition of the act of Congress (41 Stat. 305), violates that act, and is void.

A statement of its indebtedness to the Texas & Pacific Railway Company was attached to the answer, showing an indebtedness of \$3,053.94.

The company, further answering, alleged that on December 26, 1917, the President of the United States took possession of and assumed control of the transportation systems of the United States, including the Mobile & Ohio Railroad Company and the Texas & Pacific Railway Company, and proclaimed in part, as follows:

"Except with the prior written consent of said Director General [a Director General was appointed by the President] no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers."

And further that Congress ratified the action of the President and provided for the control of the railroads by an act approved March 21, 1918, section 10 of which provides as follows:

"No process, mesne or final, shall be levied against any property under such federal control."

And that any money due from the company to the Texas & Pacific Railway Company is property under federal control within the meaning of the President's proclamation and the act of Congress under the orders of the Director General appointed by the President.

A decree pro confesso was entered against the Texas & Pacific Railway Company, the

decree reciting that the company had been summoned according to law, and, having failed to appear and plead, answer, or demur, the allegations of the bill were taken as confessed against the company.

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*Subsequently the cause was set down for hearing on the decree, the answer of the other railroads, including that of the Mobile & Ohio Railroad Company, and upon the motion of the latter to discharge it as garnishee. The motion was sustained and the writ of garnishment dismissed as to it. Relief against the other roads, however, was denied, the court being of the opinion that it had no jurisdiction. The dismissal was reversed on appeal by the Supreme Court of the state. *Dantzler Lumber Co. v. Texas & P. Ry. Co.*, 119 Miss. 328, 80 South. 770, 4 A. L. R. 1669.

The Supreme Court stated the question to be whether the suit could be maintained by reason of the attachment, no other property of the Texas & Pacific Railway Company being within the state than the indebtedness of the Mobile & Ohio Railroad Company to the Texas & Pacific Railway Company.

The court decided the question in the affirmative, expressing a contrary view of the President's proclamation and the acts of Congress than that asserted by the Mobile & Ohio Railroad Company, and even intimating that otherwise the proclamation and acts would be an encroachment upon the power of the state. The court, besides, defined the words "mesne" to mean "intermediate; intervening; the middle between two extremes." This being the definition of "mesne" process, it was the conclusion of the court, as we understand its opinion, that the present proceeding was commenced under the law of the state by original process and did not incur the prohibition of section 10.

The conclusion and judgment were that the—

"court below erred in discharging the Mobile & Ohio Railroad Company as garnishee, and in holding that it had no jurisdiction to proceed to determine the controversy before it."

Upon return of the case a supplemental bill was filed and a new garnishment served on the Mobile & Ohio Railroad Company.

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*The company answered the bill, repeating, in effect, its former answer, and making other defenses, not of importance to consider.

The Director General filed what he called an amended answer to the bill, averring that his former answer was filed in the name of the Mobile & Ohio Railroad Company, and was intended to be, and was in fact the answer of the Director General, and the indebtedness admitted therein to be due the Texas & Pacific Railway Company was the indebtedness of the Director General, and not the indebtedness of the Mobile & Ohio Railroad Company. It set forth, as the answer of the

Mobile & Ohio Railroad Company had done, that on December 26, 1917, the President by proclamation issued in pursuance of law, took possession of the railroad transportation systems of the United States, including the property of the Mobile & Ohio Railroad Company. The Director General of Railroads was created by the President, to whom the present Director General is the successor, and as such was, at the time of the summons against the Mobile & Ohio Railroad Company, operating the same, and that the latter company has not been in possession or control of, nor has it operated or had anything to do with the operation of, that railroad since December 28, 1917.

And the Director General further answered that after the answer of the Mobile & Ohio Railroad Company was filed, in order to avoid confusion, he issued General Order No. 50, afterward amended by Order No. 50a, providing that suits or causes of action arising out of the operation of railroads by him should be brought against him and not against the railroad companies, and further that after the Mobile & Ohio Railroad Company (and other railroad companies) was taken over by him the account between it (and other railroad companies) was continued as before government control, and that in—

“the sense that there was money due from the

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Director General on account of *his operation of the Mobile & Ohio Railroad to the Director General on account of his operation of the Texas & Pacific Railroad, there was an indebtedness as set out in the original answer filed herein, but that it was not a debt in the true sense of the word or within the meaning of the laws of Mississippi, subjecting debts to garnishments in cases of this kind.”

And he prayed to be dismissed with costs.

Of the second trial of the case it is only necessary to say that the court refused to let the Mobile & Ohio Railroad Company out of the case, or the Director General into it (the answer of the Director General was struck out on motion of the lumber company), and, the Texas & Pacific Railway Company having failed to appear, a decree was rendered against it in favor of the lumber company in the sum of \$6,552.

It was further decreed that there was an admitted indebtedness from the Mobile & Ohio Railroad Company to the lumber company in the sum of \$3,053.94, which was ordered to be paid into the chancery court of Harrison county, Miss., within 30 days, to be disbursed in accordance with the decree.

An appeal was taken by the Mobile & Ohio Railroad Company to the Supreme Court, and in that court, James C. Davis, Director General of Railroads, as Agent of the United States, operating the Mobile & Ohio Railroad Company, was substituted as defendant, the court saying:

“The record now makes the Director General, an agent of the United States government, the defendant in garnishment.”

The court reversed the decree of the chancery court against the Mobile & Ohio Railroad Company, deciding that it should have been discharged as garnishee, and ordered a decree against Davis as Director General for the sum of \$3,053.94, with interest at 6 per cent. from June 29, 1920, until paid. To review that judgment is the purpose of this certiorari.

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*In its opinion upon the second appeal the court reaffirmed the view expressed upon the first appeal, and sustained the validity and operation of the state statute against the acts of Congress and the proclamation of the President, rejecting the defense set up that the carrier was an instrumentality or agency of the Federal Government, citing *Missouri Pacific Railroad Co. and Hines, Director General v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087.

It was deduced from that decision that the Director General was to be treated as a Director General of each separate system of transportation, and that the separate systems being operated by the Director General are separate parties within the meaning of the purposes of the Federal Control Act, and that therefore the judgment against the Mobile & Ohio Railroad Company was, in effect, in view of the substitution made, a judgment against the Director General of the Mobile & Ohio Railroad Company and that the lumber company was entitled to recover.

It was, however, decided that the Director General could not be required to pay the amount of the judgment into court, but that the lumber company would have to secure it in a manner provided for by the Federal Control Act.

[1] We think the decision of the Supreme Court is based on a misunderstanding of the Ault Case. The liability of the Texas & Pacific Railway Company occurred before the Mobile & Ohio Railroad Company passed under government control, and while the liability continued and the Texas & Pacific Railway Company was subject to suit after the assumption of such control, necessarily, the procedure had to be in accordance with the acts of Congress.

As to what this procedure should be, the contentions of the parties are in conflict. We have seen that the Supreme Court upon the first appeal, *Dantzler Lumber Co. v. Texas & P. R. Co.*, 119 Miss. 328, 80 South. 770, 4 A. L. R. 1669, decided that a carrier,

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though operated under government *control, might be subject to garnishment, and that judgment could be rendered against it for a debt it owed to the principal defendant, and, further, that the indebted company (in this case the Mobile & Ohio Railroad Company) could not plead any defense which

was personal to the principal defendant (in this case the Texas & Pacific Railway Company). From these conclusions the court considered it was not precluded by section 10 of the Federal Control Act, which provided that "no process, mesne or final, shall be levied against any property under such federal control."

This makes the question in the case.

The lumber company contests the pertinency of the provisions and their control. It asserts that no decree in rem had been rendered in the case, and that—

"the final decree of the Supreme Court of Mississippi discharged the fund, and that this court is dealing solely with the judgment in personam against the Director General, which there has been no effort to enforce."

In other words, it is said:

"The Supreme Court expressly released the fund and rendered a decree in personam, and not a word in the decree or the opinion relates to a refusal to pay the money into court, but the opinion expressly provides, this is not to be done or any other sort of execution to issue."

And again the contention is that the lumber company—

"was proceeding as it unquestionably had a right to, but for federal control, and the Director General came into court saying in effect, 'Because of federal control, I am the one to sue,' and procured dismissal of the other defendants."

And further:

"He cannot assume responsibility for the purpose of raising or attempting to raise a federal question and then deny the liability on the merits."

It would be unjust, therefore, is the contention, "now for the Director General to be even heard to say that he is not responsible for the debt," and "the natural consequences

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to *follow his substitution upon the grounds stated by him was to render the decree against him and as such substitute and he is complaining of the very ruling he himself invoked." And this, it is contended, contravenes the Ault Case.

[2] The view is partial and overlooks antagonistic things—overlooks that the Mobile & Ohio Railroad Company was made a defendant through garnishment, attempting thereby to defeat the provision of the Federal Control Act, which provides:

"No process, mesne or final, shall be levied against any property under such federal control."

And the prohibition was necessary to the unity and effectiveness of control in the President and, under him, in the Director General. Such is the ruling in the Ault Case, where it is decided that the railroad systems could be "dealt with as active responsible parties, answerable for their own wrongs," but it was also decided that "levy or execution upon their property was precluded as inconsistent with the government's needs." "Thus, under section 10," is the declaration, "if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the government, save from the immunity of physical property from levy. * * *

To repeat, the right of suit against the carriers was decided, but there was also decided the exemption of their property from levy or execution. The garnishment proceedings against the Mobile & Ohio Railroad Company was an infraction of the exemption—an infringement of the prohibition of the proclamation of the President and congressional enactments. It is not excluded from the condemnation because it is a procedure under the statutes of the state.

[3] The defense was seasonably made. It is to be remembered that the Mobile & Ohio

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Railroad Company, immediately in the proceeding against it, attacked the jurisdiction of the court and adduced the proclamation of the President exempting the property of any of the railroad systems of the United States from process, and also adduced section 10. The attack was successful in the trial court. It was declared impotent by the Supreme Court of the state, and the case was remanded for further proceedings in accordance with the law of the state; that is, in execution of the garnishment proceedings against the indebtedness of the Mobile & Ohio Railroad Company to the Texas & Pacific Railway Company. The Director General then entered the case and took up the contest commenced by the Mobile & Ohio Railroad Company against the law of the state and the jurisdiction of the state court to enforce it.

This the Director General did, and nothing more. In other words, the Director General contested the jurisdiction and power of the court to proceed against property under the control of the United States, and which the proclamation of the President and the statutes of the United States had exempted from state control.

Reversed and remanded for further proceedings not inconsistent with this opinion.

(261 U. S. 290)

OKLAHOMA NATURAL GAS CO. v. RUSSELL et al.**OKLAHOMA GAS & ELECTRIC CO. et al. v. CORPORATION COMMISSION OF OKLAHOMA.**

(Argued Feb. 20-21, 1923. Decided March 5, 1923.)

Nos. 406, 419.

1. Courts ☞101—Attack on unconstitutionality of order of state administrative board requires three judges to issue injunction.

Though Judicial Code, § 266, which forbade interlocutory injunctions restraining the action of state officers in the enforcement of any statute of a state on the ground of its unconstitutionality, without a hearing by three judges, as amended by Act March 4, 1913 (Comp. St. § 1243), by inserting the words "or in the enforcement or execution of an order made by an administrative board or commission," did not expressly include an attack on the constitutionality of an order of a commission, which did not involve an attack on the statute under which the commission acted, the purpose of the amendment was plainly to enlarge, and not to restrict, the law, and it must be construed broadly enough to include such attack.

2. Courts ☞493(3)—Enforcement of confiscatory order can be enjoined pending appeal to state Supreme Court, which has refused supersedeas.

Where an appeal from an order of the Corporation Commission of Oklahoma denying an advance in gas rates was taken to the Supreme Court of that state, as authorized by its Constitution, and supersedeas applied for, and the state court had refused the supersedeas, the gas companies were entitled to a hearing in the United States District Court as to whether the rates so fixed were confiscatory, and to an injunction against the enforcement of those rates pending the decision of the state court, if they were found to be confiscatory, since otherwise its constitutional rights could not be protected.

3. Appeal and error ☞1177(6)—Supreme Court will not pass on right to injunction which was not considered below.

Where the three judges sitting in the District Court refused an injunction against the enforcement of an order of a state Corporation Commission, on the ground they had no authority to grant it, the Supreme Court, on reversing that decision, will remand the cause to the District Court for trial, since generally it is not desirable that the Supreme Court pass on such matters until they have been dealt with below.

Appeals from the District Court of the United States for the Western District of Oklahoma.

Separate suits by the Oklahoma Natural Gas Company against Campbell Russell and others, constituting the Corporation Commission of the State of Oklahoma, and others,

and by the Oklahoma Gas & Electric Company and another against the Corporation Commission of the State of Oklahoma and others. From a decree in each case denying a temporary injunction, plaintiffs appeal. Decrees reversed, and cases remanded. See, also, 43 Sup. Ct. 360.

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*Mr. D. A. Richardson, of Oklahoma City, Okl., for appellant Oklahoma Natural Gas Co.

Messrs. R. M. Rainey, S. B. Flynn, and Dennis T. Flynn, all of Oklahoma City, Okl., for appellant Oklahoma Gas & Electric Co.

Mr. E. S. Ratliff, of Oklahoma City, Okl., for appellees Corporation Commission and others.

Mr. Henry G. Snyder, of Oklahoma City, Okl., for appellees Russell and others.

Mr. Justice HOLMES delivered the opinion of the Court.

These two cases were argued separately, but they turn on the same point, were decided in a single opinion by the Court below and do not require a separate consideration here. The plaintiffs are corporations organized under the laws of Oklahoma and furnish natural gas to consumers in that State, at rates established by the Corporation Commission. They applied to the Commission for higher rates but were denied an advance. The Constitution of Oklahoma, admitted to be like that of Virginia dealt with in *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, gives an appeal to the Supreme Court of the State, acting in a legislative capacity as explained in the case cited, with power to substitute a different order and to grant a supersedeas in the meantime. Appeals were taken to the Supreme Court and supersedeas was applied for but refused. The appeals are still not decided. After the plaintiffs had been denied a supersedeas by the Supreme Court, they filed these bills alleging that the present rates are confiscatory, setting up their constitutional rights and asking preliminary injunctions, and permanent injunctions unless the Supreme Court should allow adequate rates. Applications for temporary injunctions supported by evidence were heard by three judges but were denied by the majority on the authority of the *Prentiss* Case. Appeals were taken directly to this Court.

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[1] A doubt has been suggested whether these cases are within section 266 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1162, as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013 (Comp. St. § 1243). The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a State, upon the ground of its unconstitutionality, without a hearing

by three judges. The amendment inserted after the words "enforcement or execution of such statute" the words "or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State" but did not change the statement of the ground, which still reads "the unconstitutionality of such statute." So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed repeatedly that the section was to be taken more broadly. *Louisville & Nashville R. R. Co. v. Finn*, 235 U. S. 601, 604, 35 Sup. Ct. 146, 59 L. Ed. 379; *Phoenix Ry. Co. v. Geary*, 239 U. S. 277, 280, 281, 36 Sup. Ct. 45, 60 L. Ed. 287; *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission* (November 20, 1922), 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. —; *Western & Atlantic Railroad v. Railroad Commission of Georgia* (February 19, 1923), 261 U. S. 264, 43 Sup. Ct. 252, 67 L. Ed. —. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous, as the original statute covered them. *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 301, 318, 34 Sup. Ct. 48, 58 L. Ed. 229; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 555, 34 Sup. Ct. 364, 58 L. Ed. 721; *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 221 U. S. 400, 403, 31 Sup. Ct. 537, 55 L. Ed. 786. But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest.

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[2] *Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it. If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted. *Springfield Gas & Electric Co. v. Barker* (D. C.) 231 Fed. 331, 335. In such a state of facts *Prentiss v. Atlantic Coast Line Co.* has no application. See *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 324, 325, 107 C. C. A. 403. Rules of comity or convenience must give way to constitutional rights. In the case cited there was no doubt as to the jurisdiction of the Circuit Court but simply a decision that the bills should be retained to await the result of appeals if the companies saw fit to take them. 211 U. S. 232, 29 Sup. Ct. 67, 53 L. Ed. 150. The companies had made no effort to secure a revision and there had been no present invasion upon their rights, but only the taking

of preliminary steps toward cutting them down. In such circumstances it was thought to be more reasonable and proper to await further action on the part of the State.

[3] As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered, the cases should be remanded to that Court with directions to proceed to the trial. Generally it is not desirable that we should pass upon such matters until they have been dealt with below. *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 267, 268, 30 Sup. Ct. 505, 54 L. Ed. 757; *Brown v. Fletcher*, 237 U. S. 583, 587, 588, 35 Sup. Ct. 750, 59 L. Ed. 1128.

Decrees reversed and cases remanded for further proceedings consistent with this opinion.

(261 U. S. 299)

SEABOARD AIR LINE RY. CO. et al. v. UNITED STATES.

(Argued Jan. 23, 1923. Decided March 5, 1923.)

No. 407.

1. United States $\Leftarrow$ 110—Not chargeable with interest on unpaid claims, in absence of statute.

In the absence of a stipulation to pay interest, or a statute allowing it, interest cannot be recovered against the United States on unpaid accounts or claims.

2. War $\Leftarrow$ 14—Ascertainment of "just compensation" is judicial function.

Lever Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), authorizing the President to requisition property needed for war purposes and to pay a just compensation therefor, without specifying any allowance of interest, requires the payment of just compensation guaranteed by the Constitution, the right to which cannot be taken away, and the ascertainment of which is a judicial function.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Just Compensation.]

3. War $\Leftarrow$ 14—Just compensation must put owner in as good financial position as if property had not been taken.

The just compensation to which the owner of property requisitioned is entitled is the full and perfect equivalent of the property taken, and means that the owner shall be put in as good position pecuniarily as he would have been, if his property had not been taken.

4. War $\Leftarrow$ 14—Right to compensation for property requisitioned does not depend on implied promise.

The owner's right to just compensation for property requisitioned for war purposes does not depend on a promise, express or implied, to

pay, but such payment is a necessary condition of the taking.

5. War ~~Ex~~ 14—Interest from date of taking is allowable on just compensation for land requisitioned for war purposes.

Where the United States requisitioned property for war purposes, and took possession before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of taking, but is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking, and the allowance of interest on the value found by the jury at the legal rate established by the state in which the property was situated was a fair and reasonable method of ascertaining that element of just compensation.

In Error to the United States Circuit Court of Appeals for the Fourth Circuit.

Action by the Seaboard Air Line Railway Company and others against the United States to recover compensation for land requisitioned under the Lever Act. A judgment for the value of the land as fixed by the jury, and interest, was reversed by the Circuit Court of Appeals, and new trial awarded, unless the plaintiffs would file a remittitur abating all interest (280 Fed. 349), and the plaintiffs bring error. Decree of the Circuit Court of Appeals reversed, and that of the District Court affirmed.

Messrs. Forney Johnston, of Washington, D. C., and Geo. L. Buist, of Charleston, S. C., for plaintiffs in error.

Mr. Alfred A. Wheat, of New York City, for the United States.

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***Mr. Justice BUTLER delivered the opinion of the Court.**

The plaintiff in error, the Seaboard Air Line Railway Company, was the owner of 2.6 acres of land at Charleston, South Carolina, adjoining the Charleston Port Terminal, subject to a mortgage to the Guaranty Trust Company and William C. Cox.¹ On May 23, 1919, the United States, under authority of section 10 of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½h),² requisitioned and took possession of such land to provide storage facilities for supplies nec-

¹ For convenience, the railway company and mortgagees will be referred to herein as "the owner."

² Act of Congress approved August 10, 1917 (40 Stat. 276):

"Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so de-

termined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessities or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: Provided, That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the government any necessities held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the government any seed necessary for the seeding of land owned, leased, or cultivated by them."

termined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessities or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: Provided, That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the government any necessities held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the government any seed necessary for the seeding of land owned, leased, or cultivated by them."

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compensation to be the sum *of \$235.80, with interest thereon at the rate of 6 per cent. per annum from the date of the taking to the date of voucher for final payment. The amount was not satisfactory to the owner, and the United States was so notified. Demand was made for 75 per cent. of the award, but no part of the amount was paid. The owner sued to recover such further sum as, when added to such 75 per cent., would amount to just compensation for the property so taken.

The jury returned a verdict as follows:

"We find that the fair and reasonable value which would constitute a just compensation to be paid for the taking for public purposes on May 23, 1919, of the lands mentioned and described in the petition, under the issue herein, to be six thousand dollars."

Judgment was entered for \$6,000, with interest from May 23, 1919, at the rate of 7 per cent. per annum (the statutory rate in South Carolina).

The United States objected to the interest allowed, and took the case to the Circuit Court of Appeals, and that court reversed the judgment of the District Court and awarded a new trial, unless the owner file a remittitur abating all interest. The owner refused and brought the case here on writ of error.

Did the District Court err in allowing interest on the amount of the verdict?

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[1] *The rule is that, in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the United States upon unpaid accounts or claims. *United States v. Rogers et al.*, 255 U. S. 163, 169, 41 Sup. Ct. 281, 65 L. Ed. 566; *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935; *United States v. North Carolina*, 136 U. S. 211, 216, 10 Sup. Ct. 920, 34 L. Ed. 336; *Angarica v. Bayard*, 127 U. S. 251, 260, 8 Sup. Ct. 1156, 32 L. Ed. 159; *Harvey v. United States*, 113 U. S. 243, 5 Sup. Ct. 465, 28 L. Ed. 987.

termined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessities or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: Provided, That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the government any necessities held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the government any seed necessary for the seeding of land owned, leased, or cultivated by them."

[2] Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, 13 Sup. Ct. 622, 37 L. Ed. 463.

[3] The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, 13 Sup. Ct. 622, 37 L. Ed. 463. It rests on equitable principles and it means substantially that the owner shall be put in as good position peculiarly as he would have been if his property had not been taken. *United States v. Rogers et al.* (C. C. A. Eighth Circuit) 257 Fed. 397, 400, 168 C. C. A. 437. He is entitled to the damages inflicted by the taking. *Northern Pacific Railway Co. v. North American Telegraph Co.* (C. C. A. Eighth Circuit) 230 Fed. 347, 352, 144 C. C. A. 489, L. R. A. 1916E, 572, and cases there cited.

The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained. The owner has been deprived of the land and its use since the taking, May 23, 1919. The value of the property, as ascertained by the President, was \$235.80, and this was allowed with interest from date of taking. But, as judicially determined later, the value when taken was \$6,000.

[4] The owner's right does not depend on contract, express or implied. A promise to

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pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 337, 13 Sup. Ct. 622, 37 L. Ed. 463; *Searl v. School District, Lake County*, 133 U. S. 553, 562, 10 Sup. Ct. 374, 33 L. Ed. 740; *United States v. Jones*, 109 U. S. 513, 518, et seq., 3 Sup. Ct. 346, 27 L. Ed. 1015; *United States v. Sargent*, 162 Fed. 81, 83, 89 C. C. A. 81. It is not suggested in this case that the provisions of section 10 of the Lever Act do not meet the constitutional requirement. The only question here is whether payment at a subsequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation.

[5] In support of its contention the government cites *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935. That

case does not sustain its contention. That was a suit in the Court of Claims based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it adopted by the conformity provisions.

The case of *United States v. Rogers et al.*, 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566, is a condemnation case, and it was held that the owner was entitled as a part of the just compensation to interest on the confirmed award of the commissioners from the time when the United States took possession. The land was situated in New Mexico, and the proceedings were had under the Conformity Act of August 1, 1888. Chapter 728, 25 Stat. 357 (Comp. St. §§ 6909, 6910). Interest was allowed, not by virtue of state statute, but as constituting a part of the just compensation safeguarded by the Constitution. Speaking for the

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court, Mr. Justice Day said:

"Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property"—citing *Monongahela Navigation Co. v. United States*, 148 U. S. 341, 13 Sup. Ct. 622, 37 L. Ed. 463.

It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and section 10 of the Lever Act directs payment. The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that "just compensation" shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a "palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making 'just compensation' for the land as it stands, at the time of the taking."

United States v. Sargent (C. C. A. Eighth Circuit) 162 Fed. 81, 84, 89 C. C. A. 81.

The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have "just compensation" to which he is entitled.

The decree of the Circuit Court of Appeals is reversed, and that of the District Court is affirmed.

(261 U. S. 294)

UNITED STATES et al. v. BENEDICT.

(Argued Jan. 23, 1923. Decided March 5, 1923.)

No. 394.

Appeal and error 162(1)—**Defendant, accepting assignment of portion of judgment, cannot thereafter have it reviewed, because larger sum was not allowed.**

Where the owner of property requisitioned by the United States for war purposes under the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ et seq.) brought suit against the United States, and joined as defendant a city which claimed an interest in the land by virtue of a grant of a portion thereof for street purposes, and a judgment in favor of plaintiff was modified, in accordance with the suggestion of the Circuit Court of Appeals, to avoid reversal, by the plaintiff assigning the defendant city a portion of the compensation allowed by the judgment, which the city accepted and retained, the city could not thereafter have a writ of error to review the judgment, as modified, on the ground that it was entitled to a greater proportion of the award than was allowed to it.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Suit by George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, against the United States and the City of New York. Judgment for plaintiff was modified by the Circuit Court of Appeals, so as to require a portion of the judgment to be assigned to the City of New York (280 Fed. 76), and the United States and the City of New York bring error. Writ of error on behalf of the City of New York dismissed, and judgment affirmed.

Mr. C. J. Nehrbas, of New York City, for plaintiff in error City of New York.

The Attorney General, for the United States.

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*Mr. R. E. T. Riggs, of New York City, for defendant in error.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Relying upon the Lever Act—40 Stat. 276, 279 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½(i))—the United States took possession of certain land along New York Bay, April 6, 1918, and, as surviving trustee under

the will of Langley, defendant in error, Benedict, instituted this proceeding to recover its value. The tract had been platted into blocks and trustees holding the title had undertaken to convey to New York City the beds of Sixty-First, Sixty-Second and Sixty-Third streets from designated avenues "to New York Bay," as laid down on the commissioners' map. The city was made defendant to the amended complaint because of possible interest arising out of this conveyance. No right of recovery against it was suggested. It answered rather vaguely, but claimed title to "the lands included within the limits of Sixty-First street, Sixty-Second street and Sixty-Third street from the westerly side of First avenue to the New York Bay," and stat-

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ed that "the *area of said streets is 81,120 square feet." It asked that the complaint be dismissed. Later it moved, without success, to amend the answer and set up ownership to the beds of Sixty-First, Sixty-Second and Sixty-Third streets to the pierhead line.

The cause was tried by the court without a jury. The United States stipulated that defendant in error had good title to all the tract, upland and submerged, except such as lay within Sixty-First, Sixty-Second and Sixty-Third streets to high-water mark. Among the findings of fact which the city proposed is this—

That on April 25, 1899, the said trustees duly executed and delivered to John Whalen, the then corporation counsel of the city of New York, a deed granting and conveying to the city of New York the fee, impressed with a trust for street purposes, of the lands included within the limits of Sixty-First street, Sixty-Second street and Sixty-Third street from the westerly side of First avenue to the New York Bay.

Judgment went against the United States for a sum equal to \$2 per square foot of the whole area, with interest, less cash originally paid. The trial court held the trustees' deed to the streets invalid, but, if valid, that the recovery nevertheless should be for the same amount as streets were essential to enjoyment of the property. 271 Fed. 714.

Writs of error from the Circuit Court of Appeals were sued out by both defendants. The city assigned as error—among others—the trial court's refusal to dismiss the complaint. By opinion dated January 18, 1922—280 Fed. 76—the court ruled that the city had good title to the streets, that the judgment of the District Court was erroneous and a new trial would be awarded, unless out of the recovery defendant in error should assign to it \$162,240—\$2 per square foot for the platted streets up to New York Bay, 81,-

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120 square feet as stated *by the answer. January 28th the trustees so assigned \$162,240, with interest from April 6, 1918, and on

January 31st the contested judgment was formally affirmed.

In the Circuit Court of Appeals the city entered no objection to the arrangement suggested by the opinion. Its counsel here claim that—

"The judgment should be modified by requiring defendant in error to assign to the city of New York an additional portion of the judgment recovered against the United States, representing the compensation, with interest, awarded for the portions of the streets between the high-water line and the pierhead line, to wit, the sum of \$589,731.82."

The situation is a peculiar one. The city asked, not for recovery, but to be dismissed. Of its own motion and off the record, the court proposed a method of settlement which the trustee adopted in preference to reversal. These unusual circumstances required the city to act promptly if it did not approve.

After nearly three months it took a writ of error, and now seeks to reverse the judgment because a greater sum was not awarded. We think it may not deny voluntary acceptance of the assignment and full assent to the arrangement which defendant in error carried out with the obvious purpose of ending the controversy between them. It cannot hold what it accepted and demand more. The final judgment must be treated as though entered upon its express consent, and its writ of error is accordingly dismissed.

The United States object to the judgment because interest was allowed from date of the taking. This point has been discussed and determined in *Seaboard Air Line Railway Co. et al. v. United States*, 261 U. S. 299, 43 Sup. Ct. 354, 67 L. Ed. —, decided today, and needs no further elaboration. As to the United States, the judgment below is affirmed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1922

(261 U. S. 624)

No. 87. *McLane TILTON*, appellant, v. *Felix M. DRENNEN*, as Receiver, etc. Feb. 19, 1923. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. For opinion below, see *Cogswell v. Drennen*, 271 Fed. 289. Mr. Forney Johnston, of Washington, D. C., for appellant. Dismissed with costs, pursuant to the 10th rule.

(261 U. S. 625)

No. 233. *PORTO RICO COAL COMPANY (Inc.)*, plaintiff in error, v. *William H. EDWARDS*, Collector of United States Internal Revenue, etc. Feb. 19, 1923. In error to the District Court of the United States for the Southern District of New York. For opinion below, see 275 Fed. 104. Mr. Francis W. Aymer, of New York City, for plaintiff in error. Dismissed with costs, pursuant to the 10th rule.

(261 U. S. 625)

No. 252. *Judson KNOX*, plaintiff in error, v. *The UNITED STATES of America*. Feb. 19, 1923. In error to the District Court of the United States for the Western District of South Carolina. Mr. Chas. A. Douglas, of Washington, D. C., for plaintiff in error. Dismissed, pursuant to the 10th rule.

(261 U. S. 627)

No. 293. *RATON WATER WORKS COMPANY*, appellant, v. *The CITY OF RATON*. Feb. 19, 1923. Mr. Abram J. Rose, of New York City, for appellant. This case will stand dismissed under the 10th rule unless the deposit for printing the record is made on or before May 1 next.

(261 U. S. 626)

No. 389. *John H. BREDE*, appellant, v. *James M. POWERS*, United States Marshal; No. 410. *Mary PARTRIDGE*, plaintiff in error, v. *J. E. CROSBIE et al.*;

No. 418. *Samuel Homer WOODBRIDGE et al.*, Executors, etc., appellants, v. *The UNITED STATES*; and

No. 651. *The STATE OF ARKANSAS ex rel. Jefferson BLACK*, plaintiff in error, v. *BOARD OF DIRECTORS OF SCHOOL DISTRICT 16, MONTGOMERY COUNTY, ARKANSAS*. Feb. 19, 1923. For opinions below, see (D. C.) 279 Fed. 147; (Okl. Sup.) 205 Pac. 758; 55 Ct. Cl. 234; (Ark.) 242 S. W. 545. Mr. Morris Kamber, of Brooklyn, N. Y., for appellant Brede. Mr. Henry B. Martin, of Tulsa, Okl., for plaintiff in error Partridge. Messrs. H. P. Doolittle and Rufus S. Day, both of Washington, D. C., for appellant Woodbridge. Mr. R. G. Davies, of Hot Springs, Ark., for plaintiff in error Black. Messrs. A. A. Davidson and Preston C. West, both of Tulsa, Okl., for defendant in error Crosbie. These cases will severally stand dismissed under the 10th rule unless the deposit for printing the record is made on or before March 5 next.

(261 U. S. 625)

No. 395. *Roy YOUMAN*, plaintiff in error, v. *COMMONWEALTH OF KENTUCKY*. Feb. 19, 1923. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 193 Ky. 536, 237 S. W. 6. Mr. H. L. James, of Elizabethtown, Ky., for plaintiff in error. Dismissed with costs, pursuant to the 10th rule.

(261 U. S. 625)

No. 491. *Frank J. LEVENE*, plaintiff in error, v. *The STATE OF ALABAMA*. Feb. 19,

1923. In error to the Supreme Court of the State of Alabama. For opinion below, see 207 Ala. 712, 92 South. 920. Mr. Alex T. Howard, of Mobile, Ala., for plaintiff in error. Dismissed with costs, pursuant to the 10th rule.

(261 U. S. 625)

No. 522. JAY BURNS BAKING COMPANY et al., plaintiffs in error, v. Samuel R. McKELVIE, as Governor, etc., et al. Feb. 19, 1923. In error to the Supreme Court of the State of Nebraska. For opinion below, see 189 N. W. 383. Mr. Matthew A. Hall, of Omaha, Neb., for plaintiffs in error. Dismissed with costs, pursuant to the 10th rule.

(261 U. S. 626)

No. 537. Frank DILLON, plaintiff in error, v. The PEOPLE OF THE STATE OF ILLINOIS. Feb. 19, 1923. In error to the Supreme Court of the State of Illinois. For opinion below, see 303 Ill. 539, 135 N. E. 795. Mr. Rush B. Johnson, of Chicago, Ill., for plaintiff in error. Dismissed with costs, pursuant to the 10th rule.

(261 U. S. 626)

No. 634. Stefano SANGUINETTI, appellant, v. The UNITED STATES. Feb. 19, 1923. Appeal from the Court of Claims. For opinion below, see — Ct. Cl. —. Mr. Benj. Carter, of Washington, D. C., for appellant. Dismissed, pursuant to the 10th rule.

(261 U. S. 626)

No. 640. The UNITED STATES of America ex rel. Catoni TISI, alias Lista Cortina, appellant, v. Robert E. TOD, Commissioner of Immigration, etc. Feb. 19, 1923. Appeal from the District Court of the United States for the Southern District of New York. Messrs. Walter Nelles and Isaac Shorr, both of New York City, for appellant. Dismissed with costs, pursuant to the 10th rule.

(261 U. S. 626)

No. 653. PUGET SOUND POWER & LIGHT COMPANY et al., plaintiffs in error, v. The COUNTY OF KING et al. Feb. 19, 1923. For opinions below, see 117 Wash. 351, 201 Pac. 449, 207 Pac. 689. Mr. Jas. B. Howe, of Seattle, Wash., for plaintiffs in error. In error to the Supreme Court of the State of Washington. Dismissed with costs, pursuant to the 10th rule.

(261 U. S. 612)

No. 751. Emanuel WALLIN, petitioner, v. Rose EVERETT. Feb. 19, 1923. For opinion below, see 189 N. W. 680. Messrs. C. R. Fowler, of Minneapolis, Minn., and Halvor Steenerson, of Crookston, Minn., for petitioner. Messrs. P. H. Loughran, of Washington, D. C., and M. A. Spooner, of Bemidji, Minn., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied.

(261 U. S. 513)

No. 762. C. Dale WOLFE, Trustee, etc., petitioner, v. G. F. KILLINGSWORTH et al. Feb. 19, 1923. For opinion below, see 209 Pac. 410. Mr. C. Dale Wolfe, of Wewoka,

Okl., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(261 U. S. 613)

No. 789. J. C. TURNER LUMBER COMPANY et al., petitioners, v. WILSON & BENNETT et al. Feb. 19, 1923. For opinion below, see 283 Fed. 1021. Mr. Samuel Silbiger, of Brooklyn, N. Y., for petitioners. Mr. Max Isaac, of Savannah, Ga., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(261 U. S. 613)

No. 797. CLOSTER NATIONAL BANK, plaintiff in error, v. FEDERAL RESERVE BANK OF NEW YORK. Feb. 19, 1923. For opinion below, see 285 Fed. 138. Mr. E. W. Wakelee, of Englewood, N. J., for plaintiff in error. Mr. L. R. Mason, of New York City, for defendant in error. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 613)

No. 806. CENTRAL RAILROAD COMPANY OF NEW JERSEY, petitioner, v. Anita PELUSO, Administratrix, etc. Feb. 19, 1923. For opinion below, see 286 Fed. 661. Mr. C. E. Miller, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 613)

No. 808. L. E. SMITH GLASS COMPANY, petitioner, v. MACBETH-EVANS GLASS COMPANY. Feb. 19, 1923. For opinion below, see 284 Fed. 193. Mr. A. O. Fording, of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(261 U. S. 614)

No. 817. AMERICAN RAILWAY EXPRESS COMPANY et al., petitioners, v. M. F. BRABHAM. Feb. 19, 1923. For opinion below, see 117 S. E. 368. Mr. C. W. Stockton, of New York City, for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied.

(261 U. S. 614)

No. 818. Robert J. McBRIDE, petitioner, v. The UNITED STATES. Feb. 19, 1923. For opinion below, see 284 Fed. 416. Mr. Harry T. Smith, of Mobile, Ala., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(261 U. S. 627)

No. 277. WELLS-ELKHORN COAL COMPANY, plaintiff in error, v. OTIS STEEL COMPANY. Feb. 20, 1923. In error to the District Court of the United States for the Eastern District of Kentucky. Messrs. Simon S. Willis, John F. Hager and J. W. M. Stewart, all of Ashland, Ky., for plaintiff in error. Dismissed with costs, per stipulation.

No. 406. OKLAHOMA NATURAL GAS COMPANY, appellant, v. CAMPBELL RUSSELL et al., etc. Feb. 20, 1923. See, also, 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. —. Mr. D. A. Richardson, of Oklahoma City, Okl., for appellant. Frank C. Carter and Joe Cobb, present members of the Corporation Commission of the State of Oklahoma, substituted as parties appellees herein, on motion of Mr. D. A. Richardson in that behalf.

No. 419. OKLAHOMA GAS & ELECTRIC COMPANY et al., appellants, v. CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, et al. Feb. 20, 1923. See, also, 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. —. Messrs. Dennis T. Flynn and Streeter B. Flynn, both of Oklahoma City, Okl., for appellants. Frank C. Carter and Joe Cobb, present members of the Corporation Commission of the State of Oklahoma, substituted as parties appellees herein, on motion of Mr. Streeter B. Flynn in that behalf.

No. 577. The BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, petitioner, v. Guerne O. BURTCH. Feb. 20, 1923. See, also (Ind.) 134 N. E. 858. Mr. A. A. Wheat, of New York City, for the motion. Lula Burtch, executrix of the estate of Guerne O. Burtch, deceased, substituted as the party respondent herein, on motion of Mr. A. A. Wheat in that behalf.

No. 701. BOARD OF TRADE OF THE CITY OF CHICAGO et al., appellants, v. Charles F. CLYNE, United States District Attorney, etc., et al. Feb. 20, 1923. Mr. H. S. Robbins, of Chicago, Ill., for appellants. Edwin A. Olsen, present United States district attorney for the northern district of Illinois, substituted as a party appellee herein in place of Charles F. Clyne, resigned, on motion of Mr. Henry S. Robbins in that behalf.

No. 542. William A. PRENDERGAST et al., etc., appellants, v. NEW YORK TELEPHONE COMPANY. Feb. 23, 1923. Mr. W. W. Chambers, of Albany, N. Y., for appellants. Mr. Chas. T. Russell, of New York City, for respondent. Carl Sherman, present attorney general of New York, substituted as a party appellant herein, in place of Charles D. Newton, former attorney general of New York, on motion of Mr. W. W. Chambers in that behalf. Argument commenced by Mr. Simon Fleischmann for the appellants, continued by Mr. John W. Davis for the appellee, and concluded by Mr. W. W. Chambers for the appellant.

(261 U. S. 605)

No. —. Sergius APOSTOLOFF, appellant, v. Conrad HUBERT et al. Feb. 23, 1923. See, also (C. C. A.) 285 Fed. 161. Motion to docket this cause, and for leave to proceed in forma pauperis, denied.

(261 U. S. 605)

No. —, original. Ex parte In the matter of FRANCE & CANADA STEAMSHIP CORPORATION, petitioner. Feb. 26, 1923. See, also (C. C. A.) 285 Fed. 290. Motion for leave to file petition for a writ of mandamus herein denied.

No. 18, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the UNITED STATES, intervenor. Feb. 26, 1923. See, also, 260 U. S. 711, 43 Sup. Ct. 251, 67 L. Ed. —. Mr. Henry E. Asp, of Oklahoma City, Okl., for the motion. Leave granted to file stipulation and petition in intervention of Mary Alice Sah-maunty et al., on motion of Mr. Henry E. Asp in that behalf.

No. 20, original. The COMMONWEALTH OF MASSACHUSETTS, complainant, v. The STATE OF NEW YORK et al. Feb. 26, 1923. Messrs. J. Weston Allen, Edwin H. Abbot, Jr., and Jay R. Benton, all of Boston, Mass. for complainant. John Albert Granger, as heir-at-law of Anna T. Granger, deceased, and his wife Emma R. Granger, and Gideon Granger, as heir-at-law of Anna T. Granger, deceased, substituted as parties defendants herein in place of Anna T. Granger, deceased, on motion of Mr. J. Weston Allen in that behalf.

No. 244. Sam WINOKUR, plaintiff in error, v. H. I. HARN, Sheriff, etc. Feb. 26, 1923. For former opinion see 260 U. S. 759, 43 Sup. Ct. 249, 67 L. Ed. —. Mr. A. A. Lawrence, of Savannah, Ga., for plaintiff in error. Motion to reinstate and assign for argument denied.

(261 U. S. 628)

No. 253. M. Frank ANDREWS, plaintiff in error, v. The UNITED STATES of America. Feb. 26, 1923. In error to the District Court of the United States for the Western District of South Carolina. Messrs. Hugh H. Obeir, Richard A. Ford and Chas. A. Douglas, all of Washington, D. C., for plaintiff in error. Mr. James M. Beck, Sol. Gen., of Washington, D. C., for the United States. Judgment reversed, upon confession of error by the defendant in error, on motion of Mr. Hugh H. Obeir for the plaintiff in error, with consent thereto by Mr. Solicitor General Beck for the defendant in error.

No. 318. The PEOPLE OF THE STATE OF NEW YORK ex rel. Emeline F. CLYDE, plaintiff in error, v. James A. WENDELL, Comptroller of the State of New York. Feb. 26, 1923. See, also, 232 N. Y. 550, 134 N. E. 567. Mr. Edward J. Crummey, of New York City, for the motion. State Tax Commission of the State of New York substituted as the party defendant in error herein in place of James A. Wendell, Comptroller, etc., deceased, on motion of Mr. Edward J. Crummey in that behalf.

(261 U. S. 605)

No. 376. Henry F. MUELLER et al., etc., appellants, v. Samuel W. ADLER et al. Feb. 26, 1923. See, also, 260 U. S. 694, 43 Sup. Ct. 12, 67 L. Ed. —. Messrs. Wm. J. Hughes and Ephrim Chaplin, both of Washington, D. C., for appellants. On consideration of the petition for a rehearing or to remand this cause to the United States Circuit Court of Appeals for the Eighth Circuit, it is ordered by the court that said cause be, and the same is hereby, transferred to the said Circuit Court of Appeals, pursuant to the act of Congress of September 14, 1922.

(261 U. S. 628)

No. 686. SOUTHERN RAILWAY COMPANY, appellant, v. A. D. WATTS, etc., et al. Feb. 26, 1923. Appeal from the District Court of the United States for the Western District of North Carolina. Mr. S. R. Prince, of Washington, D. C., for appellant. Dismissed with costs, on motion of counsel for the appellant.

(261 U. S. 614)

No. 738. WAGNER ELECTRIC MANUFACTURING COMPANY, appellant, v. Lamar LYNDON et al., etc. Feb. 26, 1923. For opinion below see (C. C. A.) 282 Fed. 219. Mr. Chas. A. Houts, of St. Louis, Mo., for appellant. Petition for a writ of certiorari here-in denied.

(261 U. S. 605)

No. 749. CENTRAL COAL & COKE COMPANY, petitioner, v. Jacob OCEPEK. Feb. 26, 1923. On writ of certiorari to the Supreme Court of the State of Arkansas. For opinion below, see 244 S. W. 337. Mr. L. C. Boyle, of Washington, D. C., for petitioner.

PER CURIAM. Reversed with costs, upon the authority of Baltimore & Ohio R. Co. v. Koontz, 104 U. S. 5, 15, 26 L. Ed. 643; General Investment Co. v. Lake Shore & Michigan Southern Ry. Co., decided November 27, 1922, 260 U. S. 261, 43 Sup. Ct. 106, 67 L. Ed. —; Lee v. Chesapeake & Ohio Ry. Co., decided January 22, 1923, 260 U. S. 653, 43 Sup. Ct. 230, 67 L. Ed. —.

(261 U. S. 614)

No. 776. Sophia CHARLES et al., etc., petitioners, v. ROXANA PETROLEUM CORPORATION. Feb. 26, 1923. For opinion below, see 282 Fed. 983. Messrs. R. F. Blair, of Tulsa, Okl., and Geo. S. Ramsey, of Muskogee, Okl., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(261 U. S. 615)

No. 798. J. E. BARRACK et al., petitioners, v. TOWN OF FAIRBANKS, ALASKA. Feb. 26, 1923. For opinion below, see 282 Fed. 417. Mr. J. E. Alexander, of San Francisco, Cal., for petitioners. Messrs. Alfred Sutro, E. S. Pillsbury, F. D. Madison, H. D. Pillsbury, and Oscar Sutro, all of San Francisco, Cal., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(261 U. S. 615)

No. 803. The ROBERT DOLLAR COMPANY, petitioner, v. AMERICAN ASIATIC COMPANY. Feb. 26, 1923. For opinion below, see 282 Fed. 743. Mr. Ira S. Lillick, of San Francisco, Cal., for petitioner. Mr. R. M. Fitzgerald, of Oakland, Cal., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(261 U. S. 615)

No. 807. E. I. HORSMAN et al., etc., petitioners, v. Alfred A. KAUFMAN. Feb. 26, 1923. For opinion below, see 286 Fed. 372. Mr. O. E. Edwards, of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 615)

No. 811. FRANCE & CANADA STEAMSHIP CORPORATION, petitioner, v. FRENCH REPUBLIC. Feb. 26, 1923. For opinion below, see 285 Fed. 290. See, also, 261 U. S. 605, 43 Sup. Ct. 360, 67 L. Ed. —. Messrs. C. G. Walter and J. C. Palmer, both of New York City, for petitioner. Mr. W. H. McGrann, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 615)

No. 812. W. EVERETT et al., petitioners, v. THE UNITED STATES. Feb. 26, 1923. For opinion below, see 284 Fed. 203. Mr. Wm. H. Gorham, of Seattle, Wash., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(261 U. S. 616)

No. 813. DIRECTOR GENERAL OF RAILROADS, petitioner, v. Thomas KEENAN. Feb. 26, 1923. For opinion below, see 285 Fed. 286. Mr. D. M. Beach, of Rochester, N. Y., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 616)

No. 820. GREAT NORTHERN RAILWAY COMPANY, petitioner, v. McCALL-DINSMORE COMPANY. Feb. 26, 1923. For opinion below, see 191 N. W. 42. Mr. F. G. Dorety, of St. Paul, Minn., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted.

(261 U. S. 616)

No. 822. Benjamin KALMANSON, petitioner, v. The UNITED STATES of America. Feb. 26, 1923. For opinion below, see 287 Fed. 71. Mr. Max D. Steuer, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 616)

No. 823. FARMERS & MERCHANTS BANK OF MONROE, NORTH CAROLINA, et al., petitioners, v. FEDERAL RESERVE

BANK OF RICHMOND, VIRGINIA. Feb. 26, 1923. For opinion below, see 183 N. C. 546, 112 S. E. 252. Mr. A. W. Smith, of Atlanta, Ga., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted.

(261 U. S. 616)

No. 828. Frank N. SNELL et al., petitioners, v. J. C. TURNER LUMBER COMPANY. Feb. 26, 1923. For opinion below, see 285 Fed. 356. Mr. Frederick Seymour, of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 616)

No. 831. STANDARD OIL COMPANY OF NEW YORK, petitioner, v. CLYDE STEAMSHIP COMPANY. Feb. 26, 1923. For opinion below, see The Socony No. 5, 285 Fed. 154. Messrs. Duncan & Mount, of New York City (Messrs. Pierre M. Brown, of New York City, and Rufus S. Day, of Washington, D. C., of counsel), for petitioner. Messrs. Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for respondent Clyde S. S. Co. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 616)

No. 834. ALUMINUM COMPANY OF AMERICA, petitioner, v. FEDERAL TRADE COMMISSION. Feb. 26, 1923. For opinion below, see 284 Fed. 401. Mr. George B. Gordon, of Pittsburgh, Pa. (George W. Wickersham, of New York City, of counsel), for petitioner. Mr. James M. Beck, Sol. Gen., Mr. W. H. Fuller, Chief Counsel, and Edward L. Smith, all of Washington, D. C., for Federal Trade Commission. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(261 U. S. 617)

No. 836. Lottie I. KERN, Administratrix, etc., petitioner, v. John Barton PAYNE, Director General, etc. Feb. 26, 1923. For opinion below, see 211 Pac. 767. Mr. Frederick M. Miner, of Minneapolis, Minn., for petitioner. Messrs. W. L. Murphy and A. N. Whitlock, both of Missoula, Mont. (H. H. Field, of Chicago, Ill., of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Montana denied.

(261 U. S. 617)

No. 838. Timothy D. MURPHY, petitioner, v. The UNITED STATES of America;

No. 839. Vincenzo COSMANO, petitioner, v. The UNITED STATES of America; and

No. 840. Edward C. GIERUM, petitioner, v. The UNITED STATES of America. Feb. 26, 1923. For opinion below, see 285 Fed. 801. Mr. James J. Barbour, of Chicago, Ill., for Timothy D. Murphy and Edward C. Gierum.

Mr. Benjamin P. Epstein, of Chicago, Ill., for Vincenzo Cosmano (Messrs. Lawrence Y. Sherman and Noah C. Bainum, both of Springfield, Ill., of counsel), for petitioners. Mr. James M. Beck, Sol. Gen., of Washington, D. C., John W. H. Crim, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(261 U. S. 611)

No. 846. Harry T. GRAHAM, individually, etc., petitioners, v. Alfred I. DUPONT. Feb. 26, 1923. For opinion below, see 284 Fed. 1017. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(261 U. S. 617)

No. 847. UTAH CONSOLIDATED MINING COMPANY, petitioner, v. UTAH APEX MINING COMPANY. Feb. 26, 1923. For opinion below, see 285 Fed. 249. Messrs. John P. Gray, of Cœur d'Alene, Idaho, and A. C. Ellis, Jr., of Salt Lake City, Utah, for petitioner. Messrs. J. A. Marshall, of Salt Lake City, Utah, and W. E. Colby, of San Francisco, Cal. (Marshall, Macmillan & Crow, of Salt Lake City, Utah, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(261 U. S. 617)

No. 848. W. V. SMITH et al., petitioners, v. The UNITED STATES of America. Feb. 26, 1923. For opinion below, see 284 Fed. 673. Messrs. John H. Atwood, James M. Johnson, and Donald W. Johnson, all of Kansas City, Mo., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(261 U. S. 618)

No. 850. The NATIONAL BANK OF COMMERCE OF ST. LOUIS, petitioner, v. David R. FRANCIS et al. Feb. 26, 1923. For opinion below, see 246 S. W. 326. Mr. Geo. L. Edwards, of St. Louis, Mo. (Edw. J. White, of St. Louis, Mo., of counsel), for petitioner. Messrs. P. Taylor Bryan, Sam B. Jeffries, Thomas S. McPheeters, and Thomas Bond, all of St. Louis, Mo. (Jourdan, Rassieur & Pierce, Bryan, Williams & Cave, A. & J. F. Lee, and Jeffries & Corum, all of St. Louis, Mo., of counsel), for respondents. Petition for a writ of certiorari to the Supreme Court of the state of Missouri denied.

(261 U. S. 607)

No. 130. Harriet STOCKER et al., plaintiffs in error, v. NEMAHA DRAINAGE DISTRICT No. 2. March 5, 1923. In error to the Supreme Court of the State of Nebraska. For opinion below, see 105 Neb. 684, 181 N. W. 617. Messrs. Halleck F. Rose, of Omaha, Neb., and T. R. P. Stocker and George N. Foster, both of Lincoln, Neb., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Spencer v.

Duplan Silk Co., 191 U. S. 526, 530, 24 Sup. Ct. 174, 48 L. Ed. 287; Shulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; Norton v. Whiteside, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60 L. Ed. 186.

(261 U. S. 607)

No. 498. James K. COCHRAN et al., plaintiffs in error, v. Coulton M. BECKER. March 5, 1923. In error to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 276 Fed. 280. Mr. Harris Kobey, of Aspen, Colo., in pro. per.

PER CURIAM. Dismissed for want of jurisdiction, upon authority of section 6, act of September 6, 1916, c. 448, 39 Stat. 726, 727.

(261 U. S. 607)

No. 653. PUGET SOUND POWER & LIGHT COMPANY et al., plaintiffs in error, v. The COUNTY OF KING et al. March 5, 1923. See, also, 261 U. S. 626, 43 Sup. Ct. 359, 67 L. Ed. —. Mr. Jas. B. Howe, of Seattle, Wash., for plaintiffs in error. Motion to reinstate this cause on the docket granted.

(261 U. S. 628)

No. 713. Charles A. HOUTS et al., appellants, v. W. E. McKINNEY, as Guardian, etc., et al. March 5, 1923. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see McKinney v. Black Panther Oil & Gas Co., 280 Fed. 486. Mr. C. A. Houts, of St. Louis, Mo., for appellants. Dismissed with costs, per stipulation.

(261 U. S. 606)

No. 716. AMERICAN TRUST COMPANY, plaintiff in error, v. S. S. McNINCH et al. March 5, 1923. In error to the Supreme Court of the State of North Carolina. For opinion below, see 183 N. C. 33, 110 S. E. 663. See, also, 261 U. S. 618, 43 Sup. Ct. 363, 67 L. Ed. —. Mr. J. M. Robinson, of Charlotte, N. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Thomas v. Iowa, 209 U. S. 258, 263, 28 Sup. Ct. 487, 52 L. Ed. 782; Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 228 U. S. 326, 331, 333, 33 Sup. Ct. 510, 57 L. Ed. 857; Bowe v. Scott, 233 U. S. 658, 664-665, 34 Sup. Ct. 769, 58 L. Ed. 1141; (2) McCorquodale v. Texas, 211 U. S. 432, 437, 29 Sup. Ct. 146, 53 L. Ed. 269; St. Louis & San Francisco R. Co. v. Shepherd, 240 U. S. 240, 241, 36 Sup. Ct. 274, 60 L. Ed. 622; Mergenthaler Linotype Co. v. Davis, 251 U. S. 256, 258-259, 40 Sup. Ct. 133, 64 L. Ed. 255; Jett Bros. Distilling Co. v. Town of Carrollton, 252 U. S. 1, 6-7, 40 Sup. Ct. 255, 64 L. Ed. 421.

(261 U. S. 618)

No. 716. AMERICAN TRUST COMPANY, plaintiff in error, v. S. S. McNINCH et al. March 5, 1923. For opinion below, see 183 N.

C. 33, 110 S. E. 663. See, also, 261 U. S. 606, 43 Sup. Ct. 363, 67 L. Ed. —. Mr. J. M. Robinson, of Charlotte, N. C., for plaintiff in error. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied.

(261 U. S. 611)

No. 731. SPERRY OIL & GAS COMPANY et al., appellants, v. Pearl CHISHOLM et al. March 5, 1923. For opinion below, see 282 Fed. 93. Messrs. P. C. West and Alvin Richards, both of Tulsa, Okl., for appellants. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(261 U. S. 618)

No. 799. Ward GRANDPRE, petitioner, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. March 5, 1923. For opinion below, see 190 N. W. 323. Mr. Tom Davis, of Marshall, Minn., and E. A. Michel, of Minneapolis, Minn., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of South Dakota denied.

(261 U. S. 618)

No. 821. Hannah LEVINE, petitioner, v. PENNSYLVANIA RAILROAD COMPANY. March 5, 1923. For opinion below, see 284 Fed. 1019. Mr. J. L. Wilkie, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 618)

No. 826. William LUCKING, appellant, v. DETROIT & CLEVELAND NAVIGATION COMPANY. March 5, 1923. For opinion below, see 284 Fed. 497. Mr. Wm. Lucking, of Detroit, Mich., for appellant. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(261 U. S. 611)

No. 827. Edward A. THURSTON, Sole Surviving Trustee, etc., petitioner, v. Benjamin BROWN et al. March 5, 1923. For opinion below, see 284 Fed. 936. Mr. Wm. R. Sears, of Boston, Mass., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(261 U. S. 619)

No. 830. Edmond C. FLETCHER, petitioner, v. Isaiah S. COOMES et al. March 5, 1923. For opinion below, see 285 Fed. 893. Mr. Camden R. McAtee, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(261 U. S. 611)

No. 835. Joseph PHIPPS et al., petitioners, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. March 5, 1923. For opinion below, see 284 Fed. 945. Petition for

a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(261 U. S. 619)

No. 844. JACKSONVILLE FORWARDING COMPANY, petitioner, v. COUNTY OF NASSAU, STATE OF FLORIDA. March 5, 1923. For opinion below, see 95 South. 127. Mr. William M. Toomer, of Jacksonville, Fla., for petitioner. Mr. Samuel Silbiger, of Brooklyn, N. Y., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Florida denied.

(261 U. S. 611)

No. 855. COMMISSIONER OF IMMIGRATION OF THE PORT OF NEW YORK, petitioner, v. Gittel GOTTLIEB et al. March 5, 1923. For opinion below, see 285 Fed. 295. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(261 U. S. 619)

No. 867. Frank N. SNELL et al., petitioners, v. FRANK SNELL SAWMILL COMPANY et al. March 5, 1923. For opinion below, see 284 Fed. 847. Mr. George C. Bedell, of Jacksonville, Fla., for petitioners. Mr. Martin H. Long, of Jacksonville, Fla., for respondent. Petition for a writ of certiorari to the

United States Circuit Court of Appeals for the Fifth Circuit denied.

(261 U. S. 606)

No. 18, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS. Leave to file stipulation and petition in intervention submitted Feb. 26, 1923. Order entered March 5, 1923. See, also, 262 U. S. 724, 43 Sup. Ct. 704, 67 L. Ed. —. Mr. Henry E. Asp, of Oklahoma City, Okl., for interveners. Mr. W. W. Dyar, Sp. Asst. Atty. Gen., for the United States. It is ordered that the petition in intervention of John Tah Hah et al. be filed in accordance with the stipulation that the evidence introduced in said cause by any of the parties shall be taken as evidence as to these interveners, and that the rights of said interveners may be determined by the decree to be rendered herein.

(261 U. S. 614)

No. 781. TAUBEL-SCOTT-KITZMILLER COMPANY (Inc.), petitioner, v. David J. FOX et al., Trustees, etc. Feb. 26, 1923. Certiorari to the Circuit Court of Appeals for the Second Circuit. Messrs. Frank J. Hogan, of Washington, D. C., and Herman Goldman, of New York City, for petitioner. Mr. Irving L. Ernst, of New York City, for respondents. Ordered that the motions to vacate the writ of certiorari granted (260 U. S. 719, 43 Sup. Ct. 250, 67 L. Ed. —) herein or to advance this cause be, and they are hereby, denied.

(261 U. S. 326)

(43 Sup.Ct.)

**FOX FILM CORPORATION v. KNOWLES
et al. (two cases).**

(Argued Feb. 27, 1923. Decided March 12, 1923.)

Nos. 310 and 311.

1. Copyrights ⚡33—**Executor may renew, though author died more than one year before expiration.**

Under Copyright Act March 4, 1909, c. 320, § 24 (Comp. St. § 9545), providing that copyrights may be renewed by the author, or his widow or children, or, if the author, widow, or children be not living, then by the author's executors, or, in the absence of a will, his next of kin, provided that the application shall be made within one year prior to the expiration of the existing term, the executor of the author can renew the copyright, though the author died more than one year before the expiration of the term, so that he had no right of renewal at the time of his death, which he could give to his executor.

2. Executors and administrators ⚡74—**Executor can be given rights that testator could not have exercised.**

The executor represents the person of his testator, and it is no novelty for him to be given rights which the testator could not have exercised when he lived.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Separate suits in equity by the Fox Film Corporation against Frederick M. Knowles, Joseph Klein, and others, and against Frederick M. Knowles, William O. McWatters, and others. Decrees dismissing the bills (274 Fed. 731; 275 Fed. 582) were affirmed by the Circuit Court of Appeals (279 Fed. 1018), and complainant brings certiorari. Reversed.

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*Messrs. Alfred A. Wheat and Saul E. Rogers, both of New York City, and William J. Hughes, of Washington, D. C., for petitioner.

Mr. Louis R. Bick, of Brooklyn, N. Y., for respondents.

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*Mr. Justice HOLMES delivered the opinion of the Court.

These are bills in equity brought by the petitioner to restrain dramatic performances based upon two poems, "Over the Hills to the Poor House" and "Over the Hills from the Poor House," and for an account and damages. The author of the poems, Will Carlton, held a renewed copyright for them which expired on or about February 21, 1915. He died on December 18, 1912, testate, leaving all his property to Norman E. Goodrich and appointing him sole executor. On January 21, 1915, the executor applied for and obtained a renewal of the copyright to Feb-

ruary 21, 1929. Later the exclusive right to dramatize the poems was assigned to the plaintiff. The only defense relied upon here is that the statutes did not give the executor a right of renewal and that therefore the copyright has expired. The bills were dismissed upon this ground by the District Court, (No. 310) 274 Fed. 731; (No. 311) 275 Fed. 582; and the decrees were affirmed on the authority of *Silverman v. Sunrise Pictures Corporation*, 273 Fed. 909, 19 A. L. R. 289, by the Circuit Court of Appeals. 279 Fed. 1018.

This copyright was subsisting when the Copyright Act of March 4, 1909, c. 320, § 35 Stat. 1075 (Comp. St. § 9517 et seq.), went into effect. By section 24 of that statute (Comp. St. § 9545) copyrights so subsisting "may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act,

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including the *renewal period: * * * Provided, that application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term." The argument on which the statute was held not to apply to the present case was that the renewal creates a new estate, *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 109 C. C. A. 187; that the estate is purely statutory, and does not exist until within one year prior to the expiring of the existing term; that therefore Carlton dying more than a year before that moment had nothing to bequeath; and that the statute gave nothing to the executor except when the testator had the right to renew at the moment of his decease. It is argued that the executor is mentioned only to provide for the case of the testator's dying within the year without having exercised his right to renew, and thus having a right that the statute allowed him to transmit.

[1, 2] All of these propositions may be admitted, (for the purposes of the present argument only,) except the last. But we see no sufficient reason for thus limiting the right of the executor. The section read as a whole would express to the ordinary reader a general intent to secure the continuance of the copyright after the author's death, and none the less so if the actual continuance was effected by creating a new estate, or if the beneficiaries in certain cases are pointed out. No one doubts that if Carlton had died leaving a widow she could have applied as the executor did, and executors are men-

tioned alongside of the widow with no suggestion in the statute that when executors are the proper persons, if anyone, to make the claim, they cannot make it whenever a widow might have made it. The next of kin come after the executors. Surely they again have the same rights that the widow would have had. The limitation is derived from a theory that the statute cannot have intended

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the executor to take *unless he took what the testator already had. We should not have derived that notion from the section, which seems to us to have the broad intent that we have expressed, and the words specially applicable seem to us plainly to import that if there is no widow or child the executor may exercise the power that the testator might have exercised if he had been alive. The executor represents the person of his testator, Littleton, § 237, and it is no novelty for him to be given rights that the testator could not have exercised while he lived. *Green v. Ekins*, 2 Atk. 473, 476. A familiar illustration is to be found in the Employers' Liability Act (Comp. St. §§ 8657-8665) which gives to personal representatives a new cause of action for causing death, although the foundation is the original wrongful injury to the deceased. *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 68, 70, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176.

Decrees reversed.

(261 U. S. 330)

PULLMAN CO. v. RICHARDSON, State
Treasurer of California.

HINES, Director General of Railroads, v.
SAME.

(Argued and Submitted Dec. 4, 5, 1922. De-
cided March 12, 1923.)

Nos. 143-149.

1. Commerce ⇐72—State cannot tax gross receipts from interstate commerce.

A state can neither tax the act of engaging in interstate commerce nor the gross receipts therefrom, either of which would be a restraint or burden on such commerce, and an invasion of the power of regulation confided to Congress by the commerce clause of the Constitution.

2. Commerce ⇐72—State may tax property used in interstate commerce.

A state within whose limits property used in interstate commerce is permanently located or commonly used may tax such property.

3. Commerce ⇐72—Value of property within state as part of interstate system may be taxed.

In taxing property used in interstate commerce, which is situated or commonly used within the state, the state may tax the enhanced value which comes to the property in the state through its organic relation to the interstate system.

4. Commerce ⇐72—State may treat gross receipts as measure of value of property used in interstate commerce.

In taxing property used in interstate commerce situated within the state, the state may

employ any appropriate means of reaching the full value of such property as part of the going concern, such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value, so long as the means do not involve any discrimination against interstate commerce and the tax amounts to no more than an ordinary tax on the property valued with reference to its use.

5. Commerce ⇐72—California tax on sleeping car companies is valid.

The tax levied by Const. Cal. art. 13, § 14, adopted in 1910, on sleeping car companies which is expressly stated to be a tax on the property of such companies within the state, measured by a percentage on the gross receipts from intrastate business and on the proportion of such receipts from interstate business as the distance traveled within the state bears to the whole distance, is valid.

6. Constitutional law ⇐43(1)—Company paying tax cannot complain of invalidity of provision revoking license for nonpayment.

A sleeping car company, which had paid the tax imposed by Const. Cal. art. 13, § 14, cannot, in an action to recover the tax, complain that St. Cal. 1911, p. 548, § 24, and St. 1913, p. 7, § 5, and page 625, § 9, forfeiting the right of a foreign corporation to do business within the state for nonpayment of the tax, was invalid.

7. Commerce ⇐72—Right to engage in interstate commerce not subject to forfeiture by state for nonpayment of tax.

The state cannot forfeit the right to engage in interstate commerce within the state for nonpayment of a tax, since the right to engage in such commerce is not within state control.

In Error to the Supreme Court of the State of California.

Actions by the Pullman Company and by Hines, Director General of Railroads, against Friend W. Richardson, as Treasurer of California. Judgments for defendant were affirmed by the Supreme Court of California (185 Cal. 484, 197 Pac. 346), and plaintiffs bring error. Affirmed.

In the first six cases, the taxes were paid

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and the actions brought by *the Pullman Company. In the last of the cases, the taxes were paid while the business of the company was under federal control, and the action brought by the company and the Director General of Railroads.

Messrs. C. A. Severance, of St. Paul, Minn., Gustavus S. Fernald, of Chicago, Ill., and Burke Corbet, of San Francisco, Cal., for plaintiffs in error.

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*Messrs. U. S. Webb and Raymond Benjamin, both of San Francisco, Cal., for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

These were actions by the Pullman Company against the Treasurer of California to

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(recover moneys paid under *protest as state

taxes. Each action related to a designated part of the tax for a distinct year and was brought on the theory that the part designated was invalid because imposed under constitutional and statutory provisions repugnant to the Constitution of the United States. The Treasurer prevailed in the court of first instance and in the Supreme Court of the state. 185 Cal. 484, 197 Pac. 346. The Pullman Company then brought the cases here on writs of error.

In 1910 California adopted an amendment to her Constitution, section 14 of article 13, one purpose of which was to effect a separation of state from local taxation by subjecting public service corporations to a designated tax for state purposes and relieving them from taxation for county and municipal purposes. Referring to this feature of the amendment, the Supreme Court of the state said in *San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, 248, 135 Pac. 971, 973:

"Under the old system, the property and franchises of the corporations above referred to were taxed for both state and local purposes. The amendment creates a new mode of taxing such property and franchises, and appropriates the revenue so raised to state purposes solely. The new method by which taxes are collected exclusively for the state, is substituted for the former system, under which the same subjects were taxed for both state and local purposes."

The pertinent parts of the amendment are as follows (Laws 1910-11, p. xlv):

"Sec. 14 (a) * * * All sleeping car, dining car, drawing room car, and palace car companies, * * * operating upon the railroads in this state, * * * shall annually pay to the state a tax upon their franchises, * * * rolling stock, * * * and other property, or any part thereof, used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages

hereinafter fixed upon *the gross receipts from operation of such companies and each thereof within this state. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

"The percentages above mentioned shall be as follows: * * * On all sleeping car, dining car, drawing room car, palace car companies, * * * three per cent. * * * Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided. * * *

"(e) * * * In the event that the above named revenues are at any time deemed insufficient to meet the annual expenditures of the state, including the above named expenditures for educational purposes, there may be

levied, in the manner to be provided by law, a tax, for state purposes, on all the property in the state, including the classes of property enumerated in this section, sufficient to meet the deficiency.

"(f) All the provisions of this section shall be self-executing, and the Legislature shall pass all laws necessary to carry this section into effect, and shall provide for a valuation and assessment of the property enumerated in this section. * * * The rates of taxation fixed in this section shall remain in force until changed by the Legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof."

Several acts to carry the amendment into effect were adopted from time to time, but it suffices here to say of them, first, that the computing percentage applicable to sleeping car, dining car, drawing room car, and palace

car *companies was ^{*336} increased to 4 per cent. in 1913 (chapter 6, Laws 1913) and reduced to 3.95 per cent. in 1915 (chapter 2, Laws 1915); secondly, that provision was made for enforcing the tax by either the usual tax sale or a suit in the name of the state (chapter 335, §§ 20, 21, 24, Laws 1910-11; chapter 6, § 5, Laws 1913); and, thirdly, that there was further provision that if the tax was not paid within a designated period the delinquent company, if a domestic corporation, "will forfeit its charter" and if a foreign corporation, "will forfeit its right to do business in this state," and that the transaction of any business in the state on behalf of a company incurring any such forfeiture, except to settle its affairs, should be punished by substantial fines (Laws 1911, c. 335, § 24; Laws 1913, c. 6, § 5, and chapter 320, § 9).

The taxes in question were levied under the new system in 1911 and six subsequent years. All were alike, save in particulars not material here; so it will be enough to state the facts relating to the tax levied in 1911.

The Pullman Company is an Illinois corporation engaged in operating sleeping and parlor cars on the railroads of the country. Some of its cars are operated between points in California, some between points within and points without that state and some through the state between points outside. In 1910 the company's gross receipts from all its operations within the state were \$1,905,302.97. Of this sum \$938,736.80 came from operations which began and ended in the state and \$966,516.17 came from that part of the interstate operations which was within the state. The latter amount was arrived at by taking every service performed partly within and partly without the state and determining on a mileage basis what portion of the sum received therefor was attributable to the part of the service within the state. To illustrate: If a passenger was carried in a sleeping car from Oakland to Chicago for

^{*337} \$14, and one-seventh of *the mileage was in California, \$2 was deemed the gross receipt

for so much of the service as was rendered in that state.

The gross receipts were calculated and reported by the company and the state officers accepted the calculation. The amount of the tax was computed by applying to the gross receipts the percentage rule prescribed by the amendment to the state Constitution. In this way a tax of \$57,159.08 was levied in 1911. Had the gross receipts from intrastate business alone been considered the tax would have been \$28,163.61—that is, \$28,995.47 less than the actual levy.

The company objected to the consideration of the gross receipts from the interstate business, although they came only from service within the state, and objected to a corresponding part of the tax—the \$28,995.47. That part was paid under protest and the first of these actions was brought to recover it—an admissible course under the state law. Laws 1910-1911, c. 335, § 23; Laws 1913, c. 320, § 7. The other part was paid voluntarily and is not in controversy.

The company insists that the tax in question and the provisions therefor in the state Constitution and statutes are invalid under the commerce clause of the Constitution of the United States, because (a) the tax is laid on gross receipts from interstate commerce, and (b) its payment is made a condition to continuing an interstate business within the state, and are invalid under the due process of law clause of the Fourteenth Amendment, because the tax is intended to reach income from property situated and business done without the state.

The state court holds that the tax is not a tax on gross receipts as such, but is in both name and essence a tax on property within the state, and that it is computed with reference to the gross receipts only as a means

of adjust*ing it to the real value of the property in the relation in which the same is used.

The principles to be applied in cases of this class repeatedly have been considered by this court and are now settled.

[1] A state can neither tax the act of engaging in interstate commerce nor lay a tax on gross receipts therefrom. In either case the tax would be a restraint or burden on such commerce and its imposition and invasion of the power of regulation confided to Congress by the commerce clause of the Constitution. *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. Ed. 888; *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445.

[2,3] The rule is otherwise with property used in interstate commerce. A state within whose limits such property is permanently located or commonly used may tax it. *Cudahy*

Packing Co. v. Minnesota, 246 U. S. 450, 453, 38 Sup. Ct. 373, 62 L. Ed. 827; *Wells, Fargo & Co. v. Nevada*, 248 U. S. 165, 167, 39 Sup. Ct. 62, 63 L. Ed. 190; *Union Tank Line Co. v. Wright*, 249 U. S. 275, 282, 39 Sup. Ct. 276, 63 L. Ed. 602. And, if the property be part of a system and have an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the system, although the other parts be outside the state; in other words, the tax may be made to cover the enhanced value which comes to the property in the state through its organic relation to the system. *Fargo v. Hart*, 193 U. S. 490, 499, 24 Sup. Ct. 498, 48 L. Ed. 761; *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 225, 28 Sup. Ct. 638, 52 L. Ed. 1031; *United States Express Co. v. Minnesota*, 223 U. S. 335, 337, 32 Sup. Ct. 211, 56 L. Ed. 459; *Union Tank Line Co. v. Wright*, *supra*.

[4] In taxing property so situated and used, a state may select and employ any appropriate means of reaching its actual or full value as part of a going concern—such as treating the gross receipts from its use in

*339 both intrastate *and interstate commerce as an index or measure of its value—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce. *Cudahy Packing Co. v. Minnesota*, *supra*; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 367, 35 Sup. Ct. 99, 59 L. Ed. 265; *United States Express Co. v. Minnesota*, *supra*; *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 227, 28 Sup. Ct. 638, 52 L. Ed. 1031; *Union Tank Line Co. v. Wright*, *supra*.

[5] An examination of the tax in question in the light of these principles shows that the chief objection urged against it is not tenable. The provisions under which the tax is imposed call it a property tax, specify the property subjected to it and declare that it is in lieu of all other taxes on such property. The Supreme Court of the state holds it is a tax on the property specified. In no material respect does it differ from the tax which was recognized by this court as a property tax in *United States Express Co. v. Minnesota* and *Cudahy Packing Co. v. Minnesota*, above cited. True, it is computed with special regard to the gross receipts, but this, as is fairly shown, is done merely as a means of getting at the full value of the property, considering its nature and use. The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property valued as part of a going concern, nor to be relatively higher than the taxes on other kinds of property. There is no ground for thinking that it oper-

ates as a discrimination against interstate commerce.

[6, 7] The statutory provision that a foreign corporation which fails to pay the tax shall be excluded from doing business in the state requires but brief notice. It is not sought to be enforced here. The Pullman Company has not failed to pay the tax.

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The provision has not been *construed by the state court. If it be construed as covering interstate commerce it is void, for the right to engage in such commerce is not within the state's control. See *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 554, 8 Sup. Ct. 961, 31 L. Ed. 790; *Leloup v. Port of Mobile*, 127 U. S. 640, 645, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 695, 696, 15 Sup. Ct. 268, 39 L. Ed. 311. The state court may construe it as confined to intrastate business. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 368, 369, 35 Sup. Ct. 99, 59 L. Ed. 265. In neither event would it affect the validity of the tax before us.

We find nothing in the provisions under which the tax was levied in the decision of the state court, or in the record, which gives any support to the contention that the tax is intended to reach income from property situated or business done without the state.

Judgment affirmed.

(261 U. S. 317)

UNITED STATES v. ALLEN.

(Argued March 1, 1923. Decided March 12, 1923.)

No. 232.

Army and navy — 23—Determination of Secretary of the Navy as to correspondence in duties between Coast Guard and Navy officers is not conclusive.

Act May 22, 1917, § 15 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2856a), providing that during the war warrant officers, petty officers, and enlisted men of the Coast Guard should receive the same rates of pay as might be prescribed for corresponding grades or ratings and length of service in the Navy, was intended to give Guard officers and enlisted men the pay received by those in the Navy, whose duties and qualifications were identical, and the correspondence of duties was a question of fact, on which the table of grades and ratings prepared by the Secretary of the Navy was not conclusive.

Appeal from the Court of Claims.

Action by Will J. Allen against the United States. Judgment for plaintiff (56 Ct. Cl. 265), and the United States appeals. Affirmed.

Mr. Assistant Attorney General Seymour, for the United States.

Mr. George A. King, of Washington, D. C., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

Action for \$600, based on the claim of Allen, who was a yeoman in the Coast Guard, for pay at the rate fixed by law for a chief

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yeoman in the Navy from April 6, 1917, *to May 28, 1919, under the following provisions of the Act of May 22, 1917 (40 Stat. 84):

"An act to temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes."

Section 15: " * * * That during the continuance of the present war, warrant officers, petty officers and enlisted men of the United States Coast Guard shall receive the same rates of pay as are or may hereafter be prescribed for corresponding grades or ratings and length of service in the Navy." Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2856a.

Section 13: "Nothing contained in this act shall operate to reduce the rank, pay or allowances that would have been received by any person in the Navy, Marine Corps, or Coast Guard except for the passage of this act." Section 2483n.

Judgment was rendered for \$486.32, to review which this appeal is prosecuted.

The question presented is not the absolute rank of Allen, but the correspondence of his duties and his emolument to those of chief yeoman in the Navy.

The Commandant of the Coast Guard submitted, June 5, 1917, to the Chief of the Bureau of Navigation of the Navy Department a tabular statement showing the several grades or ratings in the Navy to which the Coast Guard grades or ratings corresponded. This tabular statement was arranged on the basis of the duties and responsibilities of the several ratings.

In this table a ship's writer was put down as corresponding to a yeoman, first class, in the Navy, and a yeoman in the Coast Guard to a chief yeoman in the Navy. October 10, 1917, the Secretary of the Navy issued a general order giving the corresponding grades in which both ship's writers and yeomen in the Coast Guard were tabulated as corresponding to yeoman, first-class, in the Navy, instead of chief yeoman in the Navy. The tabulated statement by the Commandant of the Coast Guard was in many other re-

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spects changed by the Navy Department. The action of the Navy Department was carried out by a circular letter from the Coast Guard headquarters, and, according to it, pay of all petty officers and nearly all enlisted men in the Coast Guard was higher than the pay in the Navy, thus giving to such officers no benefit of section 15 of the Act of May 22, 1917.

Allen, during the time covered by his claim, was paid as a yeoman in the Coast Guard, \$1,783.80; as chief yeoman in the Navy, he

would have received \$2,270.12, a difference of \$486.32.

The finding of the court was that he was entitled to recover the sum of \$486.32 more than that which he did receive, and it awarded him judgment for that amount, rejecting the contention of the government that:

"The fact that Congress did not expressly provide what grades and ratings of the Coast Guard should be considered 'corresponding' to the grades and ratings in the Navy left that fact to be determined by the Secretary of the Navy."

The finding and judgment of the court are in accordance with a table of grades and ratings submitted by the Commandant of the Coast Guard, pursuant to section 15 of the Act of May 22, 1917, above referred to. To this table of ratings, and the action of the Commandant, the United States opposes the order of the Secretary of the Navy, No. 329, and maintains that it was the duty of the latter, under the Act of May 22, 1917, in order to standardize the pay of the Coast Guard and Navy, to determine what were the corresponding grades or ratings. "That preliminary question was required to be settled before any pay could be fixed or allowed." And further:

"The Secretary of the Navy, acting in his administrative capacity, and within his discretionary powers, promulgated a table of grades and ratings under which the claimant (Allen) was paid."

To these contentions the court gave attentive and elaborate consideration, and deter-

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mined that they were contrary to the purpose of the Act of May 22, 1917, fixing the pay of petty officers and enlisted men during the continuance of the war with Germany so that they should receive the same pay prescribed for corresponding grades and ratings in the Navy. It held that the test of correspondence or equality was the duties and responsibilities of yeomen in the Coast Guard and yeomen in the Navy. In other words, it was the judgment of the court, that as the duties and qualifications of the officers were identical, their pay should be the same. Correspondence of duties is a question of fact, not a matter of deference to the judgment of the Secretary of the Navy.

The court said:

"The statute [Act of May 22, 1917] was passed by Congress for the purpose of equalizing as far as possible the pay of officers of the Coast Guard with that of officers of the Navy. The act attempted to assimilate the pay, and the court in construing the act will, so far as conditions admit, put such a construction upon it as will carry out the intent of Congress. In the case at bar a Coast Guard officer renders similar service to that rendered by a naval officer, has the same duties to perform, and

possesses the same qualifications; the pay of the Coast Guard officer can be assimilated to the pay of the officer of the Navy, and therefore we think that the plaintiff is entitled to receive the pay prescribed for chief yeoman in the Navy."

The conclusion was that the purpose of the act was "to establish uniformity in the pay of like officers in the Coast Guard and Navy," and that it could not be defeated by an administrative order of the Secretary of the Navy. Hence, the further conclusion was that Allen was entitled to recover the sum of \$486.32, and it was so ordered.

We concur, and affirm the judgment.

Affirmed.

(261 U. S. 321)

UNITED STATES v. MORAN.

(Argued March 1, 1923. Decided March 12, 1923.)

No. 231.

Appeal from the Court of Claims.

Action by Bernard L. Moran against the United States. Judgment for plaintiff (56 Ct. Cl. 492), and the United States appeals. Affirmed.

Mr. Assistant Attorney General Seymour, for the United States.

Mr. George A. King, of Washington, D. C., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

Action for \$600. Judgment for \$260.50. The case was submitted with United States v. Allen, 261 U. S. 317, 43 Sup. Ct. 369, 67 L. Ed. —, just decided, depends upon the same statute, and presents the question of the claim of a master at arms in the Coast Guard to receive pay at the rate allowed by the statute to a chief master at arms in the Navy, less all pay previously received in the lower grade.

Moran enlisted in the United States Revenue Cutter Service, the name of which has since been changed to the United States Coast Guard, as an ordinary seaman, and attained the rank of master at arms, the duties of which corresponded in all respects to the duties of chief master at arms in the Navy.

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*Moran, therefore, since April 6, 1917, has been, and is, entitled to receive a rate of pay corresponding to that of a chief master at arms in the Navy. Had he been so paid, and as required by the Act of May 22, 1917, 40 Stat. 84, he would have received during the entire period from August 1, 1917, when he was placed on active duty, to December 31, 1918, the sum of \$1,790.50. The pay received by him, however, was \$1,530, leaving a balance due of \$260.50. For this sum the Court of Claims gave judgment.

The findings of the court sustain its action, and on the authority of the Allen Case we affirm the judgment.

Affirmed.

(261 U. S. 322)

EWEN v. AMERICAN FIDELITY CO.

(Argued March 1, 1923. Decided March 12, 1923.)

No. 92.

Abatement and revival — 39—Expiration of three years after injunction against prosecuting business does not prevent judgment against Illinois Surety Company.

Under Hurd's Rev. St. Ill. 1917, c. 32, § 102s, making surety companies organized under that chapter subject to all laws governing corporations for pecuniary profit, and chapter 32, § 10, relating to such corporations, and continuing their existence for two years after they cease to do business for the purpose of settling their affairs, and section 12, expressly providing that the dissolution of a corporation for any cause shall not take away or impair any remedy given against such corporation, a judgment against a surety company is not void, though rendered more than three years after the company was enjoined from prosecuting any business, even if Hurd's Rev. St. Ill. 1917, c. 73, §§ 12-14, providing for dissolution of such companies, would have that effect.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Action by John Ewen against the American Fidelity Company. Judgment for defendant was affirmed by the Circuit Court of Appeals (271 Fed. 848), and plaintiff brings certiorari. Reversed.

Wm. R. Wilder, of New York City, and Henry E. Davis, of Washington, D. C., for petitioner.

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*J. M. Proskauer, of New York City, for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action upon an undertaking to pay the amount of any judgment that might be recovered by one Mackey in a suit against the Illinois Surety Company, not exceeding \$7,500 and interest, the contract being made by the present defendant in order to dissolve an attachment in that suit. That suit was begun in May, 1915, in New York. Mackey recovered a judgment for a much larger sum on June 21, 1919, and assigned the same and this undertaking to the present plaintiff. The defence is that the Illinois Surety Company, an Illinois corporation, had ceased to exist before the judgment was recovered, and that the judgment against it was void. On this ground judgment was given for the defendant in the District Court and the judgment was affirmed by the Circuit Court of Appeals.

On April 19, 1916, a majority of the stockholders of the Surety Company filed a bill in Illinois alleging that the Company was

insolvent and praying that it be restrained from further prosecution of its business, that a receiver be appointed and that upon final hearing a decree might be entered dissolving the Company and providing for the distribution of its assets. The answer of the Company was filed with the bill. It admitted the allegations and submitted to the jurisdiction of the Court. On the same day an order was entered "without bond from the complainants and until the further order of the Court" restraining the Company from further prosecution of its business. Later on the same day another decree appointed a receiver to collect the property, with power to institute and to defend suits and to apply to the Court

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for *further orders concerning the collection and distribution of the assets and the closing of the Company's concerns for which purposes jurisdiction was retained until final hearing and settlement of all unfinished business of the Company and the receivership. The receiver continued to defend the above mentioned suit in New York until about April 28, 1919, when the counsel for the Company notified the plaintiff that they no longer were authorized to appear for it; the ground of the notice being an order of the Court in Illinois that the receiver should discontinue the defence and notify the plaintiff Mackey to file his claim in that proceeding. (This order imposed no personal obligation on Mackey as he was not within the jurisdiction of the Illinois Court.) Thereafter the defendant failed to appear, and upon a report by a referee the judgment in question was entered on June 21, 1919. This was more than three years after the Company had been restrained from transacting business. The defendant says that by the Illinois statutes the Company became extinct in one year, with a continued liability to creditors of only two years more, and that the last two years had elapsed.

The Illinois Surety Company was organized under a general law of Illinois to be found in Hurd's Revised Statutes of Illinois 1917, c. 32, § 102f and following. By section 14 of the Act (Hurd, § 102s), corporations formed under it

"shall be subject to all laws of this State governing corporations for pecuniary profit, as provided for in an Act * * * approved April 18, 1872 * * * and amendments thereto, in force July 1, 1897, and the duties thereof, and shall have the powers thereof, so far as the same are not inconsistent with the provisions of this Act. Such Companies shall also be subject to the provisions and requirements of an Act entitled, 'An Act in regard to the dissolution of Insurance Companies,' approved February 17, 1874."

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The act last mentioned allows a majority of the stockholders of any Illinois insurance company to apply by petition to close its con-

cerns and authorizes the Court after due notice to all the parties interested to proceed to hear the matter and for reasonable cause to decree a dissolution.. Section 2 (Hurd's Statutes, c. 73, § 12). It also provides in the next section that the charters of all such companies, which either from neglect, or by vote of their members or officers, or in obedience to the decree of any Court, have ceased for one year to transact the business for which they were organized, shall be deemed extinct, with authority to the Court upon petition to fix the time within which the companies shall close their concerns:

"Provided, that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors." Section 3 (Hurd, § 13).

The fourth section (Hurd, § 14) continues the companies for two years more for the purpose of prosecuting and defending suits, &c., but not for that of going on with their business. The facts that we have stated were thought to bring the case within this statute and so make the New York judgment void.

We should hesitate long before deciding that the cessation of business for a year under the above mentioned decree fell within section 3 of the Insurance Act or that the proviso had no effect upon the following section 4, not to speak of other difficulties. But it is not necessary to stop at this point. The company, as has been shown, was subject also to the laws governing corporations for pecuniary profit. By section 10 of the Act of April 18, 1872 (Hurd, c. 32, § 10) these corporations are continued for two years for substantially the same purposes as are insurance companies, but it is explicitly provided by section 12 that the dissolution for any cause shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution. The

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argument seems to us strong that the *section concerning surety companies quoted at the outset takes in this section 12 without qualification and, if necessary, might be said to show that a larger signification should be given to the proviso quoted from section 3 of the Insurance Act, at least as applied to this Company. But we are relieved from an independent consideration of the matter by the opinion of the Supreme Court of Illinois in *Evans v. Illinois Surety Co.*, 298 Ill. 101, 106, 107, 131 N. E. 262, April 21, 1921, the very case in which the above mentioned injunction was issued. On page 106 it quotes section 12 of the Corporation Act, and on page 107 says:

"There could be no question but that the provisions of the General Incorporation Act heretofore quoted, and all the applicable pro-

visions, apply to corporations organized under the Surety Act."

This was later than the decision of the Circuit Court of Appeals and appears to us to warrant our taking the same view without discussion at greater length.

Judgment reversed.

(261 U. S. 312)

CITY OF NEW YORK v. NEW YORK TELEPHONE CO.

(Argued Feb. 21, 1923. Decided. March 12, 1923.)

No. 588.

1. Telegraphs and telephones ☞33(1)—City is not necessary party to suit to restrain enforcement of commission's order fixing telephone rates.

A city, which had no control over the telephone rates within its borders, but was only interested in them as a subscriber, and as such not directly interested, because its own rates were fixed by special contract, is not a necessary party to a suit against the state Public Service Commission to restrain the enforcement of the commission's order establishing telephone rates within the city.

2. Telegraphs and telephones ☞33(1)—Refusal to permit city to intervene in suit to enjoin enforcement of order held not abuse of discretion.

In a suit to restrain the enforcement of an order of the state Public Service Commission fixing telephone rates within a city, in which the counsel of the commission and the Attorney General of the state were made defendants, as well as the commission, and it appeared the Attorney General and the city were co-operating in the defense of the suit, it was not an abuse of the District Court's discretion to refuse to allow the city to become a defendant, since its interests and those of its residents were fully represented under the law by those who had been made defendants.

Appeal from the United States District Court for the Southern District of New York.

Suit by the New York Telephone Company against the New York Public Service Commission and others, in which the City of New York moved for an order making it a party defendant. From an order of the District Court denying its motion, the City of New York appeals. Appeal dismissed.

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*Messrs. M. Malldwin Fertig and John P. O'Brien, both of New York City, for appellant.

Mr. John W. Davis, of New York City, for appellee.

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 *Mr. Chief Justice TAFT delivered the opinion of the Court.

The New York Telephone Company, the appellee herein, filed its bill in the District Court against the members of the New York Public Service Commission, the counsel of the commission and the Attorney General of the state, asking an injunction against the enforcement of two orders of the Public Service Commission as to telephone rates, one as to rates in the city of New York and the other as to those in the state of New York, outside of the city, which it alleged to be confiscatory of its property and in violation of the Fourteenth Amendment. Thereafter the city of New York moved the court for an order making it a party defendant in the cause. This order the District Court denied. Thereafter an interlocutory injunction against the orders was granted and an appeal, No. 542, is pending here and has been argued, but not decided. This is a separate appeal from the order refusing the application of the city to be made a party defendant.

Under article 1, section 12, of the Public Service Commission Law of the state of New York (Consol. Laws, c. 48), it is made the duty of *counsel to the commission—

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 "to represent and appear for the people of the state of New York and the commission in all actions and proceedings involving any question under this chapter, or within the jurisdiction of the commission under the railroad law, or under or in reference to any act or order of the commission, and, if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved."

Chapter 15 of the Laws of 1922 of the state directs that:

"The Attorney General shall appear for the people of the state, and take such steps as may be necessary to protect the interests of the public, in the proceeding heretofore instituted by the Public Service Commission and entitled 'In the matter of the hearing on motion of the commission, as to rates, charges and rentals, and the regulations and practices affecting rates, charges and rentals of the New York Telephone Company.' For such purpose, he may employ special deputies, experts and other assistants, and incur such other expenses as he may find necessary, within the amount appropriated by this act."

[1] The necessary defendant in the suit to enjoin the orders lowering rates was the Public Service Commission whose orders they were. In addition the counsel of the commission and the Attorney General were made parties defendant under the legislation above recited. The city of New York has no control over the rates. Its only interest in them is as a subscriber, and even as such its interest in the general rates is not direct because its

own rates are settled by a special contract. Under such circumstances, the city is certainly not a necessary party.

In re Engelhard, 231 U. S. 646, 34 Sup. Ct. 258, 58 L. Ed. 416, an action had been brought against the city of Louisville to restrain the enforcement of an ordinance prescribing tele-

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 *phone rates. One of the subscribers filed a petition in the District Court asking to be made a party defendant. This was denied and the petitioner sought in this court a mandamus to compel the District Judge to grant the petition. It was pressed upon the court that petitioner had a common interest with other subscribers in the rates under discussion and that under equity rule No. 38 when the question is one of common or general interest and it is impracticable to bring them all before the court, one may sue or defend for all. This court held that the city was the proper defendant in the suit as the representative of all interested. We said:

"It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them."

[2] There is nothing in this case to show that the Public Service Commission will not fully and properly represent the subscribers resident in New York City. Indeed it was said at the bar that the city and the Public Service Commission and the Attorney General were co-operating in every way in the defense of the suit. It was completely within the discretion of the District Court to refuse to allow the city to become a defendant when its interests and those of its residents were fully represented under the law and protected by those who had been made defendants. There is nothing to show that the refusal complained of was an abuse of discretion. This same controversy arose in the case of City of New York v. Consolidated Gas Co., 253 U. S. 219, 40 Sup. Ct. 511, 64 L. Ed. 870, and the same conclusion was reached. Indeed it was there said that an order like the one here objected to was not of such a final character as to furnish the basis of an appeal, citing *Ex parte Cutting*, 94 U. S. 14, 22, 24 L. Ed. 49; *Credits Commutation Co. v. United States*, 177 U. S. 311, 315, 20 Sup. Ct. 636, 44 L. Ed. 782; *Ex parte*

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Leaf Tobacco Board of Trade, *222 U. S. 578, 581, 32 Sup. Ct. 833, 56 L. Ed. 323. These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, but the present is not one of them.

Our conclusion is that this appeal should be
 Dismissed.

(261 U. S. 307)

POTHIER v. RODMAN, United States Marshal, et al.

(Submitted on Motion for Leave to Proceed in Forma Pauperis by Davis G. Arnold, Feb. 23, 1923. Decided March 12, 1923.)

1. Appeal and error — 389(2)—Affidavit of poverty must be made by party.

Act July 20, 1892, c. 209, § 1, as amended by Act June 27, 1922, c. 246, 42 Stat. 666, requires the affidavit as to the poverty of the applicant for leave to appeal in forma pauperis to be made by himself and not by another, even his counsel, since it is important that he who seeks the privilege accorded by the statute should be required to expose himself to the pains of perjury.

2. Courts — 385(1)—Appeal in habeas corpus lies to Circuit Courts of Appeals, unless involving jurisdictional or constitutional questions.

An appeal from the dismissal of a petition for habeas corpus to procure discharge from an order of removal to another district for trial is not governed by any other provision of law, unless it involves a jurisdictional or constitutional question, within Judicial Code, § 238 (Comp. St. § 1215), and therefore such appeal must be taken to the Circuit Court of Appeals, not to the Supreme Court.

3. Courts — 385(4)—Attack on jurisdiction of court in which indictment was pending does not authorize appeal to Supreme Court.

An attack, in habeas corpus proceedings to prevent removal to another district for trial, on the jurisdiction of the court in which the indictment was pending, does not present a case in which the jurisdiction of the court is in issue so as to be appealable directly to the Supreme Court, under Judicial Code, § 238, as amended by Act Jan. 28, 1915, c. 22 (Comp. St. § 1215), which refers to the jurisdiction of the court from which the appeal is taken.

4. Courts — 385(4)—Objection that place of homicide was not within exclusive jurisdiction of the United States does not attack jurisdiction of District Court.

An objection that the military reservation, on which occurred the homicide for which accused was being prosecuted in the United States District Court, was not a place within the exclusive jurisdiction of the United States, was not an attack on the jurisdiction of the District Court, but raised an objection going to the merits, on which an appeal must be taken to the Circuit Court of Appeals.

5. Courts — 385(5)—Recital of assignments in error that constitutional question was involved is insufficient.

Where the assignments of error recited that constitutional questions arose, but neither the motion for leave to appeal in forma pauperis nor the record disclosed such question, the appeal cannot be taken to the Supreme Court, and it will be transferred to the Circuit Court of Appeals, under Act Sept. 14, 1922.

Appeal from an Order of the United States District Court of Rhode Island Dismissing a Petition for Writ of Habeas Corpus.

Habeas corpus proceeding by Roland R. Pothier against William R. Rodman, United States Marshal, and another. From an order dismissing the petition, petitioner appeals. On motion for leave to proceed on appeal in forma pauperis. Motion denied, and case transferred to the Circuit Court of Appeals for the First Circuit.

See, also (D. C.) 285 Fed. 632.

Mr. Davis G. Arnold, of Providence, R. I., for the motion.

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*Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a motion for leave to proceed on this appeal in forma pauperis. The character of the appeal is set forth in the motion papers, and upon the facts therein stated we reach our conclusion.

Act July 20, 1892, c. 209, § 1, 27 Stat. 252, as amended by Act June 27, 1922, c. 246, 42 Stat. 666 provides:

"That any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the Circuit Court of Appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal."

Counsel for appellant files the motion setting out in brief the facts of the cause and accompanies it with an affidavit of his own, alleging that he has examined the case, that he believes the appellant has a just cause for appeal, that the appellant is without funds, and because of his poverty he is unable to pay the costs of the appeal, that his friends and relatives have already expended large

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*sums in his defense, and that during his continued confinement in jail, the American Red Cross has been providing for his sickly wife and child. The affidavit further alleges that the appellant was allowed to prosecute the proceedings before the District Court in forma pauperis.

[1] Under the statute the affidavit as to the poverty of the applicant is to be made by himself and not by another, even his counsel.

A supporting affidavit may properly be made by the counsel, but the importance that he who is seeking the privilege accorded by the statute should be required to expose himself to the pains of perjury in a case of bad faith is plain.

Assuming, however, that this defect can be satisfactorily supplied, the motion must be denied, because it does not appear from the motion papers or the record that this court has jurisdiction of the appeal. There can be no doubt from a reading of the statute that an application of this character cannot be granted if it appear on its face that the appeal or writ of error in which the costs are to be incurred at public expense does not lie and cannot be considered by the court. The case made in the motion is as follows:

On October 19, 1922, the appellant was arrested and brought before Henry C. Hart, United States commissioner for the district of Rhode Island, under a warrant to apprehend him and to remove him pursuant to section 1014 of the Revised Statutes (Comp. St. § 1674), from Rhode Island to the Southern Division of the Western district of Washington for trial under an indictment for murder of Alexander P. Cronkhite, committed in territory in that district within the exclusive jurisdiction of the United States, to wit, the Camp Lewis military reservation. Appellant pleaded not guilty and was committed to the custody of the marshal without bail.

The petition for the writ of habeas corpus reciting these facts was filed in the District Court and was accompanied *by a prayer for a writ of certiorari directing the United States commissioner to send up the proceedings.

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The petition averred that the place in which the indictment alleged the crime to have been committed was within the exclusive jurisdiction of the state of Washington, and that the indictment did not, therefore, charge a crime against the United States, and that the court in which the indictment was found was without jurisdiction to hear it.

The District Court of Rhode Island found that this averment did not state a case warranting the discharge of the accused from custody or a halting of his removal under the warrant to the place of trial and so made the order appealed from.

[2] Appeal from the order lay to the Circuit Court of Appeals of the First Circuit, not to this court. Final decisions of a District Court are to be reviewed by the proper Circuit Courts of Appeals in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section 238 of the Judicial Code (Comp. St. § 1215), unless otherwise provided by law. Section 128, Judicial Code, as amended by Act Jan. 28, 1915, c. 22, § 2, 38 Stat. 803 (Comp. St. § 1120).

There is no other provision of law for appeals from an order granting or denying writs of habeas corpus, except when they come within section 238. *Horn v. Mitchell*, 243 U. S. 247, 248, 249, 37 Sup. Ct. 293, 61 L. Ed. 700; *Chin Fong v. Backus*, 241 U. S. 1, 3, 36 Sup. Ct. 490, 60 L. Ed. 859; *Wise v. Henkel*, 220 U. S. 556, 557, 31 Sup. Ct. 599, 55 L. Ed. 581; *In re Lennon*, 150 U. S. 393, 399, 14 Sup. Ct. 123, 37 L. Ed. 1120; *Cross v. Burke*, 146 U. S. 82, 88, 13 Sup. Ct. 22, 36 L. Ed. 896; *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 12 Sup. Ct. 517, 36 L. Ed. 840.

Section 238, Judicial Code, as amended by Act Jan. 28, 1915, c. 22, 38 Stat. 803, allows appeals direct from the District Courts to this court:

(1) In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision;

(2) From the final sentences and decrees in prize causes;

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*(3) In any case that involves the construction or application of the Constitution of the United States;

(4) In any case in which the constitutionality of any law of the United States or the validity of any treaty made under its authority, is drawn in question; and

(5) In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

[3] The case presented on this motion comes within none of these classes. Even if a direct appeal from a conviction under the indictment in the District Court of Western Washington would lie to this court under section 238 on the question whether Camp Lewis was within the exclusive jurisdiction of the United States, still the issue of jurisdiction which section 238 makes cognizable by this court on direct appeal is the jurisdiction of the District Court from which the appeal is taken, not that of the court to whose jurisdiction it is proposed to remove the petitioner. *Carey v. Houston & Texas Central Ry. Co.*, 150 U. S. 170, 180, 14 Sup. Ct. 63, 37 L. Ed. 1041; *Ex parte Jim Hong*, 211 Fed. 73, 78, 127 C. C. A. 569. There was no doubt of the jurisdiction of the District Court of Rhode Island to issue a writ of habeas corpus to look into the legality of the detention of the petitioner. Certainly he made no question of it because he asked for its exercise.

[4] But it is clear that the objection raised by the petitioner does not raise a question of jurisdiction directly appealable to this court from the District Court. Such an objection goes to the merits and the appeal must be to the Circuit Court of Appeals. *Louie v. United States*, 254 U. S. 548, 550, 551, 41 Sup. Ct. 188, 65 L. Ed. 399.

[5] Nor is there any question of the con-

struction or application of the Constitution of the United States or of the validity of a statute or treaty of the United States or of a statute of a state under the federal Constitution. The assignments of error recite that

*312 constitutional questions *did arise but neither the motion nor the record discloses one. The issue is simply whether the specified place of the alleged murder is within the exclusive jurisdiction of the United States and that does not appear to involve in any way the construction of the federal Constitution.

This motion must therefore be denied, but the ground upon which we deny it requires us to go further. Act Sept. 14, 1922 (42 Stat. 837), requires us, when an appeal has been taken to this court that should have been taken to the Circuit Court of Appeals, not to dismiss the appeal but to transfer it to the proper Circuit Court of Appeals which in this case is that of the First Circuit. *Heitler v. United States*, 260 U. S. 438, 43 Sup. Ct. 185, 67 L. Ed. —, decided January 2, 1923.

If the motion disclosed that the present appeal had been framed under section 238 to present solely the question of the jurisdiction of the District Court of Rhode Island certified here by that court, it would require us to consider whether on such a limited appeal it would be our duty and within our power to order a transfer of the appeal to the Circuit Court of Appeals under Act Sept. 14, 1922. The record shows, however, that the appeal is not so limited. The order of transfer to the Circuit Court of Appeals for the First Circuit will be made.

(261 U. S. 340)

STATE OF OKLAHOMA v. STATE OF TEXAS (UNITED STATES, Intervener).

(Partial Decree Relating to State Boundary, Entered March 12, 1923.)

No. 18, Original.

Original suit by the State of Oklahoma against the State of Texas, in which the United States intervened. Supplementary and partial decrees entered.

See, also, 42 Sup. Ct. 587; 259 U. S. 565, 42 Sup. Ct. 594, 66 L. Ed. 1067; 260 U. S. 606, 43 Sup. Ct. 221, 67 L. Ed. —.

Mr. S. P. Freeling, of Oklahoma City, Okl., for State of Oklahoma.

Messrs. C. W. Taylor, of Corsicana, Tex., Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., C. M. Cureton, of Austin, Tex., W. A. Keeling, of Mexia, Tex., R. H. Ward, of Houston, Tex., and T. W. Gregory, of Washington, D. C., for State of Texas.

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*PER CURIAM. This cause having been heard and submitted upon certain questions, and the court having considered the same and announced its conclusions in an opinion delivered January 15, 1923, 260 U. S. 606, 43 Sup. Ct. 221, 67 L. Ed. —,

It is ordered, adjudged, and decreed:

1. The boundary between the states of Oklahoma and Texas, where it follows the course of the Red river from the one hundredth meridian of west longitude to the eastern boundary of the state of Oklahoma, is part of the international boundary established by the treaty of 1819 between the United States and Spain, and is on and along the south bank of that river as the same existed in 1821, when the treaty became effective, save as hereinafter stated.

2. Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change; but where the stream has left its former channel and made for itself a new one through adjacent upland by the process known as avulsion the boundary has not followed the change, but has remained on and along what was the south bank before the change occurred.

3. Where, since 1821, the river has cut a secondary or additional channel through adjacent upland on the south side in such a way that land theretofore on that side has become an island, the boundary is along that part of the south bank as theretofore existing which by the change became the northerly bank of the island, and where by accretion or erosion there have been subsequent changes in that bank the boundary has changed with them.

4. The rules stated in the last two paragraphs will be equally applicable to such changes as may occur in the future.

5. The south bank of the river is the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank,

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along the southerly side of the river *which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed and to preserve the course of the river.

6. The boundary between the two states is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

7. At exceptional places where there is no well defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline conforming to the mean level of the waters when at other places in that vicinity they reach and wash the cut bank without overflowing it.

8. The area known as the Big Bend, which lies within a northerly bend of the river between a southerly extension of the east line of range thirteen west in Oklahoma and a southerly extension of the west line of range fourteen west in that state, has been since before 1821 fast upland on the southerly side of the river, is within the state of Texas and never was owned by the

United States. The northerly border of that area is part of the south bank of the river on and along which the state boundary extends.

9. Burke Bet Island and Goat Island, both of which are in the vicinity of the Big Bend area, are islands in the river, have been islands since before 1821, are within the state of Oklahoma, and are the property of the United States.

10. The island in front of the line between Hardeman and Wilbarger counties, in the state of Texas, was part of the fast valley land on the south side of the river in 1821, and was severed from the land on that side by avulsion in 1902. The island is within the state of Texas, and the state boundary is along its northerly bank.

11. The treaty of 1819 secures to the inhabitants of the state of Texas a right of

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reasonable access to the waters of the river along the state boundary, such as will enable them to reach the waters at all stages and to use the same for beneficial purposes in common with the inhabitants of the state of Oklahoma and of other parts of the United States.

12. The two states and the United States having joined in a request that they be permitted to withdraw the prayer in their pleadings that the boundary for its full length along the river be run, located and marked upon the ground, and having also joined in a further request that the boundary be run, located and marked only at the places hereinafter named, the requests are granted, and Arthur D. Kidder and Arthur L. Stiles, both cadastral engineers, are designated as commissioners to run, locate and mark upon the ground the following portions of the boundary in accordance with this decree and the principles announced in the opinion delivered January 15, 1923:

(a) Along the Big Bend area as hereinbefore defined;

(b) From the Big Bend area westward to a southerly extension of the west line of range sixteen west in Oklahoma;

(c) Along all places where by avulsion since 1821 the river has come to occupy a new channel whereby fast upland theretofore on one side of the river has come to be on the other side—the line in every such instance to be run, located and marked on and along what was the south bank before the change occurred; and

(d) Along any other places which either state or the United States may designate in a request in writing approved by a member of this court.

13. The mode of marking those portions of the boundary shall be by establishing in the vicinity thereof permanent monuments upon the fast upland on the southerly side of the river at suitable distances apart and carefully taking the distances and courses from such monuments to the boundary as

the same exists at the time the work is done. A description of the monuments and a statement of such distances and courses shall be included in the report of the commissioners.

14. Before they enter upon their work each commissioner shall take and subscribe an oath to perform his duties faithfully and impartially. They shall prosecute the work with all convenient dispatch, shall have authority to employ such assistants as may be needed therein, and shall include in their final report a statement of the work done and of the time employed and the expenses incurred in its performance.

15. The boundary along the Big Bend area as hereinbefore defined shall be run, located, monumented and reported to the court before the commissioners take up other portions of the work. In running and locating that part of the boundary the commissioners shall ascertain the exact location of all oil wells which are within 300 feet of the same and shall include a statement thereof in their report.

16. The work of the commissioners shall be subject in all its parts to the approval of the court. Copies of their reports shall be promptly delivered to the two states and the United States, and exceptions or objections thereto, if there be such, shall be presented to the court, or, if it be not in session, filed with the clerk, within 40 days after the report is made.

17. If for any reason there be a vacancy in the commission when the court is not in session the same may be filled by the designation of a new commissioner by the Chief Justice.

18. The cost of executing this decree, including the compensation of the commissioners, shall be borne in equal parts by the state of Oklahoma, the state of Texas, and the United States.

(261 U. S. 345)

STATE OF OKLAHOMA v. STATE OF TEXAS (UNITED STATES, Intervener).¹

(Supplement to Partial Decree of June 5, 1922.
Entered March 12, 1923.)

No. 18, Original.

On consideration of the several stipulations, suggestions and supporting briefs relating to the entry of a further decree to supplement the partial decree entered June 5, 1922, under the opinion delivered May 1, 1922,

It is ordered, adjudged and decreed:

1. This supplemental decree relates only to the bed of the Red river, and to lands bordering on the north side of the same, between the ninety-eighth meridian of west longitude and the mouth of the North fork.

2. The several interveners who, under patents or Indian allotments by the United States, own lands bordering on the north

¹ For partial decree, see 261 U. S. 340, 43 Sup. Ct. 376, 67 L. Ed. —.

side of the river are severally the owners of so much of the bed of the river as lies in front of their lands and north of the medial line of the river, except as is otherwise stated herein.

3. Where, under grants from the United States, the state of Oklahoma owns lands bordering on the north side of the river the

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state has the same riparian rights in the river bed that an individual owning the same lands under a patent or Indian allotment would have.

4. The full title and ownership of so much of the bed of the river as lies south of its medial line are in the United States.

5. In the sense intended herein, the medial line of the river is a line drawn midway between the northerly and southerly banks of the river, commonly called cut banks, save that, under a stipulation between the parties affected, to which full effect must be given, this line, in so far as it reaches and is in contact with patented or allotted tracts which are within what is now the bed of the river, shall be regarded and treated as falling no farther north than the southerly line of such tracts as the same were represented by the official survey according to which they were patented or allotted.

6. Where tracts on the north side of the river, which were not riparian when surveyed, were patented or allotted after they had become riparian, such disposals carried the title to the medial line of the river, unless other tracts between them and that line had been disposed of theretofore, in which event the later disposals did not carry any right in, or affect the title to, such intervening tracts.

7. Where tracts on the north side, which had come to be in the river bed after survey and before disposal, were patented or allotted as if they were upland, while the adjacent land behind them which was then actually riparian was as yet unsold and unallotted, such disposals carried the title to the medial line of the river, unless other tracts between them and that line had been disposed of theretofore, in which event the later disposals did not carry any right in, or affect the title to, such intervening tracts.

8. The patenting and allotting of lands bordering on the north side of the river did not carry or give any right to islands in the river which were in existence at that time.

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*9. The patent issued for lot 1 of section 35 in township 4 south of range 14 west, under which the intervener E. Everett Rowell is now claiming, carried the right and title to the river bed between such lot and the medial line of the river.

10. The patent issued for lots 1 and 2 of section 8 in township 5 south of range 14 west, under which the interveners A. E. Pearson et al. are now claiming, carried the right and title to the river bed between such lots and the medial line of the river.

11. The patent issued for the northeast quarter of the northeast quarter of section 7 in township 5 south of range 14 west, under which the interveners A. E. Pearson et al. are now claiming, invested the patentee with the full ownership of the land within the limits of that tract as shown on the plat of the official survey, but did not carry any right or title to any part of the river bed as an incident to the disposal of that tract.

12. The patent issued for lots 6 and 7 of section 7 in township 5 south of range 14 west, under which the interveners Robert L. Owen et al. are now claiming, carried the right and title to the river bed between such lots and the medial line of the river.

13. The allotments in severally made of the following tracts, to or on behalf of the Indians named, respectively included and covered the right and title to the portions of the river bed between such tracts and the medial line of the river:

Henry Boot-Pawle.

Allotment No. 3332, Kiowa, 1910.

E $\frac{1}{2}$ of the NE $\frac{1}{4}$ and lot 4 of section 33, township 5 S., range 12 W.

Webster Lonewolf.

Allotment No. 3327, Kiowa, 1910.

W $\frac{1}{2}$ of the NE $\frac{1}{4}$ and lot 3 of section 33, township 5 S., range 12 W.

Amy Laura Bear.

Allotment No. 3361, Kiowa, 1910.

E $\frac{1}{2}$ of NW $\frac{1}{4}$ and lot 2 of section 33, township 5 S., range 12 W.

Mary Hummingbird.

Allotment No. 3315, Kiowa, 1910.

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W $\frac{1}{2}$ of NW $\frac{1}{4}$ and lot 1 of section *33, township 5 S., range 12 W.

Alice Carpio.

Allotment No. 3419, Comanche, 1910.

Lot 4 of section 32, township 5 S., range 12 W.

Isabel Tsa-tah-sis-ko.

Allotment No. 3280, Apache, 1910.

Lot 3 of section 24, township 5 S., range 13 W.

Richard Ko-sope, Deceased.

Allotment No. 3279, Apache, 1910.

Lot 5 of section 23, township 5 S., range 13 W.

Julia Mah-seet.

Allotment No. 3430, Comanche, 1910.

Lot 4 of section 23, township 5 S., range 13 W.

William Quo-in-quodle.

Allotment No. 3312, Kiowa, 1910.

N $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of section 23, township 5 S., range 13 W.

Albert Aun-ko.

Allotment No. 3298, Kiowa, 1910.

SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of section 10, and lot 1 of section 15, all in township 5 S., range 13 W.

Edgar Kau-bin.

Allotment No. 3318, Kiowa, 1910.

NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ and lot 1 of section 10, township 5 S., range 13 W.

Cora Tso-odle, Deceased.

Allotment No. 3292, Kiowa, 1910.

Lots 4 and 5 and the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of section 4, township 5 S., range 13 W.

Ned Odle-pah-quote, Deceased.

Allotment No. 3299, Kiowa, 1910.

Lots 1 and 2 and the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of section 5, township 5 S., range 13 W.

Lena Ho-ah-wah.

Allotment No. 3405, Comanche, 1910.

NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ and lot 7 of section 31, and the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 32, all in township 4 S., range 13 W.

Lily Black Bear.

Allotment No. 3281, Apache, 1910.

NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 31, township 4 S., range 13 W.

John Paut-chee.

Allotment No. 3390, Comanche, 1910.

Lots 3 and 4 of section 31, township 4 S., range 13 W.

Josie Star.

Allotment No. 3283, Apache, 1910.

N $\frac{1}{2}$ of the NE $\frac{1}{4}$ and lot 2 of section 35, township 4 S., range 14 W.

George Ase-perm-my.

Allotment No. 3432, Comanche, 1910.

Lot 3 of section 35, township 4 S., range 14 W.

Emma A-one-ty.

Allotment No. 3306, Kiowa, 1910.

N $\frac{1}{2}$ of the NW $\frac{1}{4}$ and lot 4 of section 35, township 4 S., range 14 W.

James Too-ah-imp-ah.

Allotment No. 3423, Comanche, 1910.

E $\frac{1}{2}$ of the NW $\frac{1}{4}$ and lots 2 and 3 of section 34, township 4 S., range 14 W.

Day Tah-too-ah-ni-pah.

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*Allotment No. 3385, Comanche, 1910.

W $\frac{1}{2}$ of the NW $\frac{1}{4}$ and lot 4 of section 34, township 4 S., range 14 W.

Ray Do-yah.

Allotment No. 3303, Kiowa, 1910.

N $\frac{1}{2}$ of the SE $\frac{1}{4}$ and lots 1 and 2 of section 33, township 4 S., range 14 W.

Cynthia Berry.

Allotment No. 3282, Apache, 1910.

Lot 2 of section 4, township 5 S., range 14 W.

Maggie Turtle Mountain Reid.

Allotment No. 3293, Kiowa, 1910.

SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and lots 2 and 6 of section 5, township 5 S., range 14 W.

Robert To-quothy.

Allotment No. 3413, Comanche, 1910.

N $\frac{1}{2}$ of the SW $\frac{1}{4}$ and lot 5 of section 5, and lot 3 of section 8, all in township 5 S., range 14 W.

George Emau-ah, Deceased.

Allotment No. 3364, Kiowa, 1910.

Lots 3 and 4 of section 7, township 5 S., range 14 W.

Louis Sah-koodle-quoie, Deceased.

Allotment No. 3326, Kiowa, 1910.

Lots 1 and 2 of section 12, township 5 S., range 15 W.

Fannie Zo-tigh, Deceased.

Allotment No. 3320, Kiowa, 1910.

E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of section 11, and lots 2 and 3 of section 14, township 5 S., range 15 W.

William Tix-sey.

Allotment No. 3396, Comanche, 1910.

N $\frac{1}{2}$ of the SW $\frac{1}{4}$ and lot 1 of section 11, township 5 S., range 15 W.

Alice Ware.

Allotment No. 3307, Kiowa, 1910.

Lot 2 of section 10, township 5 S., range 15 W.

Dora Au-tau-bo.

Allotment No. 3295, Kiowa, 1910.

Lot 4 of section 9, township 5 S., range 15 W.

Martin Topaum.

Allotment No. 3305, Kiowa, 1910.

E $\frac{1}{2}$ of the SW $\frac{1}{4}$ of section 4, and lot 2 of section 9, township 5 S., range 15 W.

William Bointy.

Allotment No. 3291, Kiowa, 1910.

W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of section 4, lot 1 of section 9, and lot 6 of section 5, all in township 5 S., range 15 W.

Richard Hummingbird.

Allotment No. 3317, Kiowa, 1910.

Lot 7 of section 6, township 5 S., range 15 W.

Cynthia Looking-glass.

Allotment No. 3416, Comanche, 1910.

Lot 4 and the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 19, and lot 2 of section 30, all in township 4 S., range 16 W.

Ernest Wesley Gallaher.

Allotment No. 3348, Kiowa, 1910.

N $\frac{1}{2}$ of the NW $\frac{1}{4}$ and lot 3 of section 35, township 5 S., range 12 W.

Mary Tsa-tsa-tine, Deceased.

Allotment No. 3368, Kiowa, 1910.

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Lot 1 of section 35, township 5 S., range 12 W.

Lulu Pe-sau-ny.

Allotment No. 3409, Comanche, 1910.

E $\frac{1}{2}$ of the SE $\frac{1}{4}$ and lot 4 of section 15, township 5 S., range 13 W.

Lizzie Po-hoc-su-cut.

Allotment No. 3399, Comanche, 1910.

NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ and lot 5 of section 7, all in township 5 S., range 14 W.

Nettie Goom-do.

Allotment No. 3322, Kiowa, 1910.

Lots 3 and 4 of section 10, township 5 S., range 15 W.

14. The allotments in severalty made of the following tracts, to or on behalf of the

Indians named, respectively included and covered the right and title to the portions of the river bed between such tracts and the medial line of the river, save that this paragraph must be understood to be without prejudice to any rights which other persons or allottees may have in virtue of prior or contemporary disposals or allotments of other tracts between those described and that line:

Francis Chanate.

Allotment No. 3333, Kiowa, 1910.

$W\frac{1}{2}$ of the $NE\frac{1}{4}$ and the $NW\frac{1}{4}$ of the $SE\frac{1}{4}$ of section 13, township 5 S., range 12 W.

Velma Mi-he-copy.

Allotment No. 3428, Comanche, 1910.

$NE\frac{1}{4}$ of $NE\frac{1}{4}$ of section 9, township 5 S., range 13 W.

Maggie Hummingbird, Deceased.

Allotment No. 3314, Kiowa, 1910.

$NW\frac{1}{4}$ of the $SW\frac{1}{4}$ and the $S\frac{1}{2}$ of the $SW\frac{1}{4}$ of section 12, township 5 S., range 15 W.

Rob-peat-sue-ni.

Allotment No. 3332, Kiowa, 1910.

$W\frac{1}{2}$ of the $SE\frac{1}{4}$ and lot 2 of section 11, township 5 S., range 15 W.

Carl Ye-ah-que.

Allotment No. 3362, Kiowa, 1910.

$SW\frac{1}{4}$ of the $SW\frac{1}{4}$ of section 3, and $W\frac{1}{2}$ of the $NW\frac{1}{4}$ of section 10, township 5 S., range 15 W.

Cynthia Cozad.

Allotment No. 3345, Kiowa, 1910.

Lots 1 and 2 of section 4, township 5 S., range 16 W.

Jesse Locke.

Allotment No. 3403, Comanche, 1910.

$SW\frac{1}{4}$ of the $SW\frac{1}{4}$ of section 33, and the $E\frac{1}{2}$ of the $SE\frac{1}{4}$ of section 32, township 4 S., range 16 W.

John Ah-ke-ah-bo.

Allotment No. 3288, Kiowa, 1910.

$NE\frac{1}{4}$ of the $NE\frac{1}{4}$ and the $S\frac{1}{2}$ of the $NE\frac{1}{4}$ of section 32, township 4 S., range 16 W.

Louis Cozad.

Allotment No. 3343, Kiowa, 1910.

$NE\frac{1}{4}$ of the $SW\frac{1}{4}$ and the $W\frac{1}{2}$ of the $SW\frac{1}{4}$ of *section 29, township 4 S., range 16 W.

Maud Khoda Ko-se-pe-ah.

Allotment No. 3388, Comanche, 1910.

$SW\frac{1}{4}$ of the $NW\frac{1}{4}$ of section 29, and the $SE\frac{1}{4}$ of the $NE\frac{1}{4}$ and the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of section 30, township 4 S., range 16 W.

Carrie Geiogemah.

Allotment No. 3351, Kiowa, 1910.

$NE\frac{1}{4}$ of the $NE\frac{1}{4}$ and $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of section 30, township 4 S., range 16 W.

Florence Calisay.

Allotment No. 3349, Kiowa, 1910.

$NE\frac{1}{4}$ of the $SW\frac{1}{4}$ and the $N\frac{1}{2}$ of the $SE\frac{1}{4}$ of section 12, township 5 S., range 15 W.

Mary Alice Sah-maunty.

Allotment No. 3360, Kiowa, 1910.

$N\frac{1}{2}$ of the $SW\frac{1}{4}$ and the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of section 35, township 4 S., range 16 W.

Philomena Senoya.

Allotment No. 3441, Comanche, 1910.

$W\frac{1}{2}$ of the $SW\frac{1}{4}$ of section 36 and the $SE\frac{1}{4}$ of the $SE\frac{1}{4}$ of section 35, township 4 S., range 16 W.

Hattie Jones.

Allotment No. 3324, Kiowa, 1910.

$NW\frac{1}{4}$ of the $SE\frac{1}{4}$ and the $E\frac{1}{2}$ of the $SW\frac{1}{4}$ of section 36, township 4 S., range 16 W.

John Tah-hah.

Allotment No. 3401, Comanche, 1910.

$E\frac{1}{2}$ of the $SE\frac{1}{4}$ and the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of section 36, township 4 S., range 16 W.

Montgomery Fuller.

Allotment No. 3420, Comanche, 1910.

$E\frac{1}{2}$ of the $NE\frac{1}{4}$ and the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of section 10, township 5 S., range 15 W.

Elton Pah-che-ka.

Allotment No. 3414, Comanche, 1910.

$W\frac{1}{2}$ of the $NE\frac{1}{4}$ and $NW\frac{1}{4}$ of the $SE\frac{1}{4}$ of section 10, township 5 S., range 15 W.

15. The receiver is directed to surrender, as soon as conveniently may be done, the possession of all patented and allotted tracts on the northerly side of the medial line which are within the receivership area and are without an oil well, and after the possession of any such tract is so surrendered that tract shall be regarded as fully discharged from the receivership.

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(261 U. S. 369)

ST. LOUIS-SAN FRANCISCO RY. CO. et al.
v. PUBLIC SERVICE COMMISSION OF MISSOURI.

(Argued and Submitted March 1, 1923. Decided March 19, 1923.)

No. 284.

1. Commerce $\Leftrightarrow$ 58—State can require interstate trains to stop at city, if necessary to furnish reasonable facilities.

A state may require adequate local facilities of a railroad company, even to the extent of requiring the stoppage of interstate trains at a designated city, provided that it is necessary for the furnishing of reasonable facilities to such city.

2. Commerce $\Leftrightarrow$ 58—Requirement that two interstate trains stop at city held invalid.

Where a small city, whose trade territory was entirely within the state, had four other through interstate passenger trains, a requirement by the state Public Service Commission that two night interstate trains stop at that city was an unreasonable burden on interstate commerce, contrary to Const. art. 1, § 8, even though it was a convenience for local commerce.

In Error to the Supreme Court of the State of Missouri.

Proceedings before the Public Service Commission of Missouri to compel the St. Louis-

San Francisco Railway Company to stop two trains at a designated station. An order of the Commission requiring the trains to be stopped was affirmed by the Supreme Court of Missouri (290 Mo. 389, 235 S. W. 131), and the Railway Company and James C. Davis, as Director General of Railroads, bring error. Reversed and remanded.

Messrs. E. T. Miller and Wm. T. Evans, both of St. Louis, Mo., for plaintiffs in error.

Mr. Frank E. Atwood, of Carrollton, Mo., and L. H. Breuer, of Rolla, Mo., for defendant in error.

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*Mr. Justice McKENNA delivered the opinion of the Court.

The Railway Company conducts an interstate railroad between Kansas City, Mo., and Birmingham, Ala., passing through the city of Mountain Grove, Mo.

Upon the petition of a volunteer organization of the city, the Public Service Commission of Missouri ordered the Railway Company to (1) provide for the stopping of its southbound train No. 105 at Mountain Grove for the purpose of taking on and discharging passengers at that point; (2) provide for the stopping of north-bound train No. 106 at the city, on flag or signal, for the purpose of letting off passengers who board the train at points south of the Arkansas state line, and for the purpose of taking on passengers holding tickets for points beyond Springfield, Mo.; (3) the order to be in full force and effect on and after the 16th day of June, 1919.

The order was attacked by the railway company on the ground that it was "in violation of section 8 of article 1 of the Constitution of the United States, in that it constituted a regulation of, interference with, and burden upon interstate commerce." The order, however, was successively affirmed by the circuit court having jurisdiction, and by the Supreme Court of the state. To the judgment of the latter this writ of error is directed.

The Supreme Court expressed the question to be "whether or not the order of the commission as affirmed by the circuit court imposes an undue burden on interstate commerce." The court considered the question a "vital one to be determined under the facts in this case."

[1] *Chicago, Burlington & Quincy Railroad Co. v. Railroad Commission of Wisconsin*, 237 U. S. 220, 35 Sup. Ct. 560, 59 L. Ed. 926, was adduced for the conclusion that a state may require of a railroad adequate local facilities, even to the stoppage of inter-

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state trains or the rearrangement of their schedules, whether done directly by the Legislature or through an administrative body.

It was decided, however, that it was for this court to determine "the fact of local

facilities," that determination being necessary to our power to consider whether the regulation of the state affected interstate commerce to an illegal extent.

The primary principle is that, although interstate commerce is outside of regulation by a state, there may be instances in which a state, in the exercise of a necessary power, may affect that commerce. There is, however, no inevitable test of the instances; the facts in each must be considered. In *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064, it was decided that a state regulation requiring all regular passenger trains running wholly within the state to stop at stations at all county seats long enough to take on and discharge passengers invaded no constitutional right of the railroad, nor was it an infringement of interstate commerce because it was made applicable to interstate connecting trains or trains transporting mails of the United States.

In *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868, a statute requiring all regular passenger trains to stop a sufficient length of time at county seats to receive and let off passengers was held invalid as an interference with interstate commerce, there being local trains sufficient for the local business. The case reviewed prior cases including *Gladson v. Minnesota*, and declared that while there is no regulatory power in a state over interstate commerce in a proper case, the state may exercise its power to secure local facilities, although some interference with interstate commerce may result.

To the like effect is *Mississippi Railroad Commission v. Illinois Central Railroad Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209, and *Atlantic Coast Line Railroad Co. v. Wharton et al.*, 207 U. S. 328, 28 Sup. Ct. 121,

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52 L. Ed. 230. In this case, indeed in all of the cases, the admonitory caution is expressed:

"That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the interstate commerce clause of the Constitution."

There is concession, however, to the requisition of reasonable facilities; necessarily, therefore, the fact of such facilities at, or their absence from, Mountain Grove must be inquired into.

[2] Mountain Grove has a population of 2,500 persons, contains a number of banks, stores of the kind that a population of 2,500 persons would naturally demand and support, with a trade proportionate in volume and value. It has besides, a creamery, a soda water plant, a wholesale grocery business which handles dairy products, and there are shipments of live stock from the city.

UNITED STATES v. RIDER.

(Argued Feb. 23, 1923. Decided March 19, 1923.)

No. 510.

There is also an overall factory which employs about 50 girls, a state fruit experimental station and a state poultry experimental station.

The finding of the commission is that:

"The trade territory is estimated at from 30 to 50 miles north and northeast, and 25 to 40 miles south and southwest."

Trains Nos. 105 and 106 are through trains operated in long-distance travel. The order of the commission requires of one of them the fixed duty of stopping; of the other, stopping on signal, its accommodation presumably being only occasional. The trains are night trains, and it is difficult to see how they are necessary to the enterprise of the city, or an essentially contributing factor or adjunct to its business. We say "essentially contributing," as distinguished from some personal convenience or accommodation, which no doubt they are. It is to be borne in mind that interstate commerce and intrastate commerce have different purposes and these purposes are to be considered—the power of the nation and the power of the states are accommodated to them and delimited by them,

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*and kept from interference and confusion. Our cases illustrate this, and we think, determine against the power exercised in the order under review. In other words, the order under review transcends the power of the state; the order of the commission being of detriment to interstate commerce.

Much is made of the experimental stations, and it is said that 700 persons visit them annually who will suffer inconvenience by the discontinuance of the trains. The instance has attractive appeal, but any instance of convenience has like appeal. But, as we have said, the distinction between the commerces—state and interstate—and their purposes are to be considered, and the different powers necessary to direct those purposes. Interstate commerce is concerned with the business of states, states distant often from one another, involving, necessarily, a difference in service. And such is the character of the trains in question. They are operated in long-distance traffic, are the instruments of such traffic, and it is a part of their efficiency that they are run at night. They may be a facility in some degree to Mountain Grove. It is to be remembered, however, that the city has four other through interstate passenger trains and any deficiency in their schedules or equipment can be corrected without burdening interstate commerce by stopping the trains in question. This conclusion, we think, is in accordance with our decisions.

We are compelled, therefore, to reverse the judgment and remand the cause for further proceedings not inconsistent with this opinion.

So ordered.

1. Army and navy $\Rightarrow$ 23—Fifty per cent. addition to pay for flight duty did not apply to pay of \$100 per month allowed enlisted men in officers' training camps.

The pay of \$100 per month allowed to enlisted men in training for officers of the Reserve Corps by Act June 15, 1917, which was a deficiency appropriation act, and therefore did not authorize pay at that rate beyond June 30, 1918, was passed to put enlisted men on the level with civilians going through the same training, who were paid \$100 a month under Appropriation Act May 12, 1917, and did not entitle an enlisted man undergoing such training in the Aviation Section to the 50 per cent. additional pay allowed for flight duty by Act July 18, 1914, since the civilians in training received no such additional pay.

2. Army and navy $\Rightarrow$ 23—Enlisted men training for aviation were not entitled to \$100 per month after June 30, 1918.

Act July 24, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 1867f–1867o), authorizing an increase in the Signal Corps and making appropriation therefor, and Act July 9, 1918, making the appropriations by the former act available until June 30, 1919, did not extend the right of an enlisted man of the Aviation Section, while in training for a reserve officer's commission, to a continuation of the \$100 per month allowed him by Deficiency Appropriation Act June 15, 1917, which expired June 30, 1918, since after the latter date there were no longer any civilians in training, and therefore no reason for continuing the pay which was granted to the enlisted men to put them on an equal footing with civilians, and there was no provision in the other acts for continuing such pay.

Appeal from the Court of Claims.

Petition by Nelson W. Rider against the United States. From a judgment in favor of petitioner by the Court of Claims (57 Ct. Cl. 323), the United States appeals. Reversed.

The Attorney General and Mr. James A. Fowler, of Knoxville, Tenn., for the United States.

Mr. Henry W. Driscoll, of Washington, D. C., for appellee.

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*Mr. Chief Justice TAFT delivered the opinion of the Court.

Nelson W. Rider, the plaintiff below, was a first class private in the Aviation Section of the Signal Enlisted Reserve Corps from the date of his enlistment, November 29, 1917, until September 13, 1918, when he accepted a commission as a second lieutenant in Air Service Aeronautics. His suit is for pay additional to that received by him while

he was a first-class private. He asked in his petition for a judgment for \$381.42. The Court of Claims gave him judgment for \$326.22. He was paid from February 9, 1913, until June 30, 1918, at the rate of \$100 a month, from July 1 to September 13, 1918, at the rate of \$49.50 a month; i. e., \$33.00 as base pay and \$16.50 as additional pay for flight duty. He began flight duty on May 12, 1918. Rider claims, first, \$100 a month down to September 13, 1918, when he became an officer; second, 50 per cent. of that sum in addition while on flight duty, from May 12, 1918, until September 13; and, third, \$6 additional pay per month from February 9 to September 13, and 50 per cent. of that in addition on flight duty from May 12 to September 13. This third claim was disallowed by the Court of Claims, and, as Rider has taken no appeal from this ruling, we need not consider it.

On the peace establishment first-class privates of the Signal Corps received \$18 a month. Act May 11, 1908, 35 Stat. 109. This was increased when we entered the war, so as to make the pay \$33. Act May 18, 1917 (40 Stat. 82; Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044). The Aviation Section of the Army was established as a branch of the Signal Corps by the Act of July 18, 1914 (38 Stat. 514, 516; Comp. St. § 1867c), and by its terms the officer in command could instruct 12 enlisted men in the art of flying, but no enlisted man could be assigned to duty as a flyer against his will, except in time of war, and while on flight duty he was to receive an increase of 50 per

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centum in his pay. This increased the pay of enlisted men on flight duty at that time from \$18 to \$27 monthly, and when we entered the war in 1917 from \$33 to \$49.50. By the National Defense Act of June 3, 1916 (39 Stat. 166, 174, 175), the Secretary of War, under the provisions for the Signal Corps, was authorized to cause as many enlisted men to be instructed in the art of flying as he deemed necessary.

To understand how the pay of the plaintiff herein became \$100 a month as an enlisted man, we must revert to the history of the training camps. In 1915, the War Department, responding to a popular agitation for preparedness, on its own initiative and without legislative authority, organized training camps, where civilians were given military instruction. Those who attended were required to pay transportation and subsistence, to buy their uniforms, and to serve without pay. Legislative authority was given for these camps in section 54 of the National Defense Act of June 3, 1916 (39 Stat. 194; Comp. St. § 3071b). This provided transportation, uniforms, and subsistence, but no pay. The Army Appropriation Act of August 29, 1916 (39 Stat. 648), gave funds for future camps for the fiscal year 1917, and

authorized reimbursement for transportation and subsistence to persons who had attended camps prior to the Act of June 3, 1916. See 23 Comp. Dec. 217. Such was the state of legislation when the war began, April 6, 1917. At this time, civilians and enlisted men of the regular army and of the National Guard in federal service were being sent to training camps to become officers. The civilians received no pay. The enlisted men received the pay of their respective grades. By the Appropriation Act of May 12, 1917 (40 Stat. 69, 70) an appropriation of more than \$3,000,000 was made to enable the Secretary of War to pay to civilians designated by him for training as officers not exceeding \$100 a month as pay, provided they would agree to

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*accept appointment in the Officers' Reserve Corps in such grade as might be tendered.

In the Act of June 15, 1917 (40 Stat. 188), there was, under the heading of "Enlisted Men of the Line," the following:

"For pay of enlisted men of all grades, including recruits, and pay at \$100 per month for enlisted men in training for officers of the Reserve Corps, \$226,882,560."

This, as said, was a deficiency appropriation, and therefore did not authorize pay at the rate of \$100 beyond June 30, 1918. It was obviously passed to put enlisted men on a level with civilians going through the same training for commissions in the Reserve Corps.

The training camps for officers to which this appropriation then applied had been established by War Department Special Regulations, No. 49, and included only training for commissions in the infantry, cavalry, and artillery. Training schools for the Aviation Section were not included within those regulations. In such schools, satisfactory students were recommended for commissions by the Chief Signal Officer; but they were not embraced under No. 49, and were likely not to be paid the \$100 a month provided by the Act of June 15, 1917. The Chief Signal Officer and the Adjutant General brought this discrimination to the attention of the Secretary of War (26 Comp. Dec. 117) who then directed by order of July 13, 1917, that enlisted men of the Signal Enlisted Reserve Corps, admitted to the Signal Corps Aviation Schools, should be considered as designated for training as officers of the army and put on the same footing as to pay and allowances as enlisted men detailed to training camps for commissions in the infantry, cavalry and artillery.

After we had been a year in the war, and a draft act had been passed, no further necessity existed for inducement to civilians to train as officers, and no further provision after June 30, 1918, was made for pay to

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them. *Training camps were continued until November 11, 1918, but the appropria-

tions for them were only for arms and ordnance equipment. Army Appropriation Act July 9, 1918, 40 Stat. 876.

[1] This recital has been necessary to show the surrounding circumstances in view of which this provision for the \$100 monthly pay for enlisted men training for commissions should be construed. It makes clear that this legislation of June 15, 1917, was enacted merely to abolish the discriminating difference between civilians and enlisted men who were all training for the same commissions in the same camps, the former receiving three times the pay of the latter. It was a temporary leveling up. It was not the fixing of base pay. It was not a pay to which the 50 per cent. addition for flight duty could reasonably attach. Enlisted men under the act of 1914 training in flight duty to become officers, before this act of June 15, 1917, received \$49.50; i. e., \$33 plus \$16.50. This increased the pay to \$100 on a level with that of civilians engaged in the same duty and training. Such civilians, if any, were not entitled to 50 per cent. increase for flight duty. Why should it be assumed, therefore, that it was intended to pay these enlisted men \$50 more a month than civilians in a statute plainly designed to secure uniformity? But it is said that this is to repeal the act of 1914 giving additional pay for flight duty to enlisted men, and repeals by implication are not favored. This is not to repeal the act. It is merely to hold that it is not applicable to a temporary provision or bonus for a particular purpose. In reaching this conclusion, we are confirmed by the departmental construction of these acts and by that of the accounting officers of the Treasury. We cannot agree with the Court of Claims, therefore, that the 50 per cent. addition to the regular pay of the enlisted aviation student applies to the \$100 monthly pay allowed by the Deficiency Act of June 15, 1917.

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[2] *But the Court of Claims went further and held that the \$100 a month pay for such enlisted men continued beyond June 30, 1918, to which the Act of June 15, 1917, carried it. This conclusion is based on certain general provisions of two statutes. The first is the act approved July 24, 1917 (40 Stat. 243; Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 1867f-1867o), to authorize temporary increase of the Signal Corps, to purchase and make airships and to appropriate for the same. That act put the temporarily enlisted men in the Signal and Aviation Corps on the same footing as to pay, allowances and pensions as enlisted men of the same grade in the regular army, made an appropriation of \$640,000,000 for the purposes of the act and provided that enlisted men of the aviation section of the Signal Corps should be paid from funds transferred to their credit from Signal Corps appropriations. The

second act relied on is that of July 9, 1918 (40 Stat. 850), in which it was provided that the \$640,000,000 appropriated in the foregoing act, and the funds appropriated in the Act of May 12, 1917 (40 Stat. 69, 70), entitled an act making appropriations for the support of the army for the fiscal year 1918, should be made available until June 30, 1919. These statutes do not sustain the conclusion of the Court of Claims because the \$100 pay for enlisted men in training was not provided for in either of these acts but in the Deficiency Act of June 15, 1917, which is not continued in effect until June 30, 1919. It is true that the Act of May 12, 1917, gives the Secretary of War the authority to pay civilians in training for reserve commissions \$100 a month, but by the Act of July 9, 1918, no funds are appropriated to enable him to order such pay, and, as a matter of fact, after June 30, 1918, no such pay was allowed to civilians training for commissions. We are unable to see, therefore, in the acts relied on any legislative authority for paying \$100 a month to enlisted men in training for commissions after that date. The situation reverted to that preceding the Act of June 15,

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1917, and *the enlisted men in the Aviation Section became entitled to \$33 a month pay and to \$49.50 a month while engaged on flight duty.

The plaintiff below thus received all the pay which he was entitled to receive.

The judgment of the Court of Claims is Reversed.

(261 U. S. 335)

BALTIMORE & O. R. CO. v. UNITED STATES.

(Argued March 7, 1923. Decided March 19, 1923.)

No. 208.

United States $\S$ 140—Petition held to show no agreement to pay railroad for increased cost of hastening construction.

Allegations of a petition that the officers of the War Department had insisted that the construction of a railroad to an ordnance depot be hastened, and that to speed up the construction the railroad company had abandoned its contract on the unit-price basis and entered into a contract on the cost plus basis, which made the construction more expensive, does not show any agreement, express or implied, by the department to pay the additional expense, which is necessary, under Dent Act March 2, 1919 (Comp. St. Ann. Supp. 1919, §§ 3115¹⁴/₁₅a-3115¹⁴/₁₅e), to entitle the company to recover the extra expense from the United States.

Appeal from the Court of Claims.

Petition by the Baltimore & Ohio Railroad Company against the United States. From a judgment sustaining demurrer to the peti-

tion (56 Ct. Cl. 377), petitioner appeals. Affirmed.

Messrs. John F. McCarron and George E. Hamilton, both of Washington, D. C., for appellant.

Mr. Blackburn Esterline, of Washington, D. C., for the United States.

Mr. Justice SANFORD delivered the opinion of the Court.

The Railroad Company filed its petition in the Court of Claims asking judgment for the amount of certain "extraordinary expenses" which it claimed to have incurred in constructing a branch railroad to the Ordnance Depot at Curtis Bay, Maryland, under "an informal or implied agreement" with officers of the War Department for the reimbursement of such expenses by the United States. The Dent Act, March 2, 1919, c. 94, 40 Stat. 1272 (Comp. St. Ann. Supp. 1919, §§ 3115 ¹⁴/₁₅a-3115 ¹⁴/₁₅e). A demurrer to this petition was sustained. 56 Ct. Cl. 377.

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*The allegations of the petition setting forth specifically "the nature, terms and conditions" of the "agreement", may be thus summarized: Having previously determined to build a branch railroad into the Curtis Bay region, for the purpose of developing new territory, the Railroad Company, in the summer of 1917, at the request of the War Department, changed in part the location of the proposed line so as to pass alongside the Ordnance Depot which the War Department planned to build. The company then contracted with a construction company for the building of the railroad to the site of the Depot, on a unit-price basis. The work was greatly delayed by the relocation of the line, and carried into the winter months. After numerous conferences as to means of expediting the work, the officers of the Department, in December, insisted that the operations at the Depot would be seriously hampered unless the company could greatly increase progress on the construction of the railroad, and that, in order to furnish track facilities for handling construction materials and freight at the Depot, it was very urgent that the railroad be completed at the earliest possible moment. Thereupon, in order to meet the urgent needs of the Department, the company, in January, 1918, determined to and did cancel the contract for constructing the railroad on a unit-price basis, and made a contract with another construction company for completing it on a cost plus basis. By working continuously, day and night, the new contractor completed the railroad to the Depot in the latter part of February, before it would have been completed under the original contract. The excess cost of thus constructing the railroad under the cost plus plan and the extraordinary expense incurred

in hurrying its completion, amounted to \$85,474.06; for which judgment was prayed.

These allegations show no "agreement, express or implied" for the payment of these

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expenses, which is essential to an award in plaintiff's favor under the provisions of the Dent Act. No express agreement is alleged. And manifestly the mere fact that, on the urgent insistence of the officers of the Department that the construction of the railroad be hastened so as to handle construction materials for the Depot and other freight (necessarily yielding revenue to the railroad), the company, on its own determination, substituted the cost plan of construction for the unit-price plan, without any notice to the Department of its intention so to do or of the increased expenses that would result, does not, in the absence of any intimation that it would look to the United States for reimbursement of such increased expenses or of any suggestion by the Department that such reimbursement would be made, afford any substantial basis upon which an agreement for the payment of such expenses can be implied.

The judgment of the Court of Claims dismissing the petition is accordingly

Affirmed.

(261 U. S. 374)

FEDERAL LAND BANK OF NEW ORLEANS v. CROSLAND, Judge of Probate.

(Argued March 7, 1923. Decided March 19, 1923.)

No. 428.

1. Taxation ⚡6 — Provision federal farm mortgages are free from taxation prevails over inconsistent state laws.

The provision of Federal Farm Loan Act July 17, 1916, § 26 (Comp. St. § 9835q), that first mortgages executed to federal land banks shall be deemed instrumentalities of the government, and shall be exempt from federal, state, municipal, and local taxation, is valid, and must prevail over any inconsistent laws of a state.

2. Taxation ⚡6 — Federal Land Bank is practically compelled to record mortgage, so that such recording cannot be taxed.

Since the law of Alabama makes an unrecorded mortgage invalid as against a subsequent purchaser without notice, the Federal Land Bank is practically compelled to have its mortgages recorded, though not legally compelled to do so, and therefore the state cannot levy a tax on the recording of such mortgages, on the ground that the payment thereof would be optional.

3. Courts ⚡394(3) — Characterization of state statute by state court is not binding.

The characterization of a state statute by the Supreme Court of the state, as distinguish-

ed from the interpretation of the statute, does not bind the United States Supreme Court.

4. Taxation — Federal farm mortgage cannot be taxed, though bank can collect from borrower.

Under Federal Farm Loan Act July 17, 1916, § 26 (Comp. St. § 9835q), exempting mortgages executed to Federal Land Banks from taxation, a state cannot require payment of a tax on such mortgages as a condition precedent to recording, even though the bank could compel the borrower to reimburse it for the tax.

In Error to the Supreme Court of the State of Alabama.

Mandamus by the Federal Land Bank of New Orleans against D. W. Crosland, Judge of Probate, to require the recording of a mortgage. A judgment for respondent was affirmed by the Supreme Court of Alabama (207 Ala. 456, 93 South. 7), and petitioner brings error. Reversed.

Messrs. Wm. C. Dufour, of New Orleans, La., and W. A. Gunter, of Montgomery, Ala., for plaintiff in error.

Mr. James J. Mayfield, of Montgomery, Ala., for defendant in error.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a petition for a writ of mandamus to require the recording officer of Montgomery county, Alabama, to record a first mortgage deed on receiving the fee for recording the same, without payment of an additional sum of fifteen cents for each one hundred dollars of the principal sum secured. The General Revenue Act of the State approved September 15, 1919 (Acts Ala. 1919, p. 420), by section 361, Schedule

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*71, provides that no mortgage shall be received for record—

"unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to wit: * * * Upon all instruments which shall be executed to secure an indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage * * * to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender."

Any probate judge who shall receive a mortgage without collecting the "recording or registration tax," etc., is made guilty of a misdemeanor and punished.

[1] On the other hand the Federal Farm Loan Act of July 17, 1916, c. 245, § 26, provides that first mortgages executed to Federal Land Banks shall be deemed—

"instrumentalities of the government of the United States, and as such they and the income

derived therefrom shall be exempt from federal, state, municipal, and local taxation." 39 Stat. 360, 380 (Comp. St. § 9835q).

The validity of this provision is not questioned. *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 207, 212, 41 Sup. Ct. 243, 65 L. Ed. 577. Of course therefore it must prevail over any inconsistent laws of a State.

[2] The tax was sustained by the Supreme Court of the State and the petition for mandamus was ordered to be dismissed on the ground that the payment was optional; that the Federal Land Bank was not required to put its deed on record, and that if it did it must pay whatever others were required to pay for the registration of its security. But the case is not quite so simple as that. The law of Alabama does make it practically necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so it cannot say that it leaves the Bank free

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to *record or not. The Bank has a choice it is true, but so has one who acts under duress. *The Eliza Lines*, 199 U. S. 119, 131, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406.

The State is not bound to furnish a registry, but if it sees fit to do so it cannot use its control as a means to impose a liability that it cannot impose directly, any more than it can escape its constitutional obligations by denying jurisdiction to its Courts in cases which those Courts are otherwise competent to entertain. *Kenney v. Supreme Lodge of the World*, 252 U. S. 411, 415, 40 Sup. Ct. 371, 64 L. Ed. 638, 10 A. L. R. 716. It is not necessary to cite cases to show that an act may become unlawful when done to accomplish an unlawful end.

[3, 4] Of course the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the Legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the Courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. *Foot v. Maryland*, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698. But it has made no such attempt. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach. The characterization of the act by the Supreme Court as distinguished from the interpretation of it does not bind this Court. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 362, 35 Sup. Ct. 99, 59 L. Ed. 265. *St. Louis Cotton*

Compress Co. v. Arkansas, 260 U. S. 346, 43 Sup. Ct. 125, 67 L. Ed. —, December 4, 1922. It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax, but whoever pays it it is a tax upon

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the mort*gage and that is what is forbidden by the law of the United States.

A petition for certiorari presented by the plaintiff in error for greater caution will be dismissed.

Decree reversed.

(261 U. S. 379)

ARKANSAS NATURAL GAS CO. v. ARKANSAS RAILROAD COMMISSION et al.

(Argued Feb. 21, 1923. Decided March 19, 1923.)

No. 500.

1. Public service commissions —7—State need not grant relief against improvident contract.

While a state may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts, that power does not exist per se, but is justified only by the intervention of the public interest, so that the state is not obliged to regulate rates merely to relieve a contracting party from the burdens of an improvident contract, and in fact would be precluded from doing so by the contract impairment clause of the Constitution.

2. Constitutional law —48—Construction giving validity to statute is to be adopted, if possible.

If a statute admits of two constructions, one of which would render it unconstitutional and the other establish its validity, the court will adopt the latter.

3. Gas —14(1)—Exception of contracts for supplying gas to distributors held not limited to designated contracts.

In Act Ark. March 25, 1921 (Acts 1921, p. 429), transferring jurisdiction from the Corporation Commission to the Railroad Commission, the provision that the Railroad Commission shall have no jurisdiction to modify existing contracts for supplying gas to persons, firms, corporations, municipalities, or distributing companies is not to be construed as applying only to the three specified petitions which the Railroad Commission was directed to consider, but is a general exception, which does not invalidate the act.

4. Constitutional law —48—Classification presumed to be reasonable.

The presumption is that an act of Legislature, applying alike to all falling within the class, was enacted with full knowledge of the conditions, and that no arbitrary selection of persons for subjection to the prescribed rule was intended, so that the statute will be upheld, where there is nothing to show the classification was unreasonable or arbitrary, even though the rea-

sons which influenced the classification are not disclosed.

5. Constitutional law —240(1)—Legislative discretion in regulating public utility interfered with only when inequality is palpably unreasonable and arbitrary.

The state Legislature is vested with a wide discretion in regulating public utilities, and the Supreme Court will not interfere merely because its exercise has produced inequality, which is the result of every selection of subjects or persons for regulation, but only when it has produced an inequality which is actually and palpably unreasonable and arbitrary.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Suit by the Arkansas Natural Gas Company against the Arkansas Railroad Commission and others. From a decree granting the relief prayed for only in part, plaintiff appeals. Affirmed.

Messrs. W. B. Smith and John M. Moore, both of Little Rock, Ark., for appellant.

Messrs. E. J. Dimock, of New York City, and Ashley Cockrill, of Little Rock, Ark., for appellees.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

The appellant brought suit in the District Court, alleging that an order of the Arkansas Railroad Commission was invalid, as establishing confiscatory rates for natural gas furnished to its consuming customers and as maintaining certain divisional rates (alleged to be wholly inadequate), fixed by contracts between appellant and the Little Rock Gas & Fuel Company and the Consumers' Gas Company. An interlocutory injunction was sought under section 266 of the Judicial Code (Comp. St. § 1243). The court granted the injunction in respect of the rates to consumers but denied it as to the divisional rates. The appeal brings here for review only the action of the lower court in the latter respect.

By the divisional contracts referred to, appellant, in consideration of the payment to it of a stated proportion of the rates collected, agreed to furnish gas to the two companies named, to be by them distributed to their customers in the cities of Little Rock and Hot Springs, respectively. The gas was to be delivered at the intake of the distributing systems for these cities. Appellant asserts that the income afforded by the rates prescribed by these contracts is so inadequate as to have the effect of a virtual confiscation of its property, and that this result is in large part due to improper and wasteful methods of distribution on the part of the two distributing companies.

The commission was asked to fix a flat rate, called a city gate rate, for the gas de-

livered at the city borders, the effect of which, of course, would have been to abrogate the contract rates based upon a percentage of the collections. Appellant's application was made to the Arkansas Corporation Commission, but was decided by the

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Railroad *Commission, to whom the Legislature in the meantime had transferred jurisdiction. There is no claim that rates to consumers were affected by these contracts; nor does it appear that the public interest is involved in the action which the commission was asked to take.

The Railroad Commission denied the application primarily upon the ground that the power to grant it had been expressly withheld by the act of the Legislature, known as Act 443, passed on March 25, 1921 (Acts Ark. 1921, p. 429), transferring to it the jurisdiction theretofore possessed by the Corporation Commission and providing that the Railroad Commission "shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms, corporations, municipalities or distributing companies, and such contracts shall not be affected by this act or the act of which this is an amendment." The act is copied in the margin.¹

¹ "All records, papers, furniture and stationery under the control of the Arkansas Corporation Commission at the time of the passage of the act of which this is an amendment, shall be turned over to the Arkansas Railroad Commission and remain in its custody, and all investigations, proceedings and hearings that were pending before the Arkansas Corporation Commission at the time of the passage of the act of which this is an amendment, and the hearings of which are embraced within the powers conferred on the Arkansas Railroad Commission, shall be transferred to the Arkansas Railroad Commission for such consideration, orders and determination as may be made by it under the terms of the act of which this is an amendment, and the petitions pending before the Arkansas Corporation Commission at the time of the passage of the act of which this is an amendment, involving regulations of service and rates for natural gas, and numbered 417, 418 and 423 on the records of said Arkansas Corporation Commission, are transferred to the Arkansas Railroad Commission for decision and the making of such orders and rates as may be appropriate, and the Arkansas Railroad Commission shall consider the testimony that has heretofore been taken in said cases and hear such further testimony as may be appropriate to fully present such cases, and such orders and rates as may be made by the Arkansas Railroad Commission in the said gas cases shall apply not only to the service outside of municipalities, but also to the service and rates for supplying natural gas within municipalities or to distributing companies operating within such municipalities, except that the Arkansas Railroad Commission shall have no jurisdiction or power to modify or impair any existing contracts or supplying gas to persons, firms, corporations, municipalities or distributing companies, and such contracts shall not be affected by this act or the act of which this is an amendment.

"From the decisions of the Arkansas Railroad Commission in such cases appeals may be prosecuted to the circuit court and Supreme Court, and such appeals shall be taken, proceeded in, heard and disposed of as provided in sections 20 and 21 of the act of which this is an amendment: Pro-

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[1] *The question whether in the absence of the statute—it being made to appear that the stipulated consideration was grossly inadequate—the commission, under the circumstances disclosed by the record, would have been under a duty to fix gas rates in contravention of the contracts, may be put aside with brief consideration. While a state may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372, 375, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; Producers' Transp. Co. v. R. R. Comm., 251 U. S. 228, 232, 40 Sup. Ct. 131, 64 L. Ed. 239), there is, quite clearly, no prin-

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ciple *which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist per se. It is the intervention of the public interest which justifies and, at the same time conditions its exercise.

[2-4] But the appellant contends that the statute violates the Fourteenth Amendment because it imposes restrictions upon the rate-making power of the commission in respect of the particular contracts of appellant here involved, which, it is said, are not imposed in the case of contracts of other utility corporations. In others words, it is urged that the act singles out the appellant for special restraint in this respect and is, therefore, unequal. While its meaning is not free from doubt, we do not so construe the act. The rule is fundamental that, if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter. *Railway Co. v. Arkansas*, 235 U. S. 350, 369, 35 Sup. Ct. 99, 59 L. Ed. 265. The language of this act is general. By its terms jurisdiction over all

vided, however, that on the determination of such natural gas cases by the Arkansas Railroad Commission and the decision on any appeals therefrom and the making of orders by the Commission in pursuance to orders of the court made on such appeals, the powers and jurisdiction of the Arkansas Railroad Commission to regulate these particular utilities and fix their rates shall be such only as is conferred by other sections of the act of which this is an amendment. In all cases where the Arkansas Corporation Commission made a final decision or order before the act of which this is an amendment became effective and the time for an appeal has not elapsed, any party to said proceedings shall have the right to have the matter heard on appeal as is provided in sections 20 and 21 of the act of which this is an amendment."

proceedings and hearings then pending before the Corporation Commission is transferred to the Railroad Commission. There follows a provision particularizing certain petitions numbered 417, 418 and 423, being the cases of appellant, as to which the Railroad Commission is directed to consider the testimony theretofore taken by the Corporation Commission and to hear such further testimony as may be appropriate to fully present such

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cases. The paragraph then concludes with *the exception, already quoted, to the effect that the Railroad Commission shall have no power to modify or impair existing contracts for supplying gas, etc. Considering the several provisions of the act together, its terms fairly justify the conclusion that the exception was meant to apply to all proceedings pending before the Corporation Commission transferred to the Railroad Commission and not alone to the three specified cases. The record contains nothing to indicate the character or number of these proceedings and nothing to suggest that their grouping or subjection to the rule of the exception constitutes an unreasonable or arbitrary classification. The reasons which influenced the classification are not disclosed on the face of the act, but the mere absence of such disclosure will not justify the court in assuming that appropriate reasons did not in fact exist. The presumption is that the action of the Legislature—which applies alike to all falling within the class—was with full knowledge of the conditions and that no arbitrary selection of persons for subjection to the prescribed rule was intended. See *Atchison, Topeka, etc., Railroad Co. v. Matthews*, 174 U. S. 96, 106, 19 Sup. Ct. 609, 43 L. Ed. 909.

[5] The state Legislature is vested with a wide discretion in the matter and interference by this court may not be had merely because its exercise has produced inequality—every selection of subjects or persons for governmental regulation does that—but only where it has produced an inequality which is actually and palpably unreasonable and arbitrary. See *Bachtel v. Wilson*, 204 U. S. 36, 41, 27 Sup. Ct. 243, 51 L. Ed. 357; *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 563, 19 Sup. Ct. 281, 43 L. Ed. 552; *Erb v. Morasch*, 177 U. S. 584, 586, 20 Sup. Ct. 819, 44 L. Ed. 897; *Missouri, Kansas & Texas Railway Co. v. May*, 194 U. S. 267, 269, 24 Sup. Ct. 638, 48 L. Ed. 971; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 43 Sup. Ct. 83, 67 L. Ed. —, November, 1922.

Applying the rule established by these and other decisions of this court, the decree below is

Affirmed.

(261 U. S. 352)

WORK, Secretary of the Interior, v. UNITED STATES ex rel. MOSIER et al.

(Reargued Feb. 27 and 28, 1922. Decided March 19, 1923.)

No. 25.

1. Indians ⇨16(7)—Bonus paid for oil leases is part of "income," not capital.

The bonus paid for oil leases of Indian lands as a result of competitive bidding therefor is in effect part of the royalty or rental for such leases, within Act June 28, 1906, § 4, providing for distribution of such income among the Indian allottees, and is not to be considered as part of the capital.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

2. Indians ⇨16(7)—Secretary has no discretion to determine whether bonus for oil leases is to be considered as income.

The question whether bonuses received by competitive bidding for oil and gas leases on Indian lands are to be considered as income or capital is a matter of construction of Act June 28, 1906, which was not intrusted to the discretion of the Secretary, but is determinable in court at the instance of the beneficiaries as of right.

3. Indians ⇨16(7)—Secretary could not decide in advance how much income from oil leases should be paid to parents of minor allottees.

The proviso to Act June 28, 1906, § 4, authorizing the Commissioner of Indian Affairs, if he becomes satisfied that the interest of any minor allottee is being misused by the parents to whom it is payable, to withhold payment, does not give the Commissioner or the Secretary of the Interior discretion to determine in advance the amount of royalty from oil and gas leases from lands of a minor which he shall pay to the minor's parents, but he is charged with the ministerial duty of making such payments until he determines that payments in the past have been misused.

4. Indians ⇨16(7)—Mandamus will not issue to compel payment of income to parents of minor, who have not accounted for past income.

Under Act June 28, 1906, § 4, requiring the income from oil and gas leases of lands allotted to Indian minors to be paid to their parents, but authorizing the Commissioner to withhold payments if the interest of the minor is being squandered, the Secretary, acting through the Commissioner, has authority to require the parents of minor allottees to render an account of their disposition of previous payments of the interest of the minors and mandamus will not issue to compel such payments of the interest to parents, who have refused to render an account.

In Error to the Court of Appeals of the District of Columbia.

Mandamus by the United States, on the relation of Wm. T. Mosier and others, against Hubert Work, as Secretary of the Interior. The judgment for relator was affirmed by the Court of Appeals of District of Columbia (*Payne v. United States*, 50 App. D. C. 219, 269 Fed. 871), and respondent brings error. Reversed and remanded, with instructions to dismiss the petition without prejudice.

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*This writ of error brings in review a judgment of the Court of Appeals of the District of Columbia, affirming a judgment of mandamus against the Secretary of the Interior commanding him to pay to the relators all the moneys due their minor children, members of the tribe of Osage Indians of Oklahoma by reason of the distributions made under the Act of June 28, 1906 (34 Stat. 539), including their respective shares of bonus moneys paid the Secretary for oil leases made by the Tribal Council.

The relators are W. T. Mosier and Louisa Mosier, members of the Osage Tribe of Indians and enrolled as such under the Act of Congress of June 28, 1906 (34 Stat. 539), and are parents of John T. Mosier, Edwin P. Mosier, Luther C. Mosier and Agnes C. Mosier, also enrolled members of the same tribe, who are minors and in the care and keeping of the relators.

In their petition, after reference to the provisions of the law of 1906 and their history, they allege that the Secretary of the Interior has refused to pay them certain income due them under the statute as parents of these minors, and has imposed on payment thereof conditions and limitations unauthorized by the act and beyond his power to impose. The Secretary answered admitting his refusal, and asserting that under the statute he and the Commissioner of Indian Affairs were vested with a discretion to protect the interest of the minors, and that his refusal was in the exercise of that discretion. The facts are shown in the admissions in the pleadings and by a stipulation. They can be better understood after a state-

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*ment of the act whose construction is the subject-matter of the controversy.

The act of 1906, *supra*, entitled "An act for the division of the lands and funds of the Osage Indians in Oklahoma territory, and for other purposes," provided for the enrollment of the tribe including minors, and for the division of the land between them by selection, the selection for the minors being made by their parents, but forbade the sale of the oil, gas, coal or other minerals covered by the lands, the minerals being reserved to the use of the tribe for a period of twenty-five years, the royalties to be paid to the tribe. The act directed that the gas, oil, coal and other minerals should become the property of the individual owner of the land at the end of that period unless otherwise provided. Section 3 of the act directs the

leasing of oil, gas and other mineral rights in these lands by the Tribal Council under such rules and regulations as the Secretary may direct and with his approval, provided "that the royalties to be paid to the Osage Tribe under any mineral lease so made shall be determined by the President of the United States." The effect of the act was to give to each member of the tribe three selections of land, part of which was to be a homestead and the remainder surplus land, all to be farmed by him for 25 years and to become his absolute property at the end of that time. Under section 4, funds belonging to the tribe and derived from various sources were to be held by the United States as trustee for 25 years, and the interest as earned thereon was to be divided between the members of the tribe. In addition, under the second paragraph of section 4, the royalty received from oil, gas, coal and other mineral leases and all moneys secured from the sale of town lots and other lands of the tribe, and from rent of grazing lands, were to be distributed to the members of the tribe as income, payable quarterly. Thus the members

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of the tribe were *to share in two kinds of property, first, homesteads and farm lands and their proceeds; and, second, income from the sources above mentioned. So far as minors were concerned, the methods of distribution of the income from the two kinds were described in somewhat different language. The directions as to proceeds from lands is in section 7 as follows:

"That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: Provided, that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: And provided further, that all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

The first paragraph of section 4 prescribes the method of distributing the income from the second kind of property and directs that it shall be paid quarterly to the members entitled except in case of minors, in which case it shall be paid quarterly—

"to the parents until said minor arrives at twenty one years: Provided, that if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: And provided further, that said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

For 10 years, after the act, the sums due the minors were small and were evidently

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not more than enough to *furnish reasonable support of the minors by the parents; but thereafter by the increase in the value of the oil and gas properties, the income payable grew to such amounts that Secretary of Interior Lane, who was the first defendant herein, deemed it his duty to take action to prevent a sacrifice of the minors' income and through the Commissioner of Indian Affairs called for accounts from the parents of the manner of the disposition of minors' income paid them. He issued an order that the income should be devoted solely to the care and use of the minor whose income it was, that any other use would be misuse, and that no more than \$50 a month would be paid to the parents on account of a minor's share, unless a specific showing was made that the funds were being used for the specific benefit of each particular child. As already shown, the royalties on mineral leases were fixed by the President. As the mineral properties became more valuable and after a general lease known as the "Foster lease" was ended, the practice was initiated with approval of the Secretary of putting up the privilege of leasing particular mineral properties at auction. Large sums as down payments in addition to the royalties as fixed by the President were realized, inuring to the benefit of the tribe. The Secretary held that these sums, called "bonuses," were not royalties, but should be deposited in the Treasury as part of the trust funds for the tribe held by the United States, and that only the interest therefrom should be distributed. The Comptroller of the Treasury ruled against this view, at least so far as to hold that there was no authority of law for such an interest bearing deposit in the United States Treasury. 23 Comptroller's Decisions, 483, 486. Nevertheless the Secretary withheld payment of minors' interest therein from the parents. While it was admitted that many of the Osages are idle, wasteful, extravagant, and improvident, it was also admitted that the relators were not so. The stipula-

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tion of facts *showed that at no time prior to the rendition of accounts by the relators under the order of April 26, 1917, had the Indian Commissioner ever determined that the relators had misused or squandered the funds, that relators' accounts theretofore showed that the funds paid them were providently expended for the direct use and benefit of the minors or were invested and retained for their ultimate use and benefit, but that since April 26, 1917, the relators had neglected and refused to render any accounting and the Commissioner had been without information on which to determine whether the funds were being misused or squandered.

Mr. C. Edward Wright, of Washington, D. C., for plaintiff in error.

Mr. T. J. Leahy, of Pawhuska, Okl., for defendant in error.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The questions presented are, first, the proper classification of bonuses under the statute; second, the validity of the conditions imposed by the Secretary on the payment of the minors' incomes to the parents; and third, the propriety of mandamus as a remedy in this case.

[1] The bonus which was the result of bidding for desirable and profitable oil and gas leases secured for the members of the Osage Tribe the just value of the use of their property which the fixing of royalties in advance by the President was not adapted to give them. It was in effect a supplement to the royalties already determined. It was really part of the royalty or rental in a lump sum

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or down *payment. We do not see how it can be classified as anything else. It was income from the use of the mineral resources of the land. Of course, it involved a consumption and reduction of the mineral value of the land, but so does a royalty. This is an inevitable characteristic of income from the product of the mine. What was intended to be distributed to the members of the tribe was the income from the mineral deposits in their lands, and the bonus was part of that. Doubtless Congress had in mind regular annual or quarterly equal payments when it used the word "royalties," and did not anticipate such large down payments. But in the unexpected event, we must decide under what head the bonus is to be treated, whether as capital or income, and it seems clear to us that, in view of the entire statute, it is more aptly described by the latter term.

[2] Nor is the settlement of this question a matter of discretionary construction by the Secretary. The Act of June 28, 1906 (34 Stat. 539), was enacted to make a definite disposition of the Osage Indians' resources. Except those which were sold outright or were kept as tribal lands for grazing, all lands were divided between the members of the tribe, adults and minors, share and share alike, for individual use for every purpose except the production of minerals, and at the end of 25 years the parcels were to vest absolutely in the respective individuals or their heirs. On the other hand, the funds of the tribe were to be kept by the United States in its treasury, and interest thereon was to be paid quarterly to the members, share and share alike. In addition to this interest, there was also to be distributed as they fell due, the royalties from leases of mineral rights, the proceeds of the sale of certain lands already referred to and the rentals

from the grazing lands. The question whether bonuses were to be included in royalties is a matter of statutory construction, not finally intrusted to the discretion of the Secretary,

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but determinable in court at the instance of the beneficiaries as of right.

[3] Having thus determined that the duty of the Secretary to pay this income to the adult members of the tribe is ministerial, we come now to the question how much discretion the statute gives him in withholding payment from minors. In respect to the income from the distributed lands, the Secretary has no duty whatever. The lands of the minors are given over to the custody and use of the parents, who can cultivate or lease them and apply the proceeds as they see fit. Congress evidently intended to trust to the natural disposition of the parents to look after and care for their children out of the proceeds, and to allow them to treat the proceeds of the inalienable lands as a family fund, to be administered by them until the children should reach their majority. It was probably anticipated that the proceeds of a minor's land from agriculture only would not be large, and could not greatly exceed, if indeed it would equal, the expense his care and support would entail on the family.

With respect to the payment of income from United States bonds, mineral leases, sale of extra lands, and grazing rents, belonging to minors, Congress seems to have had a similar view; but it did vest in the Commissioner of Indian Affairs, subject to the supervision of the Secretary of the Interior, discretion to see that its confidence in the natural parental feeling as a motive for care of the minors' interest in such income should not be abused, and whenever he found misuse or squandering by the parents of the income he was given authority to withhold payment.

The record shows that the Secretary enlarged this discretion vested in him and his subordinate into a power to lay down regulations, limiting in advance the amount to be paid to the parents to a certain monthly rate, and declaring that no use of the funds

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would be permitted which did not inure to the separate benefit of the minor. He was led to take this action, which was a departure from the previous practice of the Department during the decade immediately following the passage of the act, because of the sudden increase in the income of the minors resulting from the bonuses given for mineral leases. However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary. Congress has since met the need by an amendment to the act of 1906 by the Act of March 3, 1921 (41 Stat. 1249).

The direction to the Secretary to pay to the parents the income due to the minors is

clear and positive. It is that the income "shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years." The proviso, "That if the commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being used or squandered he may withhold the payment," did not confer on him a power to determine in advance by general limitation a monthly rate in excess of which what was due minors should not be paid to parents, nor did it enable him to require before payment a showing that the income beyond such limited monthly rate was being used for the specific benefit of each child. Congress evidently intended that the Commissioner should through his agents keep track of the conduct of parents in the use of the income of their children and necessarily vested him and the Secretary with power to require an account of how the income was being used; but this was not a regulatory function to be exercised in advance of payment which is positively enjoined. The proviso imposes on the Commissioner the duty of supervising each case and determining from the circumstances whether there has been, in cases of payments made, misuse or squandering, and, if so, of withholding further payment on account of it. No bond is required of the parents as

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would be in case of a guardian to whom the income is to be paid in the absence of parents, and it was the evident purpose of Congress, in view of the then comparatively small amount of the probable income, to allow it when there was a family to go into the family funds for the support of the family and of the minors as part of the family. This was the intent in respect to the annual proceeds from the land allotted to the minors, and the same purpose may be inferred as to the income from the funds and royalties, qualified, of course, by the proviso in order to prevent a perversion or squandering of it which would defeat this purpose.

[4] We come, then, in our view of the statute, to consider the correctness of the judgment of mandamus of the District Supreme Court as affirmed by the District Court of Appeals. The opinion of the Supreme Court which was adopted by the Court of Appeals, closes as follows:

"The conclusion is that the second question must be answered to the effect that the respondent cannot limit the amount to be paid to the relators as the parents of their minor children from the moneys distributable to them under the law, but can require from them the submission of periodical statements of accounts showing in detail the expenditure of the moneys so received. With this limitation on the scope of the writ of mandamus prayed for, it will issue as prayed.

"And it is so ordered."

But the judgment actually entered and affirmed is as follows:

(43 Sup.Ct.)

"Ordered and adjudged that the prayers of the petition be and the same are hereby granted and the writ of mandamus be issued herein directed to the respondent, commanding him to deliver, or cause to be delivered to the plaintiffs all the moneys due their minor children, members of the tribe of Osage Indians of Oklahoma, by reason of the distributions made in virtue of the act of June 23, 1906 (34 Stats.

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539), prior to the filing of the bill in *this cause, including their respective shares of bonus moneys distributable as royalties under said act."

This is broad and unconditional and cannot be sustained. The relators had refused and neglected to give an accounting of the funds last paid to them for the minors and the Commissioner and Secretary were entitled to withhold future payments until the Commissioner was by such accounting enabled to determine whether in his judgment there was a misuse or squandering of the income then being expended. The fact that in the past the relators had satisfactorily accounted for money received is not sufficient. The Commissioner was entitled to the latest information before acting. The principles governing the issuing of the writ of mandamus in such cases have been much considered by us. *Hall v. Payne*, 254 U. S. 343, 41 Sup. Ct. 131, 65 L. Ed. 295; *Alaska Smokeless Coal Co. v. Lane*, 250 U. S. 549, 40 Sup. Ct. 33, 63 L. Ed. 1135; *Ness v. Fisher*, 223

U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074. Subject to the construction we have put upon the statute, the discretion is vested in the Commissioner to determine in each case whether in his judgment there has been misuse or squandering, and, within the same limitation, to decide what is misuse or squandering. Until he has had a full opportunity to exercise this discretion, neither he nor the Secretary can be compelled by mandamus to make the payment, and if in its exercise, he does not act capriciously, arbitrarily or beyond the scope of his authority, the writ will not issue at all.

Our conclusion is that the petition for the mandamus in this case should be dismissed without prejudice to the filing of another petition after the relators shall have made the requisite accounting of the moneys of the minors paid them down to the date of filing, and shall have submitted the same to the Commissioner, and after the failure, if there be such, of the Commissioner and the Secretary within a reasonable time to exercise the discretion vested in them under the statute

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as we have construed and limited it in the foregoing opinion. The case is therefore reversed and remanded to the Supreme Court of the District, with instruction to dismiss the petition accordingly.

(261 U. S. 525)

ADKINS et al., Minimum Wage Board of District of Columbia, v. CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA. SAME v. LYONS.

(Argued March 14, 1923. Decided April 9, 1923.)

Nos. 795 and 796.

1. Appeal and error ⇨14(2)—Court of Appeals could entertain appeal from decree entered pursuant to its mandate, whether or not it had jurisdiction to grant rehearing on first appeal.

Whether or not the Court of Appeals of the District of Columbia had jurisdiction to grant a rehearing after first denying it, it could properly entertain a second appeal from the decree entered pursuant to its mandate, and decide the case on such appeal.

2. Constitutional law ⇨47—Legislative determination of validity of legislation to be given great weight.

When the legislative branch of the government, by enacting legislation, has affirmed its validity, such determination must be given great weight.

3. Constitutional law ⇨45—Statute contrary to Constitution must be so declared.

When, by clear and indubitable demonstration, a statute is opposed to the Constitution, the court has no choice but to say so, since the Constitution by its own terms is the supreme law, and that which is not supreme must yield to that which is.

4. Constitutional law ⇨70(1)—To hold statute invalid is exercise of judicial power.

To hold a statute invalid, if it be invalid, is an exercise of the judicial power, or power vested in the courts to administer justice according to law, as there necessarily results, from the authority to ascertain and determine the law, the duty to declare and enforce the supreme law, and reject an act of legislation transcending the Constitution, because of no effect and binding on no one.

5. Constitutional law ⇨70(1)—To hold statute invalid is not exercise of substantive power to nullify acts of Congress.

To hold a statute invalid is not to exercise a substantive power to review and nullify acts of Congress, which power does not exist, but simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court according to law.

6. Constitutional law ⇨276—Right to contract is part of the "liberty" protected by the Constitution.

The right to contract about one's affairs, including the right to make contracts of employment, and to obtain the best terms one can as the result of private bargaining, is a part of the "liberty" of the individual, protected by Const. U. S. Amend. 5.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liberty.]

7. Constitutional law ⇨276—Freedom of contract is not absolute, but abridgment can only be justified by exceptional circumstances.

Freedom of contract is not absolute, and is subject to restraint, but is the general rule, and its abridgment can only be justified by the existence of exceptional circumstances.

8. Constitutional law ⇨276—Women cannot be subjected to restrictions on liberty of contract which could not be imposed on men.

In view of the great changes in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, while physical differences may be recognized in fixing hours or conditions of work, women of mature age, sui juris, may not be subjected to restrictions on their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.

9. Constitutional law ⇨275(2)—Master and servant ⇨69—Statute authorizing fixing of minimum wage for women held arbitrary and void.

Act Sept. 19, 1918 (Comp. St. Ann. Supp. 1919, §§ 3421½a-3421½w), so far as it authorizes the commission thereby created to fix minimum wages in the District of Columbia for adult women, measured by the amount necessary to maintain them in good health and protect their morals, and without regard to their earning ability, or the necessities of the employer, is invalid, under Const. Amend. 5, as arbitrarily interfering with freedom of contract, imposing on the employer the burden of supporting a partially indigent person, fixing a standard for the board impossible of practical application with any degree of accuracy, and attempting a classification, as a means of safeguarding morals, without reasonable basis.

10. Constitutional law ⇨47 — That minimum wage laws have been adopted or not adopted, or their policy approved or not approved, throws no light on question of validity.

That several states have adopted minimum wage laws, that many others have refrained from so doing, or that the policy of such laws has been approved or disapproved in printed opinions, tends only to establish the desirability or undesirability of such legislation, and reflects no legitimate light on the question of validity.

Mr. Chief Justice Taft, Mr. Justice Sanford, and Mr. Justice Holmes, dissenting.

Appeals from the Court of Appeals of the District of Columbia.

Two suits, by the Children's Hospital of the District of Columbia and by Willie A. Lyons, against Jesse C. Adkins and others, constituting the Wage Board of the District of Columbia. Decrees for plaintiffs were affirmed by the Court of Appeals of the District of Columbia, and defendants appeal. Affirmed.

For opinion below, on appeal from dismissal of bills, see 284 Fed. 613.

Messrs. Felix Frankfurter, of Cambridge, Mass., and F. H. Stephens, of Washington, D. C., for appellants.

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*Messrs. Wade H. Ellis and Challen B. Ellis, both of Washington, D. C., for appellees.

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*Mr. Wm. L. Brewster, of Portland, Or., amicus curiæ.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The question presented for determination by these appeals is the constitutionality of the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia. 40 Stat. 960, c. 174 (Comp. St. Ann. Supp. 1919, §§ 3421½a-3421½w).

The act provides for a board of three members to be constituted, as far as prac-

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ticable, so as to be equally repre*sentative of employers, employees and the public. The board is authorized to have public hearings, at which persons interested in the matter being investigated may appear and testify, to administer oaths, issue subpoenas requiring the attendance of witnesses and production of books, etc., and to make rules and regulations for carrying the act into effect.

By section 8 the board is authorized—

"(1) To investigate and ascertain the wages of women and minors in the different occupations in which they are employed in the District of Columbia; (2) to examine, through any member or authorized representative, any book, pay roll or other record of any employer of women or minors that in any way appertains to or has a bearing upon the question of wages of any such women or minors; and (3) to require from such employer full and true statements of the wages paid to all women and minors in his employment."

And by section 9—

"To ascertain and declare, in the manner hereinafter provided, the following things: (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals; and (b) standards of minimum wages for minors in any occupation within the District of Columbia, and what wages are unreasonably low for any such minor workers."

The act then provides (section 10) that if the board, after investigation, is of opinion that any substantial number of women workers in any occupation are receiving wages inadequate to supply them with the necessary cost of living, maintain them in health and protect their morals, a conference may be called to consider and inquire into and report on the subject investigated, the conference to be equally representative of em-

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ployers and employees in *such occupation and of the public, and to include one or more members of the board.

The conference is required to make and

transmit to the board a report including, among other things:

"Recommendations as to standards of minimum wages for women workers in the occupation under inquiry and as to what wages are inadequate to supply the necessary cost of living to women workers in such occupation and to maintain them in health and to protect their morals."

The board is authorized (section 12) to consider and review these recommendations and to approve or disapprove any or all of them. If it approve any recommendations it must give public notice of its intention and hold a public hearing at which the persons interested will be heard. After such hearing, the board is authorized to make such order as to it may appear necessary to carry into effect the recommendations, and to require all employers in the occupation affected to comply therewith. It is made unlawful for any such employer to violate in this regard any provision of the order or to employ any woman worker at lower wages than are thereby permitted.

There is a provision (section 13) under which the board may issue a special license to a woman whose earning capacity "has been impaired by age or otherwise," authorizing her employment at less than the minimum wages fixed under the act.

All questions of fact (section 17) are to be determined by the board, from whose decision there is no appeal; but an appeal is allowed on questions of law.

Any violation of the act (section 18) by an employer or his agent or by corporate agents is declared to be a misdemeanor, punishable by fine and imprisonment.

Finally, after some further provisions not necessary to be stated, it is declared (section 23) that the purposes of the act are—

"to protect the women and minors of the District *from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes."

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The appellee in the first case is a corporation maintaining a hospital for children in the District. It employs a large number of women in various capacities, with whom it had agreed upon rates of wages and compensation satisfactory to such employees, but which in some instances were less than the minimum wage fixed by an order of the board made in pursuance of the act. The women with whom appellee had so contracted were all of full age and under no legal disability. The instant suit was brought by the appellee in the Supreme Court of the District to restrain the board from enforcing or attempting to enforce its order on the ground that the same was in contravention of the Constitution, and particularly the due process clause of the Fifth Amendment,

In the second case the appellee, a woman 21 years of age, was employed by the Congress Hall Hotel Company as an elevator operator, at a salary of \$35 per month and two meals a day. She alleges that the work was light and healthful, the hours short, with surroundings clean and moral, and that she was anxious to continue it for the compensation she was receiving, and that she did not earn more. Her services were satisfactory to the Hotel Company, and it would have been glad to retain her, but was obliged to dispense with her services by reason of the order of the board and on account of the penalties prescribed by the act. The wages received by this appellee were the best she was able to obtain for any work she was capable of performing, and the enforcement of the order, she alleges, deprived her of such employment and wages. She further averred that she could not secure any other position at which she could make a living,

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with *as good physical and moral surroundings, and earn as good wages, and that she was desirous of continuing and would continue the employment, but for the order of the board. An injunction was prayed as in the other case.

The Supreme Court of the District denied the injunction and dismissed the bill in each case. Upon appeal the Court of Appeals by a majority first affirmed, and subsequently, on a rehearing, reversed, the trial court. Upon the first argument a justice of the District Supreme Court was called in to take the place of one of the appellate court justices, who was ill. Application for rehearing was made, and, by the court as thus constituted, was denied. Subsequently, and during the term, a rehearing was granted by an order concurred in by two of the appellate court justices, one being the justice whose place on the prior occasion had been filled by the Supreme Court member. Upon the rehearing thus granted, the Court of Appeals, rejecting the first opinion, held the act in question to be unconstitutional and reversed the decrees of the trial court. 284 Fed. 613. Thereupon the cases were remanded, and the trial court entered decrees in pursuance of the mandate, declaring the act in question to be unconstitutional and granting permanent injunctions. Appeals to the Court of Appeals followed, and the decrees on the trial court were affirmed. It is from these final decrees that the cases come here.

[1] Upon this state of facts the jurisdiction of the lower court to grant a rehearing, after first denying it, is challenged. We do not deem it necessary to consider the matter farther than to say that we are here dealing with the second appeals, while the proceedings complained of occurred upon the first appeals. That the lower court could properly entertain the second appeals, and decide the cases does not admit of doubt; and this the appellants virtually concede by having themselves invoked the jurisdic-

tion. See *Rooker et al. v. Fidelity Trust Company et al.*, 261 U. S. 114, 43 Sup. Ct. 288, 67 L. Ed. —, February 19, 1923.

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[2-5] *We come then, at once, to the substantive question involved.

The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity, and that determination must be given great weight. This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt. But, if by clear and indubitable demonstration a statute be opposed to the Constitution, we have no choice but to say so. The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority, and if it conflict with the Constitution must fall; for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power—that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law.

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[6] *The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court and is no longer open to question. *Allgeyer v. Louisiana*, 165 U. S. 578, 591, 17 Sup. Ct. 427, 41 L. Ed. 832; *New York Life Ins. Co. v. Dodge*, 246 U. S. 357, 373-374, 38 Sup. Ct. 337, 62 L. Ed. 772, Ann. Cas. 1918E, 593; *Coppage v. Kansas*, 236 U. S. 1, 10, 14, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960; *Adair v. United States*, 203 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; *Lochner v. New York*, 198

U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; Butchers' Union, etc., v. Crescent City, etc., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Muller v. Oregon, 208 U. S. 412, 421, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957. Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.

In *Adair v. United States*, supra, Mr. Justice Harlan (208 U. S. at pages 174, 175, 28 Sup. Ct. 280, 52 L. Ed. 436, 13 Ann. Cas. 764), speaking for the court said:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. * * * In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In *Coppage v. Kansas*, supra (236 U. S. at page 14, 35 Sup. Ct. 243, 59 L. Ed. 441, L. R. A. 1915C, 960), this court, speaking through Mr. Justice Pitney, said:

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this *right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

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"An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state."

[7] There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest:

(1) *Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest.* There are many cases, but it is sufficient to cite *Munn*

v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77. The power here rests upon the ground that, where property is devoted to a public use, the owner thereby in effect grants to the public an interest in the use which may be controlled by the public for the common good to the extent of the interest thus created. It is upon this theory that these statutes have been upheld, and, it may be noted in passing, so upheld, even in respect of their incidental and injurious or destructive effect upon pre-existing contracts. See *Louisville & Nashville Railway Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671. In the case at bar the statute does not de-

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pend upon *the existence of a public interest in any business to be affected, and this class of cases may be laid aside as inapplicable.

(2) *Statutes relating to contracts for the performance of public work.* *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148; *Heim v. McCall*, 239 U. S. 175, 36 Sup. Ct. 78, 60 L. Ed. 206, Ann. Cas. 1917B, 287; *Ellis v. United States*, 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589. These cases sustain such statutes as depending, not upon the right to condition private contracts, but upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it, or, in the case of a state, for its municipalities. We may therefore, in like manner, dismiss these decisions from consideration as inapplicable.

(3) *Statutes prescribing the character, methods, and time for payment of wages.* Under this head may be included *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315, sustaining a state statute requiring coal to be measured for payment of miners' wages before screening; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, sustaining a Tennessee statute requiring the redemption in cash of store orders issued in payment of wages; *Erie Railway Co. v. Williams*, 233 U. S. 685, 34 Sup. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097, upholding a statute regulating the time within which wages shall be paid to employees in certain specified industries; and other cases sustaining statutes of like import and effect. In none of the statutes thus sustained was the liberty of employer or employee to fix the amount of wages the one was willing to pay and the other willing to receive interfered with. Their tendency and purpose was to prevent unfair, and perhaps fraudulent, methods in the payment of wages, and in no sense can they be said to be, or to furnish a precedent for, wage-fixing statutes.

(4) *Statutes fixing hours of labor.* It is upon this class that the greatest emphasis is laid in argument, and therefore, and because such cases approach most nearly the line of principle applicable to the statute here involved, we shall consider them more at length

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In some instances *the statute limited the hours of labor for men in certain occupations, and in others it was confined in its application to women. No statute has thus far been brought to the attention of this court which by its terms, applied to all occupations. In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the court considered an act of the Utah Legislature, restricting the hours of labor in mines and smelters. This statute was sustained as a legitimate exercise of the police power, on the ground that the Legislature had determined that these particular employments, when too long pursued, were injurious to the health of the employees, and that, as there were reasonable grounds for supporting this determination on the part of the Legislature, its decision in that respect was beyond the reviewing power of the federal courts.

That this constituted the basis of the decision is emphasized by the subsequent decision in *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, reviewing a state statute which restricted the employment of all persons in bakeries to 10 hours in any one day. The court referred to *Holden v. Hardy*, supra, and, declaring it to be inapplicable, held the statute unconstitutional as an unreasonable, unnecessary and arbitrary interference with the liberty of contract and therefore void under the Constitution.

Mr. Justice Peckham, speaking for the court (198 U. S. 56, 25 Sup. Ct. 542, 49 L. Ed. 937, 3 Ann. Cas. 1133), said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the

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police power *would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint."

And again (198 U. S. 57, 58, 25 Sup. Ct. 543, 49 L. Ed. 937, 3 Ann. Cas. 1133):

"It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

Coming then directly to the statute (198 U. S. 53, 25 Sup. Ct. 543, 49 L. Ed. 937, 3 Ann. Cas. 1133), the court said:

"We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, sui juris, as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go."

And, after pointing out the unreasonable range to which the principle of the statute might be extended the court said (198 U. S. 60, 25 Sup. Ct. 544, 49 L. Ed. 937, 3 Ann. Cas. 1133):

"It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must

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*be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the Legislature."

And further (198 U. S. 61, 25 Sup. Ct. 545, 49 L. Ed. 937, 3 Ann. Cas. 1133):

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employés, if the hours of labor are not curtailed."

Subsequent cases in this court have been distinguished from that decision, but the principles therein stated have never been disapproved.

In *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435, 61 L. Ed. 830, Ann. Cas. 1918A, 1043, a state statute forbidding the employment of any person in any mill, factory, or manufacturing establishment more than ten hours in any one day, and providing payment for overtime not exceeding three hours in any one day at the rate of time and a half of the regular wage, was sustained on the ground that, since the state Legislature and state

Supreme Court had found such a law necessary for the preservation of the health of employees in these industries, this court would accept their judgment, in the absence of facts to support the contrary conclusion.

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The law was attacked *on the ground that it constituted an attempt to fix wages, but that contention was rejected and the law sustained as a reasonable regulation of hours of service.

Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024, involved the validity of the so-called Adamson Law (Comp. St. §§ 8680a-8680d), which established an 8-hour day for employees of interstate carriers for which it fixed a scale of minimum wages with proportionate increases for overtime, to be enforced, however, only for a limited period. The act was sustained primarily upon the ground that it was a regulation of a business charged with a public interest. The court, speaking through the Chief Justice, pointed out that regarding "the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference," but that this did not affect the power to deal with the matter with a view to protect the public right, and then said (243 U. S. 353, 37 Sup. Ct. 304, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024):

"And this emphasizes that there is no question here of purely private right since the law is concerned only with those who are engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that business and which we have seen comes under the control of the right to regulate to the extent that the power to do so is appropriate or relevant to the business regulated."

Moreover, in sustaining the wage feature, of the law, emphasis was put upon the fact (243 U. S. 345, 37 Sup. Ct. 301, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024) that it was in this respect temporary "leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time." The act was not only temporary in this respect, but it was passed to meet a sudden and great emergency. This feature of the law was sustained principally because the parties, for the time being, could not or would not agree. Here they are forbidden to agree.

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*The same principle was applied in the *Rent Cases* (*Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165, and *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877), where this court sustained the legislative power to fix rents as between landlord and tenant upon the ground that the operation of the statutes was temporary to tide over

an emergency and that the circumstances were such as to clothe "the letting of buildings * * * with a public interest so great as to justify regulation by law." The court said (256 U. S. 157, 41 Sup. Ct. 460, 65 L. Ed. 865, 16 A. L. R. 165):

"The regulation is put and justified only as a temporary measure [citing *Wilson v. New*, supra]. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

In a subsequent case, *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 43 Sup. Ct. 158, 67 L. Ed. —, decided December 11, 1922, this court, after saying, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change," pointed out that the *Rent Cases* dealt with laws intended to meet a temporary emergency and "went to the verge of the law."

In addition to the cases cited above, there are decisions of this court dealing with laws especially relating to hours of labor for women. *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; *Riley v. Massachusetts*, 232 U. S. 671, 34 Sup. Ct. 469, 58 L. Ed. 788; *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829; *Bosley v. McLaughlin*, 236 U. S. 385, 35 Sup. Ct. 345, 59 L. Ed. 632.

[8] In the *Muller Case* the validity of an Oregon statute, forbidding the employment of any female in certain industries more than 10 hours during any one day was upheld. The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in

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respect *of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. The *Cases of Riley, Miller, and Bosley* follow in this respect the *Muller Case*. But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case* (208 U. S. 421, 28 Sup. Ct. 327, 52 L. Ed. 551, 13 Ann. Cas. 957) has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, sui juris, require or

may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. In passing, it may be noted that the instant statute applies in the case of a woman employer contracting with a woman employee as it does when the former is a man.

The essential characteristics of the statute now under consideration, which differentiate it from the laws fixing hours of labor, will be made to appear as we proceed. It is sufficient now to point out that the latter, as well as the statutes mentioned under paragraph (3), deal with incidents of the employment

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having no necessary effect upon *the heart of the contract; that is, the amount of wages to be paid and received. A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages. Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. This court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the Legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages.

[9] If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under

penalties as to the employer—to freely contract with one another in respect of the price

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for *which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee.¹ The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment, and, while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources she may have. It is based wholly on the opinions of the members of the board and their advisers—perhaps an average of their opinions, if they do not precisely agree—as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals. It applies to any and every occupation in the District, without regard to its nature or the character of the work.

The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy. What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so. The amount will depend upon a variety of circumstances: The individual temperament, habits of thrift, care, ability to buy necessities intelligently, and whether the woman live alone or with her family. To those who practice economy, a given sum will afford comfort, while to those of contrary habit the same sum will be wholly inadequate. The co-operative economies of the family group are not taken into ac-

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count, *though they constitute an important consideration in estimating the cost of living, for it is obvious that the individual expense will be less in the case of a member of a family than in the case of one living alone. The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages, and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis. No distinction can be made

¹ This is the exact situation in the Lyons Case, as is shown by the statement in the first part of this opinion.

between women who work for others and those who do not; nor is there ground for distinction between women and men, for, certainly, if women require a minimum wage to preserve their morals men require it to preserve their honesty. For these reasons, and others which might be stated, the inquiry in respect of the necessary cost of living and of the income necessary to preserve health and morals presents an individual and not a composite question, and must be answered for each individual considered by herself and not by a general formula prescribed by a statutory bureau.

This uncertainty of the statutory standard is demonstrated by a consideration of certain orders of the board already made. These orders fix the sum to be paid to a woman employed in a place where food is served or in a mercantile establishment, at \$16.50 per week; in a printing establishment, at \$15.50 per week; and in a laundry, at \$15 per week, with a provision reducing this to \$9 in the case of a beginner. If a woman employed to serve food requires a minimum of \$16.50 per week, it is hard to understand how the same woman working in a printing establishment or in a laundry is to get on with an income lessened by from \$1 to

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\$7.50 per week. The board prob*ably found it impossible to follow the indefinite standard of the statute, and brought other and different factors into the problem; and this goes far in the direction of demonstrating the fatal uncertainty of the act, an infirmity which, in our opinion, plainly exists.

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of

the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there

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*rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or grocer to buy food, he is morally entitled to obtain the worth of his money; but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demand-

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ing *more, simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fix-

ed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.

[10] We are asked, upon the one hand, to consider the fact that several states have adopted similar statutes, and we are invited, upon the other hand, to give weight to the fact that three times as many states, presumably as well informed and as anxious to promote the health and morals of their people, have refrained from enacting such legislation. We have also been furnished with a large number of printed opinions approving the policy of the minimum wage, and our own reading has disclosed a large number to the contrary. These are all proper enough for the consideration of the lawmaking bodies, since their tendency is to establish the desirability or undesirability of the

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legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads.

It is said that great benefits have resulted from the operation of such statutes, not alone in the District of Columbia but in the several states where they have been in force. A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of this statement, all of which we have found interesting, but only mildly persuasive. That the earnings of women are now greater than they were formerly, and that conditions affecting women have become better in other respects, may be conceded; but convincing indications of the logical relation of these desirable changes to the law in question are significantly lacking. They may be, and quite probably are, due to other causes. We cannot close our eyes to the notorious fact that earnings everywhere in all occupations have greatly increased—not alone in states where the minimum wage law obtains but in the country generally—quite as much or more among men as among women, and in occupations outside the reach of the law as in

those governed by it. No real test of the economic value of the law can be had during periods of maximum employment, when general causes keep wages up to or above the minimum; that will come in periods of depression and struggle for employment, when the efficient will be employed at the minimum rate, while the less capable may not be employed at all.

Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If, in the face of the guaranties of the Fifth

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Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. If, for example, in the opinion of future lawmakers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains the minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employer of his constitutional liberty of contract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other.

It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable, but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and, when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

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*It follows, from what has been said, that the act in question passes the limit prescribed

by the Constitution, and accordingly the decrees of the court below are

Affirmed.

Mr. Justice BRANDEIS took no part in the consideration or decision of these cases.

Mr. CHIEF JUSTICE TAFT, dissenting.

I regret much to differ from the court in these cases.

The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark. Our court has been laboriously engaged in pricking out a line in successive cases. We must be careful, it seems to me, to follow that line as well as we can, and not to depart from it by suggesting a distinction that is formal rather than real.

Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound.

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*Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law, and that while in individual cases, hardship may result, the restriction will inure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large.

The right of the Legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee, it seems to me, has been firmly established. As to that, one would think, the line had been pricked out so that it has become a well formulated rule. In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, it was applied to miners

and rested on the unfavorable environment of employment in mining and smelting. In *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, it was held that restricting those employed in bakeries to 10 hours a day was an arbitrary and invalid interference with the liberty of contract secured by the Fourteenth Amendment. Then followed a number of cases beginning with *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, sustaining the validity of a limit on maximum hours of labor for women to which I shall hereafter allude, and following these cases came *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435, 61 L. Ed. 830, Ann. Cas. 1918A, 1043. In that case, this court sustained a law limiting the hours of labor of any person, whether man or woman, working in any mill, factory, or manufacturing establishment to 10 hours a day with a proviso as to further hours to which I shall hereafter advert. The law covered the whole field of industrial employment and certainly covered the case of persons employed in bakeries. Yet the opinion in the *Bunting Case* does not mention the

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Lochner Case. No one can *suggest any constitutional distinction between employment in a bakery and one in any other kind of a manufacturing establishment which should make a limit of hours in the one invalid, and the same limit in the other permissible. It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case*, and I have always supposed that the *Lochner Case* was thus overruled sub silentio. Yet the opinion of the court herein in support of its conclusion quotes from the opinion in the *Lochner Case* as one which has been sometimes distinguished but never overruled. Certainly there was no attempt to distinguish it in the *Bunting Case*.

However, the opinion herein does not overrule the *Bunting Case* in express terms, and therefore I assume that the conclusion in this case rests on the distinction between a minimum of wages and a maximum of hours in the limiting of liberty to contract. I regret to be at variance with the court as to the substance of this distinction. In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand.

If it be said that long hours of labor have a more direct effect upon the health of the employee than the low wage, there is very respectable authority from close observers, disclosed in the record and in the literature on the subject quoted at length in the briefs that they are equally harmful in this regard. Congress took this view and we cannot say it was not warranted in so doing.

With deference to the very able opinion of the court and my brethren who concur in it, it appears to me to exaggerate the importance of the wage term of the contract of employment as more inviolate than its other terms. Its conclusion seems influenced by the fear

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that the *concession of the power to impose a minimum wage must carry with it a concession of the power to fix a maximum wage. This, I submit, is a non sequitur. A line of distinction like the one under discussion in this case is, as the opinion elsewhere admits, a matter of degree and practical experience and not of pure logic. Certainly the wide difference between prescribing a minimum wage and a maximum wage could as a matter of degree and experience be easily affirmed.

Moreover, there are decisions by this court which have sustained legislative limitations in respect to the wage term in contracts of employment. In *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315, it was held within legislative power to make it unlawful to estimate the graduated pay of miners by weight after screening the coal. In *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, it was held that stores orders issued for wages must be redeemable in cash. In *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, a law forbidding the payment of wages in advance was held valid. A like case is *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348, 40 Sup. Ct. 350, 64 L. Ed. 607. While these did not impose a minimum on wages, they did take away from the employee the freedom to agree as to how they should be fixed, in what medium they should be paid, and when they should be paid, all features that might affect the amount or the mode of enjoyment of them. The first two really rested on the advantage the employer had in dealing with the employee. The third was deemed a proper curtailment of a sailor's right of contract in his own interest because of his proneness to squander his wages in port before sailing. In *Bunting v. Oregon*, supra, employees in a mill, factory, or manufacturing establishment were required if they worked over 10 hours a day to accept for the 3 additional hours permitted not less than 50 per cent. more than their usual wage. This was sustained as a mild penalty imposed on the employer to enforce the limitation as

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to hours; but it necessarily curtailed the employee's freedom to contract to work for the wages he saw fit to accept during those 3 hours. I do not feel, therefore, that either on the basis of reason, experience, or authority, the boundary of the police power should be drawn to include maximum hours and exclude a minimum wage.

Without, however, expressing an opinion that a minimum wage limitation can be enacted for adult men, it is enough to say that the case before us involves only the applica-

tion of the minimum wage to women. If I am right in thinking that the Legislature can find as much support in experience for the view that a sweating wage has as great and as direct a tendency to bring about an injury to the health and morals of workers, as for the view that long hours injure their health, then I respectfully submit that *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, controls this case. The law which was there sustained forbade the employment of any female in any mechanical establishment or factory or laundry for more than 10 hours. This covered a pretty wide field in women's work, and it would not seem that any sound distinction between that case, and this can be built up on the fact that the law before us applies to all occupations of women with power in the board to make certain exceptions. Mr. Justice Brewer, who spoke for the court in *Muller v. Oregon*, based its conclusion on the natural limit to women's physical strength and the likelihood that long hours would therefore injure her health, and we have had since a series of cases which may be said to have established a rule of decision. *Riley v. Massachusetts*, 232 U. S. 671, 34 Sup. Ct. 469, 58 L. Ed. 788; *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829; *Bosley v. McLaughlin*, 236 U. S. 385, 35 Sup. Ct. 345, 59 L. Ed. 632. The cases covered restrictions in wide and varying fields of employment and in the later cases it will be found that the objection to the particular law was based, not on the ground that it had general application, but because it left out some employments.

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*I am not sure from a reading of the opinion whether the court thinks the authority of *Muller v. Oregon* is shaken by the adoption of the Nineteenth Amendment. The Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests. The amendment did give women political power and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I do not think we are warranted in varying constitutional construction based on physical differences between men and women, because of the amendment.

But for my inability to agree with some general observations in the forcible opinion of Mr. Justice HOLMES, who follows me, I should be silent and merely record my concurrence in what he says. It is perhaps wiser for me, however, in a case of this importance separately to give my reasons for dissenting.

I am authorized to say that Mr. Justice SANFORD concurs in this opinion.

Mr. Justice HOLMES, dissenting.

The question in this case is the broad one, Whether Congress can establish minimum

rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress had no power to meddle with the matter at all. To me, notwithstanding the deference due to the prevailing judgment of the Court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have

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learned our greatest *lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price it seems to me impossible to deny that the belief reasonably may be held by reasonable men. If the law encountered no other objection than that the means bore no relation to the end or that they cost too much I do not suppose that anyone would venture to say that it was bad. I agree, of course, that a law answering the foregoing requirements might be invalidated by specific provisions of the Constitution. For instance it might take private property without just compensation. But in the present instance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law. To that I turn.

The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. Insurance rates may be regulated. German

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Alliance Ins. Co. *v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189. (I concurred in that decision without regard to the public interest with which insurance was said to be clothed. It seemed to me that the principle was general.) Contracts may be forced upon the companies.

National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71, 43 Sup. Ct. 32, 67 L. Ed. —, November 13, 1922. Employers of miners may be required to pay for coal by weight before screening. McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315. Employers generally may be required to redeem in cash store orders accepted by their employees in payment. Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55. Payment of sailors in advance may be forbidden. Patterson v. The Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002. The size of a loaf of bread may be established. Schmidinger v. Chicago, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364, Ann. Cas. 1914B, 284. The responsibility of employers to their employees may be profoundly modified. New York Central R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537. Finally women's hours of labor may be fixed, Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; Riley v. Massachusetts, 232 U. S. 671, 679, 34 Sup. Ct. 469, 58 L. Ed. 788; Hawley v. Walker, 232 U. S. 718, 34 Sup. Ct. 479, 58 L. Ed. 813; Miller v. Wilson, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829; Bosley v. McLaughlin, 236 U. S. 385, 35 Sup. Ct. 345, 59 L. Ed. 632; and the principle was extended to men with the allowance of a limited overtime to be paid for "at the rate of time and one-half of the regular wage," in Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435, 61 L. Ed. 830, Ann. Cas. 1918A, 1043.

I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here as elsewhere the distinctions of the law are distinctions of degree, but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate. Muller v. Oregon, I take it, is as good law today as it was in 1908. It

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will *need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account. I should not hesitate to take them into account if I thought it necessary to sustain this Act. Quong Wing v. Kirkendall, 223 U. S. 59, 63, 32 Sup. Ct. 192, 56 L. Ed. 350. But after Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435, 61 L. Ed. 830, Ann. Cas. 1918A, 1043, I had supposed that it was not necessary, and that Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, would be allowed a deserved repose.

WABASH RY. CO. v. ELLIOTT.

(Argued Jan. 16, 1923. Decided April 9, 1923.)

No. 225.

Railroads $\Leftarrow$ 5½, New, vol. 6A Key-No. Series
 —Company held not liable for attorney's fee
 after settlement by Director General.

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld. I see no greater objection to using a Board to apply the standard fixed by the Act than there is to the other commissions with which we have become familiar or than there is to the requirement of a license in other cases. The fact that the statute warrants classification, which like all classifications may bear hard upon some individuals, or in exceptional cases, notwithstanding the power given to the Board to issue a special license, is no greater infirmity than is incident to all law. But the ground on which the law is held to fail is fundamental and therefore it is unnecessary to consider matters of detail.

The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly cannot be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria and a number of the States of this Union. The belief is fortified by a very remarkable collection of documents submitted on behalf of the appellants, material here, I conceive, only as showing

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that the *belief reasonably may be held. In Australia the power to fix a minimum for wages in the case of industrial disputes extending beyond the limits of any one State was given to a Court, and its President wrote a most interesting account of its operation. 29 Harv. Law Rev. 13. If a legislature should adopt what he thinks the doctrine of modern economists of all schools, that "freedom of contract is a misnomer as applied to a contract between an employer and an ordinary individual employee," Ibid. 25, I could not pronounce an opinion with which I agree impossible to be entertained by reasonable men. If the same legislature should accept his further opinion that industrial peace was best attained by the device of a Court having the above powers, I should not feel myself able to contradict it, or to deny that the end justified restrictive legislation quite as adequately as beliefs concerning Sunday or exploded theories about usury. I should have my doubts, as I have them about this statute—but they would be whether the bill that has to be paid for every gain, although hidden as interstitial detriments, was not greater than the gain was worth: a matter that it is not for me to decide.

I am of opinion that the statute is valid and that the decree should be reversed.

An attorney who had a contract for a contingent fee for recovering damages for the death of a railway employee, which under Rev. St. Mo. 1919, § 691, made the company settling the claim after notice of such contract without the consent of the attorney liable to the attorney, cannot enforce his claim against the railway company, where the railway was being operated by the Director General at the time the injury was caused, so that the liability was that of the Director General, and not of the railway company, under Federal Control Act March 21, 1918, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½j), and General Order No. 50 of the Director General, the settlement was made by the Director General's check, and the claim agent who made it was in the Director General's employ, though the railway company was included in the release signed by the representative of the deceased employee, and the claim agent signed as attorney for the company a stipulation for dismissal of the suit begun against the company.

On Writ of Certiorari to the Kansas City Court of Appeals, State of Missouri.

Action by Miles Elliott against the Wabash Railway Company and another. Judgment for plaintiff against the named defendant was affirmed by the Kansas City Court of Appeals, of the State of Missouri (208 Mo. App. 348, 234 S. W. 520), and defendant brings certiorari. Reversed.

Mr. Frederic D. McKenney, of Washington, D. C., for petitioner.

Mr. M. J. O'Donnell, of Kansas City, Mo., for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

On April 2, 1918, while the railroad of the Wabash Railway Company was in the possession of the United States and operated by the Director General of Railroads, Mern G. Welker, a brakeman on that railroad, was fatally injured and died in circumstances which, under the Employers' Liability Acts of Congress, probably would have made the railway company liable in damages for his

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*injury and death, had the company been operating the railroad at the time. His widow became the administratrix of his estate, and as such entered into a contract with Miles Elliott, an attorney at law, under which the latter was to investigate the claim for the injury and death, compromise the same, or enforce it by suit, and have for his service 50 per cent. of all moneys received. Elliott

caused a notice, addressed to the railway company and reciting the substance of the contract, to be served on one Stepp, who was the station agent of the Director General at Chillicothe, Mo. The contract was made and the notice given under a statute of Missouri (section 691, R. S. 1919), which provides that such a contract shall, after the service of notice, give the attorney a lien on the claim and the proceeds for his portion or percentage, and that—

"Any defendant or defendants, or proposed defendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement. * * *

June 5, 1918, Elliott commenced an action by the administratrix against the railway company in the circuit court of Livingston county, Mo., to enforce the claim. Before there was any appearance by the railway company in that case, the Director General, acting through a claim agent in his employ, compromised the claim with the administratrix, paid to her \$4,000 from the funds of the United States Railroad Administration, and received from her a written instrument acknowledging the receipt of that sum from him, and releasing him and the railway company from all claims and demands by reason of Welker's injury and death. The Director General also paid to her from the

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same funds the further sum of \$162.85 to cover funeral and burial expenses. As part of the compromise and settlement, the administratrix and the claim agent acting for the Director General entered into a stipulation, bearing the title of the action against the railway company, reciting that the subject-matter of the action had been fully settled between the parties, and consenting that the action be dismissed at defendant's costs. This stipulation was presented and filed in the circuit court by counsel acting for the Director General. The settlement and the stipulation for a dismissal were without the consent of Elliott, and no part of the sum paid to the administratrix was paid by her to him.

January 11, 1919, Elliott began a proceeding against the railway company in the circuit court of Livingston county, where the action of the administratrix was pending, to enforce a lien under his contract and the state statute. In his petition he set forth the matters before stated, save that, instead of recognizing the federal control and operation of the railroad, he directly charged the railway company with all that was done by the Director General and the representatives, agents, and employees of the latter, and he

alleged that as part of the compromise and settlement the company promised the administratrix to pay to him, as his compensation or percentage under the contract, the same amount that was paid to her. His prayer was that his lien be enforced by awarding him a judgment against the company for that sum. In an amended petition he made the Director General a party, charged both the railway company and the Director General with what he had before charged against the company alone, and prayed judgment against both.

Separate answers were filed, but that of the Director General need not be noticed. The company's answer set up, among other things: (1) That the federal possession, control, and operation of the railroad covered all the dates named in the petition, and there

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was no possession or operation by the company during that period; (2) that the acts charged against the company in the petition, in so far as they had any reality, were solely the acts of representatives, employees and agents of the Director General; and (3) that the suit of the administratrix and the proceeding by Elliott could not be maintained against the company, but only against the Director General. As showing the nature of the federal control and the company's freedom from liability for acts or omissions in the course of such control, the answer directed attention to and invoked the application of the acts of Congress, proclamations of the President, and orders of the Director General according to which that control was exercised.

On the trial the court found the issues between Elliott and the railway company in favor of the former, and those between Elliott and the Director General in favor of the latter. Judgment was then entered that Elliott recover \$4,162.85 from the company and nothing from the Director General. The company appealed to the Kansas City Court of Appeals and it affirmed the judgment, 208 Mo. App. 348, 234 S. W. 520. That court refused to transfer the case to the Supreme Court of the state and the latter denied a petition asking it to review the judgment on writ of certiorari. After the avenues of review within the state were thus exhausted this court granted a petition for a writ of certiorari to the Kansas City Court of Appeals to bring the case here.

Complaint is made of several rulings, but only one need be considered. Conformably to the local practice the railway company, at the close of the evidence, requested the court to declare that there was no evidence to sustain a finding against it, and therefore the finding and judgment should be in its favor. This request was based in part on what the company claimed was the right construction and application of the congressional enactments, presidential proclamations,

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and orders of the Director *General relied on in its answer. The request was refused. We think it plainly should have been granted.

Affirmatively and without contradiction the evidence established that at the time of Welker's injury and death, and continually until after Elliott's proceeding was begun, the company's railroad was in the exclusive possession and control of the United States and operated by the Director General of Railroads; that Welker's injury and death were not caused by any act or omission of the company, or any one in its employ; and that the company had nothing to do with the compromise and settlement with the administratrix, and did not promise to pay her attorney. The courts below apparently assumed that the claim agent who effected the compromise and settlement represented the company as well as the Director General; but the assumption was wholly inadmissible. The evidence was directly and positively to the contrary. The claim agent had been in the company's service prior to the federal control, but during that control was only in the service of the Director General. The payment to the administratrix was made by a check drawn by the Director General on funds of the United States Railroad Administration, and the receipt taken from her recited that the payment was by the Director General. Indeed, so far as appeared, the company did not know of the compromise and settlement until after Elliott's proceeding was begun. In all the evidence there were but two matters which, even if separated from the rest, could give any color to what was assumed below. One was the inclusion of the company in the release. But this was explained consistently with the other evidence by an accompanying recital that the sum received by the administratrix from the Director General was the sole consideration for the release, and by the fact that in the circumstances simple justice to the company would suggest its inclusion in the

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*release. The other matter was that the claim agent signed the stipulation for a dismissal of the pending suit as attorney for the company. But this was made quite negligible by direct evidence that the claim agent had no authority to act or speak for the company and by the fact that the Director General, during whose operation the claim arose and for whom the claim agent was acting, was free to have himself substituted as a party in the company's place

and to assume the defense of that suit. See *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087.

To sustain its asserted freedom from liability in such circumstances the company relied particularly¹ on section 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½j), and General Order No. 50 by the Director General of Railroads, U. S. R. R. Administration Bulletin No. 4 (Revised), p. 334. That statute and order were considered at length in *Missouri Pacific R. R. Co. v. Ault*, supra, and were there construed as contemplating and intending that rights of action arising out of acts or omissions occurring in the course of the federal control of a railroad should be against the Director General and not the company owning the road. That decision was followed and applied in *North Carolina R. R. Co. v. Lee*, 260 U. S. 16, 43 Sup. Ct. 2, 67 L. Ed. — (October 16, 1922), and its principle was recognized in *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U. S. 111, 42 Sup. Ct. 6, 66 L. Ed. 154, and *Davis, Director General, v. L. N. Dantzler Lumber Co.*, 261 U. S. 280, 43 Sup. Ct. 349, 67 L. Ed. — (February 26, 1923).

Thus whatever claim the administratrix had for Welker's injury and death was against the Director General, not the company. Elliott's lien, if he had one, was on that claim. The settlement of the claim was

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strictly an *act of the Director General done in the course of the federal control. No liability could attach to the company for that act consistently with the federal statute and order just cited. Whether the particular liability defined in the state statute before quoted was of such a nature that it could be applied to the Director General we need not consider, for there was no appeal from the judgment of the circuit court in his favor. See *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 563 et seq. 41 Sup. Ct. 593, 65 L. Ed. 1087; *Norfolk-Southern R. R. Co. v. Owens*, 256 U. S. 565, 41 Sup. Ct. 597, 65 L. Ed. 1093.

Judgment reversed.

¹ It also relied incidentally on the act of August 29, 1916, c. 418, 39 Stat. 619, 645, the President's Proclamation of December 26, 1917, 40 Stat. 1733 (Comp. St. § 1974a), General Orders Nos. 18, 18a and 26 by the Director General of Railroads, U. S. R. R. Administration Bulletin No. 4 (Revised), pp. 186, 187, 196, and section 206 of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456.

(261 U. S. 476)

HARTFORD LIFE INS. CO. v. DOUDS et al.**SAME v. LANGDALE.**

(Argued and Submitted March 7, 1923.

Decided April 9, 1923.)

Nos. 265 and 271.

Insurance ⚡26—Action to recover payments above specified maximum assessments does not affect management of internal affairs of company.

Where a life insurance company had made assessments in excess of the highest rate specified in the certificate, which had been paid by those insured, suits to recover from the company the amounts so paid in excess of the specified maximum are not suits which involve the management of the internal affairs of the insurance company, and therefore may be maintained in a state, other than that of the home office of the company, in which the company was doing business, and where all parties came before the court.

On Writs of Certiorari to the Supreme Court of the State of Ohio.

Separate suits by Frank F. Douds and others, as executors, and by Robert H. Langdale, against the Hartford Life Insurance Company. Judgments for plaintiffs were affirmed by the Supreme Court of Ohio (103 Ohio St. 398, 136 N. E. 274; 103 Ohio St. 433, 138 N. E. 96), and defendant brings certiorari in each case. Affirmed.

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*Messrs. H. B. Arnold, of Columbus, Ohio, and James C. Jones, Frank H. Sullivan, and James C. Jones, Jr., all of St. Louis, Mo., for petitioners.

Mr. Smith W. Bennett, of Columbus, Ohio, for respondents.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

These are separate causes, but the facts are similar and both present the same essential question. A statement based upon record No. 271 will suffice.

Petitioner is a Connecticut corporation with home office at Hartford. For many years it has carried on the business of insurance upon the assessment or mutual plan within the state of Ohio. May 4, 1882, it issued to respondent Langdale, aged 40, a certificate of membership, Safety Fund Department, for \$3,000. This recites that in consideration of representations, etc., and "the further payment in accordance with the conditions hereof of all mortuary assessments" the company agrees (among other things) to assess holders of certificates "according to the table of graduated assessment rates given hereon, as determined by their respective ages and the number of such certificates in force," and pay the amount so collected to the assured's legal representatives.

The "Table of Graduated Assessment Rates

for Death Losses for Every \$1,000 of a Total Indemnity of \$1,000,000" is printed upon the certificate and shows increasing rates for ages from 15 to 60. The highest specified rate *is at 60—\$2.68.^{*478} Immediately after the table this statement appears:

"These rates decrease in proportion as the total indemnity in force increases above one million dollars in amount, and are calculated so as to cover the usual expense for collecting."

During the years 1903 to 1914 the company made and the insured paid assessments on account of death losses at rates varying from \$2.86 to \$4 per thousand. To recover all above \$2.68 per thousand so paid, with interest, respondent brought suit in the common pleas court, Franklin county, Ohio. The company appeared, demurred, and later answered, saving at all times the question of jurisdiction. A judgment against it was affirmed by the Supreme Court. 103 Ohio St. 398, 136 N. E. 274; 103 Ohio St. 433, 138 N. E. 96.

Petitioner now insists that the trial court lacked jurisdiction of the subject-matter; that the suit involved the management of its internal affairs and the validity of action relative to the Safety Fund Department; that the courts of Connecticut have exclusive jurisdiction over such matters; and that enforcement of the Ohio judgment will deprive it of property without due process of law.

The court below confined its ruling concerning jurisdiction to the trial court's power to render the above-mentioned money judgment, and it held that to determine the issue did not require exercise of visitatorial power over the foreign corporation; that the judgment did not interfere with the discretion of petitioner's officers or the management of its internal affairs. This conclusion, we think, is plainly right.

By a written contract petitioner had agreed that no mortuary assessment should exceed \$2.68 per thousand. It demanded and received more, and respondent sued to recover the excess. All parties came before the court; the necessary facts were established; and he obtained judgment for a definite sum of money. This cannot interfere with the management of the company's internal affairs.

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*In the recent case of Frick v. Hartford Life Insurance Co. (November 27, 1922) 98 Conn. 251, 119 Atl. 229, instituted to enforce an Iowa judgment (179 Iowa, 149, 159 N. W. 247) against petitioner based upon facts essentially like those here disclosed, the Supreme Court of Connecticut considered the precise point now urged upon us. In harmony with Dresser v. Hartford Life Insurance Co., 80 Conn. 681, 709, 70 Atl. 39, it held that the membership certificate constituted a contract not to demand of the assured more than \$2.68 per thousand for any mortuary assessment, and also that the jurisdic-

tion of the Iowa court to render judgment for excess payments was clear.

Hartford Life Insurance Co. v. Ibs, 237 U. S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765, is not in point. That controversy related to the effect of the decree in Dresser v. Hartford Life Insurance Co., supra, a class suit instituted to determine the status and proper use of the mortuary fund. The causes now under consideration present no such problem.

The judgments below are affirmed.

(261 U. S. 590)

PEOPLE OF STATE OF NEW YORK ex rel.
DOYLE et al. v. ATWELL, Acting
Chief of Police, et al.

(Submitted March 12, 1923. Decided April 9, 1923.)

No. 306.

Courts  391(3)—Writ of error dismissed, if state court's decision is sustainable on state grounds.

Where the state court decided the federal and constitutional question raised by habeas corpus proceedings adversely to relators, but also held that habeas corpus was not the proper remedy, since the magistrate had jurisdiction and the constitutional question could be raised on appeal from a conviction, the writ of error to the state court must be dismissed, under the rule that, if the judgment was based, not alone on a ground involving a federal question, but also upon an independent ground broad enough to sustain the judgment, the United States Supreme Court will not take jurisdiction.

In Error to the Supreme Court of the State of New York.

Habeas corpus proceedings by the People of the State of New York, on the relation of Thomas F. Doyle and others, against George C. Atwell, Acting Chief of Police of the City of Mt. Vernon and another. An order sustaining the writs and discharging the relators was reversed by the Appellate Division of the Supreme Court, and the writs dismissed (197 App. Div. 225, 188 N. Y. Supp. 803), and the order of the Appellate Division affirmed by the Court of Appeals of the state (232 N. Y. 96, 133 N. E. 364), and relators bring error. Writ of error dismissed.

Mr. A. G. Hays, of New York City, for plaintiffs in error.

Mr. Frederick E. Weeks, of White Plains, N. Y., for defendants in error.

Mr. Justice SANFORD delivered the opinion of the Court.

The record presents a preliminary question as to our jurisdiction under the writ of error.

The relators were arrested by the police of the city of Mt. Vernon, N. Y., while holding a street meeting, on the charge of violating

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an ordinance which prohibited, under penalty of fine, the gathering or assembling of persons or the holding of public meetings upon the public streets of the city, without special permit of the mayor. Before trial the relators obtained writs of habeas corpus from the Supreme Court of the State, at Special Term, which, being heard together, resulted in an order sustaining the writs and discharging the relators. The Appellate Division of the Supreme Court (197 App. Div. 225, 188 N. Y. Supp. 803), on appeal reversed this order and dismissed the writs; and the Court of Appeals of the State, on a further appeal, affirmed the order of the Appellate Division (232 N. Y. 96, 133 N. E. 364) and remitted the record and proceedings to the Supreme Court to be proceeded upon according to law. Thereafter this writ of error was granted by the Chief Judge of the Court of Appeals to review the judgment of that court.

It is urged, in substance, that the Court of Appeals denied the contention of the relators that the ordinance, both by its provisions and through the alleged discriminatory manner in which it was enforced, deprived them of their rights of freedom of speech and assembly in violation of the Fourteenth Amendment. The Court of Appeals, however, held not only that the ordinance was a valid and constitutional exercise of the police power, but also that the writ of habeas corpus was not, under the state practice, the proper method of contesting its validity. In the opinion of that court, after passing upon the constitutional question, it was said:

"A writ of habeas corpus cannot take the place of [or] perform the functions of an appeal from a judgment of conviction. The court before which a person is brought under such writ simply inquires whether the court rendering the judgment had jurisdiction to do so. If that fact appears, and the mandate under which the defendant is held be regular upon its face, the writ must be dismissed. People ex rel. Hubert v. Kaiser, 206 N. Y. 46. The mag-

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istrate before whom the relators were taken had jurisdiction to try them for a violation of the ordinance in question, and they are now legally in custody. The Appellate Division, therefore, properly held that the order of the Special Term was erroneous, reversed the same, dismissed the writs and remanded the relators."

It is settled law, that where the record discloses that the judgment of a state court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to maintain the judgment, this Court will not take jurisdiction to review such judgment and will dismiss a writ of error brought for that purpose. *Eustis v. Bolles*, 150 U. S. 361,

(43 Sup.Ct.)

366, 14 Sup. Ct. 131, 37 L. Ed. 1111; Dibble v. Land Co., 163 U. S. 63, 69, 16 Sup. Ct. 939, 41 L. Ed. 72; Allen v. Arguimbau, 198 U. S. 149, 155, 25 Sup. Ct. 622, 49 L. Ed. 990; Adams v. Russell, 229 U. S. 353, 358, 33 Sup. Ct. 846, 57 L. Ed. 1224; Cuyahoga Power Co. v. Realty Co., 244 U. S. 300, 304, 37 Sup. Ct. 643, 61 L. Ed. 1153.

Hence, as the decision of the Court of Appeals as to the effect of the writs of habeas corpus was broad enough to maintain the judgment, independently of its decision as to the constitutional question, the writ of error is

Dismissed.

(261 U. S. 571)

WATKINS et al. v. SEDBERRY et al.

(Argued Jan. 19, 1923. Decided April 9, 1923.)

No. 248.

1. Bankruptcy $\hookrightarrow$ 482(1)—Attorney's fees held subject to court's approval.

Under Bankruptcy Act, § 62a (Comp. St. § 9646), the amount of an attorney's fee to be charged against the estate as an expense of administration is subject to the examination and approval of the court.

2. Bankruptcy $\hookrightarrow$ 272—Contract for attorney's fee held invalid.

Contract with bankruptcy trustee by attorney to sue to recover property belonging to the bankrupt, any property recovered to be first charged with expenses, and the balance to be equally divided between the trustee and the attorney, made without notice to creditors, and on an order of the referee authorizing the trustee to contract with the attorney "on a contingent basis," but not disclosing the proportion of the property to be given the attorney for services, held invalid.

3. Champerty and maintenance $\hookrightarrow$ 5(3, 8)—Contingent contract with attorney held champertous.

A bankruptcy trustee's contract with an attorney, whereby the latter was to sue to recover property belonging to the bankrupt, indemnifying the trustee against damages and expenses, the proceeds, after deducting expenses, to be divided equally, was champertous; but that fact did not defeat the attorney's right to a fair and reasonable compensation, where he rendered valuable services in such employment.

4. Bankruptcy $\hookrightarrow$ 474—Attorney's fees held payable out of estate.

Where decree in suit brought to recover property of a voluntary bankrupt standing in the name of his wife as trustee adjudged that the real title of the land and personal property thereon was and had been in the bankrupt from the date of the nominal transfer thereof to the wife as trustee, and that on his bankruptcy it vested in the trustee, the suit must be deemed to have been brought under Bankruptcy Act, § 70a, cls. 4, 5 (Comp. St. § 9654), notwith-

standing allegations in the complaint suitable in an action by creditors to set aside a fraudulent conveyance, under Shannon's Code Tenn. §§ 6097, 6099, so that attorney's fees and expenses in such suit were payable as part of the expenses of administration of the bankrupt estate before return of the surplus to the bankrupt, and were not payable out of the debts; that is, were not to be borne by the creditors.

5. Bankruptcy $\hookrightarrow$ 482(2)—Fee of \$7,500 for successful suit to recover property not excessive.

Where attorney successfully sued to recover property of a voluntary bankrupt sufficient to pay in full all debts, amounting, including attorney's fee and expenses, to \$29,000, held, that an allowance of \$7,500 to the attorney for such services was not excessive.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

In the matter of the bankruptcy of J. H. Sedberry; Thomas G. Watkins, trustee. An order concerning attorney's fees was modified (275 Fed. 894), and the trustee and others bring certiorari. Decree of Circuit Court of Appeals reversed, and that of the District Court affirmed.

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*Messrs. C. C. Calhoun, of Washington, D. C., and Clarence T. Boyd, of Nashville, Tenn., for petitioners.

Mr. Norman Farrell, of Nashville, Tenn., for respondents.

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*Mr. Justice BUTLER delivered the opinion of the Court.

This case involves fees and expenses of an attorney for a trustee in bankruptcy. Claims therefor are made on a written contract between the trustee and the attorney, Jordan Stokes, Jr.¹ The amount claimed for fees is about \$49,000² and for expenses \$1,127.28. The debts, existing at the time of the filing of the petition in bankruptcy and since proved and allowed, amount to \$21,000 with interest. The services were rendered in the prosecution of a suit brought by the trustee in the state chancery court against the respondents, the bankrupt and his family, to recover a farm and personal property thereon. The suit was successful, and the value of the property is \$99,743.01. After the recovery of that judgment, the respondents pe-

¹ The attorneys interested are the petitioners, Jordan Stokes, Jr., Joseph R. West, and R. H. Crockett. The contract of employment was between the trustee and Stokes. As authorized by the contract, Stokes employed West and Crockett as assistants. There is no matter here in dispute between the attorneys. The word "attorney" is used in the opinion to include all the petitioners, other than Watkins, the trustee.

² All figures stated in the opinion are approximate and intended only to identify the sum involved, not to fix it.

tioned in the bankruptcy case for an order, fixing the amount of indebtedness of the bankrupt, as finally allowed, and the expenses of administration, including a reasonable fee for the attorney of the trustee, to the end that all debts and expenses might be fully paid out of money raised by mortgage of the land so recovered, and that the bankruptcy proceedings be dismissed. After hearing the referee decided that the trustee had no authority to contract in advance for the amount to be paid for legal services, and that the attorney be allowed a fee of \$10,000 and \$750 for expenses, and that both items be paid out of the property so recovered. The

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petitioners nad re*spondents both petitioned for review. The District Court held that the contract was invalid; allowed a fee of \$7,500 and \$750 expenses, and directed that these sums be paid as a part of the expenses of administration of the bankrupt estate before return of surplus to respondents. Both sides petitioned to revise and also appealed to the Circuit Court of Appeals. That court (275 Fed. 894) dismissed the appeals and dealt only with the petitions to revise. It held that the attorney's fee should be paid out of the debts—i. e., should be borne by the creditors—and not out of the surplus remaining after the payment of debts in full. The award of the District Judge of \$7,500 attorney's fees was vacated, on the ground that the amount of the recovery in the chancery court, which was deemed a material element to be considered in fixing the fee, was in the lower court erroneously taken to be \$29,000, instead of \$21,500, and the District Judge was left at liberty to use his discretion in again fixing the amount, "with due regard to the modified character of the recovery, and the change of the source from which payment must be made."

[1, 2] The validity of the contract between the trustee and attorney is first to be considered. The bankrupt filed a voluntary petition in bankruptcy August 24, 1917. He scheduled unsecured debts amounting to \$18,260. Many years before any of these debts were contracted, he purchased a farm and caused the deed to be made to his wife as "trustee" for the use and benefit of herself, her husband and their children; on the advice of counsel, he did not schedule it; and he did not schedule any property applicable to the payment of such debts. The trustee made a preliminary investigation and caused the bankrupt and his family to be examined. The attorney, Mr. Stokes, who had for collection two of the largest claims against the bankrupt, acted for the trustee in these matters. On October 24, 1917, the trustee and attorney made the contract; the attorney agreed to institute such suits as

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might *be necessary and proceed generally to

recover property that he might be able to locate belonging to the bankrupt; he agreed to bear the necessary expenses and to indemnify the trustee against all damages and expenses growing out of his employment; it was provided that any property recovered should be first chargeable with the amounts that the attorney expended in prosecuting the claims and that the balance should be divided equally between the trustee and the attorney. The contract was made without notice to or the authority of the creditors, and without the knowledge of the respondents. On the same day, the trustee presented a petition to the referee, showing that the bankrupt scheduled no property and that none had come to the trustee; that after investigation he believed that a large amount might be recovered for the creditors, and that the attorney was willing to bear all expenses and undertake the matter. The referee made an order authorizing the trustee to enter into a contract of employment with the attorney "on a contingent basis," and providing that the attorney should be personally responsible for and pay all expenses incurred in the prosecution of any suits. Neither the petition nor the order disclosed what proportion of the property was agreed to be given to the attorney for his services. The probable value of the property proposed to be recovered was not shown. The amount or kind of professional services required could not be known in advance. The amount of attorney's fees to be charged against the estate as an expense of administration is subject to the examination and approval of the court. Section 62a, Bankruptcy Act (Comp. St. § 9646); *In re Stotts* (D. C.) 93 Fed. 438, 439; *W. J. Davidson v. Friedman*, 140 Fed. 853, 72 C. C. A. 553; *Page v. Rogers*, 149 Fed. 194, 195, 79 C. C. A. 153. The trustee was not authorized so to dispose of property of the estate. The amount claimed under the contract is grossly excessive. The contract is invalid.

The attorney claims compensation on quantum meruit, if recovery under the contract is

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denied. The respondents *contend that the contract is champertous and that the attorney is not entitled to any compensation.

[3] The essential provisions of the contract have been stated. There is no ground for the claim that the attorney had an interest in the proposed litigation that would make it proper for him to pay the expenses of the suit and indemnify the trustee. It is true, as contended by the petitioners, that the severity of the old rule of the English common law against champerty, regarding it as an offense *malum in se*, has been somewhat relaxed. *Burnes v. Scott*, 117 U. S. 582, 589, 6 Sup. Ct. 865, 29 L. Ed. 991; *Roberts v. Cooper*, 20 How. 467, 484, 15 L. Ed. 969; *Byrne*

v. Kansas City, etc., Railroad (C. C.) 55 Fed. 44, 47; Courtright v. Burnes (C. C.) 13 Fed. 317, 320.

No statute of Tennessee authorizes such a contract. Chapter 66, Acts of 1821 (Shannon's Code, §§ 3171-3184), denounced champerty and required the dismissal of suits, whenever it was made to appear they were prosecuted pursuant to champertous arrangements. Heaton v. Dennis, 103 Tenn. 155, 160, 52 S. W. 175; Robertson v. Cayard, 111 Tenn. 356, 367, 77 S. W. 1056; Staub v. Sewanee Coal Co., 140 Tenn. 505, 508, 205 S. W. 320. By chapter 173, Acts of 1899, this requirement was eliminated; but no decision of the Supreme Court of that state has been called to our attention which would sustain this contract. It is champertous under the rule generally prevailing in this country. Peck v. Heurich, 167 U. S. 624, 630, 17 Sup. Ct. 927, 42 L. Ed. 302, and cases there cited; Jones v. Pettingill, 245 Fed. 269, 275, 157 C. C. A. 461; Casserleigh v. Wood, 119 Fed. 308, 312-315, 56 C. C. A. 212; Stearns v. Felker, 28 Wis. 594, 596; Butler v. Legro, 62 N. H. 350, 13 Am. St. Rep. 573; Huber v. Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; Moreland v. Devenney, 72 Kan. 471, 83 Pac. 1097.

As to the attorney's right to compensation on quantum meruit: It was the duty of the trustee to employ counsel to bring suit to recover the property belonging to the bankrupt. The fact that the contract between him and his attorney was champertous, even if its terms had been known, could not have

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been interposed by respondents to *defeat the trustee's suit. Burnes v. Scott, supra; Staub v. Sewanee Coal Co., supra, 140 Tenn. 509, 205 S. W. 320; Robertson v. Cayard, supra, 111 Tenn. 365, 77 S. W. 1056; Boone v. Chiles, 10 Pet. 177, 219, 9 L. Ed. 388. They should have handed over the property to the trustee without suit because, as it was adjudged in that case, the bankrupt was the real owner. After judgment went against them in the chancery court, they petitioned the bankruptcy court to fix a reasonable fee for the trustee's attorney. They did not then know of the existence of the contract, and, while they may successfully oppose payment of the amount therein provided for, they have no standing now to object to a reasonable fee. The attorney rendered valuable services in the prosecution of a proper and legitimate suit. Through his efforts there was recovered more than enough to pay expenses and debts in full. The trustee joins the attorney in asking that a reasonable fee be allowed. The making of the contract was not malum in se. The attorney's right to fair and reasonable compensation is not forfeited. Brush v. City of Carbondale, 229 Ill. 144, 152, 82 N. E. 252, 11 Am. Cas. 121; Stearns v. Felker, 28 Wis. 594, 597; In re Snyder, 190 N.

Y. 66, 75, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441; Gammons v. Johnson, 69 Minn. 488, 72 N. W. 563; Rust v. Larue, 4 Litt. (Ky.) 412, 428, 14 Am. Dec. 172; Elliott v. McClelland, 17 Ala. 206, 209; Holloway v. Lowe, 1 Ala. 246, 248.

The respondents cite cases which hold that champerty defeats the attorney's right to recover on quantum meruit,³ but we think that they are not applicable to the facts of this case hereinbefore stated.

[4] The District Court held that the attorney's fee should be paid out of the surplus as an expense of administration. It was decided that the suit was not brought under or to enforce the right conferred by the Tennes-

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see statutes (Shannon's Code, §§ 6097, 6099),⁴ but was prosecuted under the provisions of section 70 of the Bankruptcy Act, and especially under subsection a (4)⁵ and (5) being Comp. St. § 9654, and that under these provisions the trustee was entitled to recover the entire property for the purpose of administration in the bankruptcy court as general assets of the estate, citing Globe Bank v. Martin, 236 U. S. 288, 304, 35 Sup. Ct. 377, 59 L. Ed. 583; Bunch v. Smith, 116 Tenn. 201, 216, 93 S. W. 80. The Circuit Court of Appeals held that the payment should be made out of the amount of debts, and thus be borne by the creditors. Its decision went upon the ground that under the laws of Tennessee (Shannon's Code, §§ 6097, 6099) where a conveyance is set aside as fraudulent to creditors, counsel fees must be paid out of the debts recovered and cannot be charged against the surplus; that the suit was brought under sections 67e⁶

*Roller v. Murray, 112 Va. 780, 72 S. E. 665, 38 L. R. A. (N. S.) 1202, Ann. Cas. 1913B, 1088; Moreland v. Devenney, supra; Butler v. Legro, supra; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779; Taylor v. Perkins, 171 Mo. App. 246, 157 S. W. 122.

*6097.—"Any creditor, without first having obtained a judgment at law, may file his bill in chancery for himself, or for himself and other creditors, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering and delaying creditors, and subject the property, by sale or otherwise, to the satisfaction of the debt." (1851-52, c. 365, § 10.)

6099.—"If the bill is filed by one creditor for himself and others, the other creditors may make themselves parties at any time before final decree, by petition, agreeing to join in the bonds required in the case, and giving bond, with good security, to the original complainant, and in a sufficient penalty, to pay their proportional part of the recovery on such bonds." (Id.)

*"70. Title to Property. The trustee . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt . . . to all . . . (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. . . ."

*Section 67e confers upon state courts jurisdiction of suits by the trustee in bankruptcy to recover property fraudulently conveyed by the bankrupt

and 70e of the Bankruptcy Act (Comp. St.

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§§ 9651, 9654), *conferring upon the trustee the rights of creditors under the state statute, and that where a bankrupt fraudulently conveys property more than four months before bankruptcy, the attorney's fee must be paid out of the debts recovered, and cannot be charged against the surplus, and held the recovery of the trustee in the chancery court so limited.

That ruling cannot be sustained. The final decree in the suit in the chancery court adjudged and determined that the real title to the land and personal property thereon was and had been in the bankrupt from January 1, 1902, and that upon his bankruptcy it vested in the trustee. It is urged that the decree should be read in the light of the purposes of the suit and the laws of Tennessee, and should be deemed to be a judgment only for the amount of the debts. The purposes of the suit are disclosed by the complaint which, among other things, alleged that on January 1, 1902, the bankrupt procured a conveyance of the farm to be made by one Zellner to the bankrupt's wife, "Z. C. Sedberry, Trustee"; that there is a provision in the deed to the effect that she was to hold the land for the use and benefit of herself, her husband and their children; that she did not pay any part of the purchase price; that the bankrupt at all times was the owner thereof; that the wife and children were made parties in order to remove all clouds from the title; and the complaint, among

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other things, prayed judgment *that the trustee be declared the owner of the property. At the time of the entry of judgment granting relief as prayed, it was stipulated that none of the parties would prosecute an appeal or seek any revision of it. The decree following the allegations and prayer vested in the trustee the property in question, and he holds it for the purposes of administration of the bankrupt estate. It is true that it was alleged that the bankrupt procured the farm to be conveyed on January 1, 1902, to his wife as trustee for the purpose of defrauding his existing and subsequent creditors, and that the complaint contains allegations that would be suitable in an action by

within four months prior to the filing of the petition.

Section 70e: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy . . . and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

creditors to set aside a fraudulent conveyance under the state statute, but these constitute no ground for cutting down the terms of the decree or for limiting the recovery to the amount of the debts, leaving the creditors to pay the attorney's fee for services made necessary by the respondent's failure to turn over to the trustee the property of the bankrupt. The value of the property affected by the decree being in excess of the amount required, the recovery must be deemed to be sufficient to pay all expenses, including a reasonable attorney's fee and the debts in full.

[5] The evidence is sufficient to support the allowance made in the District Court of \$7,500 as reasonable compensation for the services of the attorney for the trustee. The debts, plus the attorney's fee and expenses, amount to \$29,000, and, in fixing the attorney's fee, that amount is properly to be regarded as the recovery in the chancery suit.

The attorney claims \$1,127.28 for expenses. The referee held that the statement was not properly itemized, and allowed \$750 as a lump sum and gave him opportunity, if unwilling to accept that amount, to furnish a statement properly setting forth the claim in detail. No further statement of the claim

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was made. The attorney *failed to establish his right to any greater sum on account of expenses.

The decree of the Circuit Court of Appeals is reversed, and that of the District Court affirmed.

(261 U. S. 893)

HALLANAN, State Tax Com'r, et al. v. EUREKA PIPE LINE CO. (two cases).

(Submitted on Motion to Dismiss or Affirm March 12, 1923. Decided April 9, 1923.)

Nos. 569 and 885.

Courts ⇐400—Mandate held to permit state court to determine entire act was unconstitutional.

Where the United States Supreme Court, after stating it was admitted that the state tax might be levied in respect to oil transported intrastate, held a tax was invalid as to oil transported interstate, it did not thereby determine that the state statute was valid as to the intrastate transportation, so as to preclude the state Supreme Court, on receipt of the mandate, from determining that the invalidity as to interstate transportation invalidated the entire act.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia.

In Error to the Supreme Court of Appeals of West Virginia.

Suit by the Eureka Pipe Line Company against Walter S. Hallanan, State Tax Com-

missioner of West Virginia, and another. Judgment by the Supreme Court of Appeals of the state, affirming a judgment below on remand from the United States Supreme Court, and defendants bring error and petition for certiorari. Application for writ of certiorari denied, and writ of error dismissed.

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*Messrs. S. B. Avis, Fred O. Blue, Wm. G. Mathews, and E. T. England, all of Charleston, W. Va., for plaintiffs in error.

Messrs. Frank L. Crawford, of New York City, and James M. Beck, of Washington, D. C., for defendant in error.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is an effort by writ of error, and if that is inappropriate for the purpose, by an application for a writ of certiorari, to review the action of the Supreme Court of Appeals of West Virginia in the judgment which it entered in avowed and attempted compliance with the judgment of this court in the case on writ of error sub nomine Eureka Pipe Line Co. v. Hallanan et al., 257 U. S. 265, 42 Sup. Ct. 101, 66 L. Ed. 227. It is contended by the state authorities seeking review here that the Supreme Court of Appeals did not enter the judgment required by our mandate and that we should in some appropriate way direct that court specifically what judgment it should enter.

A summary of the litigation must needs be made in order that the controversy may be understood and decided.

The pipe line company filed a bill against the state tax commissioner and other state authorities to enjoin them from enforcing a statute of the state which forbade any one to engage in the business of transporting petroleum in pipe lines without the payment of a tax of two cents for each barrel of oil transported. The pipe line company owned a system of pipe lines by which it transported 22,000,000 of barrels in the year ending June 30,

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*1919. Of this, it was admitted that 1,239,000 barrels had their origin in West Virginia and their destination there, and that the privilege of transporting that amount might be taxed; but it was insisted that the remainder was a stream of interstate commerce, the privilege of conducting which could not be taxed under the commerce clause of the federal Constitution. The circuit court, in which the bill was filed and the causes heard, held that the remainder was interstate commerce and no privilege tax could be imposed on a pipe line company engaging in it. It conceded that it would be competent for the Legislature to collect a privilege tax for the purely intrastate transportation of the 1,239,000 barrels already mentioned, but it inquired whether the state had done this by the act in question, and said:

"If it can be contended that the tax affects this particular oil it is only incidental to the

like tax imposed upon the whole body of oil transported. It is plain the Legislature did not mean to distinguish as between the two classes of oil, for the act makes no attempt at a division. We are not able to say from an inspection of the act whether or not the Legislature would have imposed the tax upon the privilege of handling this intrastate oil alone, had it been exempting the balance of the oil when framing the law, as we think it should have done. Whether it would have made the tax applicable to the West Virginia oil alone, no one can say; and this we understand to be the test of whether or not the act is divisible. *Eckhart v. State*, 5 W. Va. 515; *Robertson v. Preston*, 97 Va. 296, 33 S. E. 618; *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786."

Accordingly the circuit court held the whole act bad and granted an injunction against enforcing it against the pipe line "in any respect."

On appeal the Supreme Court of Appeals held that the act was to be construed as applying to pipe lines only so far as they were

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engaged in intrastate commerce and that *it did not apply to transport of oil in interstate commerce. It held, however, that oil originating in West Virginia, a large part of which was ultimately carried out of the state, but the destination of which was undetermined, because its owners might withdraw it from the line at any point within the state, was intrastate commerce and was a proper basis for the privilege tax under the law. Accordingly, in so far as the decree of the circuit court enjoined collection of a privilege tax measured by intrastate commerce in oil as thus determined, it was reversed. In this court it was held that oil produced in West Virginia and constituting in fact a stream of oil flowing out of the state was interstate commerce, even though those who delivered the oil to the company for transportation might have diverted it from the interstate commerce stream, and though in comparatively small quantities some oil was thus diverted.

Accordingly the decree of the Supreme Court of Appeals was reversed, and the cause was remanded to that court for further proceedings not inconsistent with the opinion of this court. That court then entered the following decree entitled in the cause:

"Upon an appeal from a decree of the circuit court of Kanawha county pronounced on the 8th day of September, 1920.

"The court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered, and decreed that the decree of the circuit court of Kanawha county, pronounced in this cause on the 8th day of September, 1920, be and the same is hereby affirmed."

It is now objected by the representatives of the state that this action of the Supreme

Court of Appeals was not in accord with the mandate because it was inconsistent *with the opinion of this court. In the course of that opinion, in stating the facts, it was said (257 U. S. 270, 42 Sup. Ct. 102 [66 L. Ed. 227]):

"But all the oil of the same grade was mixed, regardless of source, and of the Pennsylvania grade only 1,239,099.55 barrels were used in West Virginia. It is admitted that the tax may be levied in respect of the last item, but the question before us is whether the tax can be laid upon the whole product of the state upon which was imposed the gathering charge."

It is said that this language imposed the duty upon the Supreme Court of Appeals of so shaping its decree under our mandate as to enable the state to collect a privilege tax from the pipe line company upon the number of barrels above mentioned. We cannot agree with this. The statement quoted from the opinion was part of a review of the facts and a classification of the oil according to its interstate and intrastate character. Both the West Virginia courts and the counsel for both parties agreed that this amount of oil was intrastate commerce and subject to such a privilege tax. But the language quoted was not used to indicate the form of the decree to be entered below. This court gave no consideration to the question whether the invalidity of part of the tax rendered the whole law void because indivisible, as the circuit court had held it to be. That was peculiarly a state question, and when we reversed the case for the reason that oil in transport which the Supreme Court of Appeals held to be intrastate, and so taxable was interstate and immune, and remanded the case for further proceedings, it was entirely within the power and duty of that court to decide what under the state law would be the effect of the invalidity of part of the tax levied by the law as adjudged by this court upon the validity of the whole tax law. The Supreme Court of Appeals evidently reached the conclusion that the circuit court had been right in deciding that, if so much of the tax was

invalid, it could *not infer that the Legislature would have enacted the law at all. Accordingly it affirmed the decree of that court, as it had full power to do.

The application for the writ of certiorari is denied, and the writ of error is dismissed.

(261 U. S. 398)

HALLANAN, State Tax Com'r, et al. v. UNITED FUEL GAS CO. (two cases).

(Decided April 9, 1923.)

Nos. 570 and 886.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia.

In Error to the Supreme Court of Appeals of the State of West Virginia.

Action by the United Fuel Gas Company against Walter S. Hallanan, State Tax Commissioner, and another. Judgment by the Supreme Court of Appeals of the state, affirming a judgment below on remand from the United States Supreme Court and defendants bring error and petition for certiorari. Application for writ of certiorari denied, and writ of error dismissed.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a case like that of Hallanan v. Eureka Pipe Line Co., 261 U. S. 393, 43 Sup. Ct. 414, 67 L. Ed. —, just decided, involving the

question *whether the Supreme Court of Appeals of West Virginia has complied with the mandate of this court issued on a judgment entered in the case of United Fuel Gas Co. v. Hallanan (decided December 12, 1921) 257 U. S. 277, 42 Sup. Ct. 105, 66 L. Ed. 234. It is in all respects similar to that in Eureka Pipe Line Co. Case and requires the same judgment.

The petition for the writ of certiorari is denied, and the writ of error is dismissed.

(261 U. S. 446)

PAGE CO. v. MACDONALD.

(Argued March 13, 1923. Decided April 9, 1923.)

No. 308.

1. Process $\S$ 119—Cannot be served on person without jurisdiction to testify in state court.

A federal court in a state is not foreign and antagonistic to a court of the state, within the principle that immunity from service of process cannot be claimed and sustained while in attendance to testify in a foreign court, so that a suitor appearing to testify in the state court cannot be served with process issued from the federal court.

2. Process $\S$ 119—Exemption of suitors from services privilege of the court.

The exemption of suitors from service of process in another action while attending to testify in a pending action is a privilege of the court in which the action is pending, not of the suitor.

3. Process $\S$ 119—Case against defendant cannot be assumed to deny immunity from service.

Immunity from service of process while attending to testify in a state court cannot be denied, on the ground that defendant had libeled plaintiff by pleadings filed in the state court, since it cannot be assumed, in order to deny her immunity, that plaintiff's cause of action against her is true.

In Error to the District Court of the United States for the District of Massachusetts.

Action for libel by the Page Company against Lucy Maud Montgomery Macdonald. From a judgment abating the action on defendant's plea in abatement, plaintiff brings error. Affirmed.

Mr. Asa P. French, of Boston, Mass., for plaintiff in error.

Mr. Weld A. Rollins, of Boston, Mass., for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

The Page Company brought suit in the District Court of the United States for the District of Massachusetts against the defendant in error for libel, constituted, it was alleged, by allegations in a certain bill of complaint which was filed by her against that company in a superior court of Massachusetts.

A question of jurisdiction in the sense of immunity from process is presented. Plain-

^{*447} tiff in error is a Massa^{*}chusetts corporation; defendant in error, a resident and citizen of Leaksdale, Ontario, Canada.

The Page Company brought this suit against defendant in error, alleging her suit against it, the Page Company, was a deliberate and malicious libel; its statements having been made "with full information and knowledge that they were false," and for the purpose of injuring the company's reputation. Damages were prayed.

The facts are stipulated and are condensed by the District Court as follows:

"The facts on which this plea is grounded are not in dispute: Mrs. Macdonald brought a suit in equity against the Page Company in the state court. The Page Company, claiming that certain statements made by her in the bill were libelous and actionable, brought the present action at law against Mrs. Macdonald in this court; and service was made upon her while she was in the district 'in attendance before a special master appointed by the superior court to hear the parties and their evidence' * * * in the other case. She has pleaded in abatement of this action that she was immune from service while within the district for the purpose stated."

The court decided "that the plea in abatement is good and that the action must be abated"—citing *Stewart v. Ramsay*, 242 U. S. 128, 37 Sup. Ct. 44, 61 L. Ed. 192; *Larned v. Griffin* (C. C.) 12 Fed. 590; *Diamond v. Earle*, 217 Mass. 499, 105 N. E. 363, 51 L. R. A. (N. S.) 1178, Ann. Cas. 1915D, 984.

[1] The Page Company, contesting the ruling and the application of the cases cited to sustain it, contends that immunity cannot be claimed and sustained from the judicial process of a different sovereignty.

In *Diamond v. Earle* and *Stewart v. Ramsay*, it is said both courts were exercising jurisdiction conferred by the same sovereignty. It is, necessarily, a condition of the contention, that the federal court in Massachusetts is a foreign court within the principle.

We are unable to concur. A federal court in a state is not foreign and antagonistic to

^{*448} a court of the state *within the principle and, therefore, as said in *Stewart v. Ramsay*, supra:

"Suitors as well as witnesses, coming from another state or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going."

And we can add nothing to what is said in support of the rule. "It is founded," it is said, "in the necessities of the judicial administration," and the courts, federal and state, have equal interest in those necessities. They are both instruments of judicial administration within the same territory, available to suitors, fully available, neither they nor their witnesses subject to be embarrassed or vexed while attending, the one "for the protection of his rights"; the others "while attending to testify."

The next contention of the Page Company is that defendant in error "forfeited her right to claim and obtain immunity from the service here questioned by using the state court as a medium for the publication of a deliberate and malicious libel concerning this plaintiff [the Page Company] as to matters not material to any issue raised by the bill in her suit against this plaintiff, to testify in which she came to Massachusetts." It must be assumed, is the further contention, to be a libel, "a continuing tort, potentially and actually working injury to the plaintiff down to and at the moment of the service upon defendant of the process in this suit."

[2, 3] The contention has strength upon first impression which disappears upon reflection of the purpose of the principle and the necessity of its inflexibility. The service of process is upon the individual but the exemption from its requirement is something more than a privilege to him. It is "the privilege of the court," we have seen, rather than his. "It is founded in the necessities of the judicial administration." Besides, it cannot be assumed as plaintiff in error does, that the pleading in her suit against plaintiff in error

^{*449} was false and a tort, and on that *assumption deny her the immunity to which she is entitled. The truth or falsity of the pleadings is not to be assumed; it is to be established.

Judgment affirmed.

(261 U. S. 479)

**GREAT LAKES DREDGE & DOCK CO.
v. KIEREJEWSKI.**

(Argued Feb. 27, 1923. Decided April 9, 1923.)

No. 633.

Admiralty ⚓—**Held to have jurisdiction when one repairing scow in navigable waters drowned as result of operation of tug.**

Where one engaged in repairing a scow moored in navigable waters and working on scaffolding resting on a float alongside was drowned when one of his employer's tugs negligently agitated the waters and swamped the float, the rights and liabilities of the parties were governed by the rules of the maritime law, supplemented by the local death statute, and a court of admiralty had jurisdiction.

In Error to the District Court of the United States for the Western District of New York.

Libel in admiralty by Sophia Kierejewski, as administratrix of Leo Kierejewski, deceased, against the Great Lakes Dredge & Dock Company. The District Court entertained jurisdiction (280 Fed. 125), and defendant brings error. Affirmed.

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*Mr. Geo. Clinton, Jr., of Buffalo, N. Y., for plaintiff in error.

Mr. Irving W. Cole, of Buffalo, N. Y., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The sole question propounded upon this direct writ of error is whether the District Court rightly held that it had jurisdiction to entertain the libel by which defendant in error sought to recover damages for the death of her husband. 280 Fed. 125.

Plaintiff in error, a corporation engaged in dredging, pile driving, etc., maintains a yard at Buffalo, N. Y., and also keeps there scows and tugs. Leo Kierejewski, a master boiler maker, was employed by it to perform services as called upon. Acting under this employment, he began to make repairs upon a scow moored in the navigable waters of Buffalo river. He stood upon a scaffold resting upon a float alongside. One of the company's tugs came near, negligently agitated the water, swamped the float, and precipitated him into the stream where he drowned.

While performing maritime service to a completed vessel afloat, he came to his death upon navigable waters as the result of a tort there committed. The rules of the maritime law, supplemented by the local death statute, applied and fixed the rights and liabilities of the parties. *Western Fuel Co. v. Garcia*, 257 U. S. 233, 42 Sup. Ct. 89, 66 L. Ed. 210.

"The general doctrine that in contract matters admiralty jurisdiction depends upon the

nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 476, 42 Sup. Ct. 157, 158 (66 L. Ed. 321).

In the cause last cited neither Rohde's general employment nor his activities had any direct relation to navigation or commerce—the matter was purely local—and we were of opinion that application of the state statute, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity.

Here the circumstances are very different. Not only was the tort committed and effective on navigable waters, but the rights and liabilities of the parties are matters which have direct relation to navigation and commerce. *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 42 Sup. Ct. 475, 66 L. Ed. 927; *State Industrial Commission of New York v. Nordenholt Corporation*, 259 U. S. 263, 42 Sup. Ct. 473, 66 L. Ed. 933.

Affirmed.

(261 U. S. 449)

**PHIPPS, Director of Department of Commerce of Ohio, v. CLEVELAND REFINING CO.
OF CLEVELAND, OHIO.**

(Argued March 15, 1923. Decided April 9, 1923.)

No. 324.

Commerce ⚓—**Fees for inspection held to exceed cost, so as to burden interstate commerce.**

In a suit to enjoin the enforcement of Act Ohio May 19, 1915 (105 Ohio Laws, 309), providing for the inspection of petroleum and products thereof, which permitted the charging of fees for the inspection which produced a revenue largely in excess of the cost of inspection, evidence held to sustain the District Court's finding that the fees for inspection of interstate commerce could not be separated from the fees for intrastate commerce, and were so excessive as to burden interstate commerce, contrary to Const. art. 1, § 8, giving Congress power to regulate interstate commerce.

Appeal from the District Court of the United States for the Southern District of Ohio.

Suit by the Cleveland Refining Company of Cleveland, Ohio, against W. H. Phipps, individually and as Director of the Department of Commerce of the State of Ohio, to restrain the enforcement of a state statute. From an order granting a temporary injunction.

tion against defendant as Director (277 Fed. 463), defendant appeals. Affirmed.

Messrs. Wm. J. Meyer and John G. Price, both of Columbus, Ohio, and Ray Martin, of Newark, Ohio, for appellant.

Messrs. Charles D. Chamberlin and H. B. Fuller, both of Cleveland, Ohio, for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

The Cleveland Company is a dealer in petroleum products, and brought this suit to restrain the execution of an act passed by the

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General Assembly of Ohio May 19, *1915, entitled "An act to provide for the inspection of petroleum, illuminating oils, gasoline, and naphtha, and to repeal sections 844 to 868, inclusive, of the General Code" (Ohio Laws, vol. 105, p. 309).

The case presented by the bill is as follows: The company is engaged in business in East Cleveland and has the necessary instrumentalities for carrying on its business (the bill enumerates them). It buys its products in other states, ships them into Ohio, and receives at its place of business large quantities of them. It has contracts for them which it is bound to consummate, and which it cannot perform without great loss, except through its established business.

By the terms of the statute, oil intended for sale for illuminating purposes must be inspected in Ohio, and it designates the fees to be paid to the state inspector or his deputy, which are payable on demand and are made a lien upon the articles inspected; and there are provisions which safeguard the quality of the oil.

The quantities of petroleum products are increased year by year, and the revenue derived by the state will increase over and above the revenue derived in past years, if the enforcement of the act is permitted to continue, and the act is repugnant to article 1, section 10, clause 2, of the Constitution of the United States forbidding states from laying imposts without the consent of Congress upon interstate commerce, except such as may be absolutely necessary for the execution of inspection laws.

The act violates section 8, article 1, giving to Congress the power to regulate commerce, and also violates certain provisions of the Constitution of Ohio.

The District Court decided that "the act, except as to the amount of fees charged for inspection" was "in its essential details and even in nearly all of the language employed, a re-enactment of the law declared unconstitutional in *Castle v. Mason*, 91 Ohio St.

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296." Commenting ^{*451}on the latter case, the court said it found the earlier act did not differ materially from the law pronounced void in *Foote v. Maryland*, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698, and that also held

to be void in *Red "C" Oil Manufacturing Co. v. Board of Agriculture*, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. 240, and observed:

"The General Assembly, with at least constructive knowledge that, under the operations of the law, the excess of receipts over expenses was large and annually mounting, permitted the inspection charges to remain undisturbed, and in this respect its conduct has differed from" the conduct "of the Minnesota Legislature with reference to the act considered in *Pure Oil Company v. Minnesota*, 248 U. S. 158."

The conclusion of the court was upon further consideration of the facts pertinent to the purpose and quality of the act, that it was an interference with interstate commerce. The court said:

"The fees prescribed by the statute are beyond the cost of legitimate inspection to determine the quality of the articles inspected, and the act is therefore not only a police measure, but a revenue measure also. Such cost by necessary operation unduly burdens and obstructs the freedom of interstate commerce, and, as such commerce cannot be separated from the intrastate shipments, the whole tax is void."

The court was of opinion that the other questions discussed by counsel were not necessary to consider.

Phipps, as an individual, was dismissed from the case, except as director of the department of commerce. Against him as such a temporary injunction was ordered issue.

Appellant contests the conclusion of the court and condenses his assignments of error to the following propositions:

"(1) The state's cost of interstate inspection is greater than the fees charged therefor. (2) In practical administration, the comparative cost of interstate inspection is ascertainable as distinguished from the cost of intrastate inspection."

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*It is admitted that these conclusions depend upon an estimate of the evidence, and the District Court adjudged against them. The court found that the fees collected from July 1, 1915, to June 30, 1920, amounted to \$639,057.47; the disbursements to \$321,188.68. The court further found that:

"The collections when least were 63 per cent. greater than the inspection costs," and had "so advanced from year to year that the fees provided by the statute must be held to be unreasonable and disproportionate to the service rendered, and the act must be declared unconstitutional, as imposing a direct burden upon interstate commerce, unless interstate shipments under the provisions of the act are separable from intrastate shipments and the fees collected for the inspection of the former are equal or substantially equal to the cost of inspecting shipments of that character. The defendant's [appellant's] position is that the two classes of shipments are thus separable, and the interstate shipments have in fact been inspected at a loss to the state."

The position was held untenable by the court upon considerations and reasoning which we need not reproduce. It is enough to say we approve of them. It is contended by appellant that whatever defects may exist on the face of the act, may be and will be corrected in its administration, and whatever excess there may be in the fees collected will not be assigned to interstate commerce. There is quite a minute and detailed argument to show how this can be done. The District Court upon consideration in connection with the evidence rejected it, and we affirm its judgment.

Judgment affirmed.

(261 U. S. 486)

ROBINSON v. UNITED STATES.

(Argued March 16, 1923. Decided April 9, 1923.)

No. 335.

1. United States $\S$ 66—Provision for liquidated damages for each day's delay in performing contract not against public policy.

Under Act June 6, 1902, $\S$ 21 (Comp. St. $\S$ 6922), requiring insertion of a provision for liquidated damages a provision of a government contract for liquidated damages for each day's delay in completion of the work is not against public policy.

2. United States $\S$ 73—That part of delay caused by government held not to defeat right to damages for delay not so caused.

Under government contract providing that the contractor should be allowed one day additional for each day of delay caused by the government, that no claim for damages should be made for delay so caused, and that the contractor should pay \$420 for each day's delay not caused by the government, the fact that part of the delay was caused by the government did not relieve the contractor of liability for the stipulated damages for the part of the delay not so caused.

3. Courts $\S$ 389—Specific findings of Court of Claims held conclusive.

Specific findings of the Court of Claims as to how much of the delay in performance of a government contract was attributable to the fault of each party are conclusive.

4. United States $\S$ 73—Contractor not relieved of liability on guaranty of work because government ignored suggestion that material was not suited to the climate.

Where government contractor guaranteed the condition of the work for one year after acceptance, and there was no mutual mistake, fraud, misrepresentation, or concealment, it was not relieved from the obligation so assumed because its suggestion that wood called for by the specifications was not well suited to the climate and locality was disregarded by the government, at least where warping of the wood was not entirely caused by its unsuitability.

Appeal from Court of Claims.

Suit by Roy H. Robinson, administrator of John C. Robinson, deceased, against the United States. From a judgment for claimant (57 Ct. Cl. 7) for an insufficient amount, he appeals. Affirmed.

Messrs. Charles H. Merillat and Charles J. Kappler, both of Washington, D. C., for appellant.

Mr. Blackburn Esterline, of Washington, D. C., for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

On August 30, 1905, claimant's intestate entered into a contract with the United

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States to install the interior finish in the custom house building then being constructed in New York City pursuant to Act of March 2, 1899, c. 337, 30 Stat. 969. The contract price was \$1,037,281.69, and the time for completion of the work, October 15, 1906. Before it had been completed, but after that date, a supplemental agreement was made, which provided for additional work, increased the contract price \$200,041.01, and extended the time for completion to June 1, 1907. The work was not completed until 121 days after that date. The government insisted that only 12 days of this delay were chargeable to it, and that the contractor was liable in liquidated damages for \$420 for each of the remaining 109 days' delay. It therefore deducted \$45,780 from the amount otherwise payable to the contractor.

To recover that sum (and others) the contractor brought this suit in the Court of Claims. He contended that, since the government had caused some of the delay, the provision for liquidated damages became wholly inapplicable and was unenforceable, and that, since the government had failed to prove actual damage, it was not entitled to any damages whatsoever. The court found that, of the 121 days of delay, only 61 days were chargeable to the contractor, and that the remainder were caused by the government, after the date of the supplemental contract. It accordingly gave the claimant judgment (among other things) for \$20,160, being that part of the amount withheld which represented the delay in excess of 61 days. 57 Ct. Cl. 7. The case is here on claimant's appeal. Whether on these facts the provision for liquidated damages governs is the main question for decision.

The original contract provided that the contractor "shall be allowed one day, additional to the time herein stated, for each and every day of * * * delay [that may be caused by the government]," "that no claim

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shall be made or allowed to [the contractor] for any damages which may arise out of any delay caused by [the government]," and that

the contractor shall pay \$420 for each and every day's delay not caused by the United States. The supplemental contract provided that the extension then granted was in lieu of all additional time which had accrued to that date "on account of delays by the government." The construction of the contract and the findings of fact are clear. If the provision for liquidated damages is not to govern, it must be either because, as matter of public policy, courts will not, under the circumstances, give it effect (even as a defense) or, because in spite of the explicit finding, no day's delay can, as matter of law, be chargeable to the contractor, where the government has caused some delay. Neither position is tenable.

[1-3] The provision is not against public policy. The law required that some provision for liquidated damages be inserted. Act of June 6, 1902, c. 1036, § 21, 32 Stat. 310, 326 (Comp. St. § 6922). In construction contracts a provision giving liquidated damages for each day's delay is an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform, and courts give it effect in accordance with its terms. *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, 673, 674, 22 Sup. Ct. 240, 46 L. Ed. 366; *Wise v. United States*, 249 U. S. 361, 39 Sup. Ct. 303, 63 L. Ed. 647; *J. E. Hathaway & Co. v. United States*, 249 U. S. 460, 464, 39 Sup. Ct. 346, 63 L. Ed. 707. The fact that the government's action caused some of the delay presents no legal ground for denying it compensation for loss suffered wholly through the fault of the contractor. Since the contractor agreed to pay at a specified rate for each day's delay not caused by the government, it was clearly the intention that it should pay for some days' delay at that rate, even if it were relieved from paying for other days, because of the government's action. If it had appeared that the first 61 days' delay

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had been due wholly *to the contractor's fault, and the government had caused the last 60 days' delay, there could hardly be a contention that the provision for liquidated damages should not apply. Here the fault of the respective parties was not so clearly distributed in time, and it may have been difficult to determine, as a matter of fact, how much of the delay was attributable to each. But the Court of Claims has done so in this case. Its findings are specific and conclusive. Compare *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 121, 27 Sup. Ct. 450, 51 L. Ed. 731; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 163, 164, 36 Sup. Ct. 342, 60 L. Ed. 576. The case is wholly unlike *United States v. United Engineering Co.*, 234 U. S. 236, 34 Sup. Ct. 843, 58 L. Ed. 1294, upon which claimant relies. The question there was one of construction. The lower court found, as a fact that, but for

the government's action, the work would have been completed within the contract period, and this court construed the provision for liquidated damages as not applicable to such a case. Here the question is not properly one of construction.

[4] It is also assigned as error that the court sustained a deduction by the government from the contract price of the amount paid by it for certain repairs. The contract contained a guarantee by the contractor of the condition of the work for one year after acceptance. The specifications provided for window sashes of solid oak. After the contract had been signed, and before putting in the windows, the contractor called the architect's attention to the fact that solid oak is not well suited for a damp climate and locality, like that of lower New York City, and he suggested a modification of the specifications to avoid warping. The suggestion was not accepted. By reason, in part, of warping which occurred within a year after acceptance of the work, extensive repairs became necessary. He was requested by the government to make the repairs, but refused to do so. Then the government had them made by others. The Court of Claims found

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that, *owing partly to the fact that oak is not suitable to the climate and partly "to the further facts that the materials of some of the sash were not of the best quality, nor thoroughly seasoned, and that the workmanship in their construction and installation was in some instances not of first-class character, there occurred * * * much warping, * * * which required extensive repairs of an expensive character."

The contractor contends that the government's refusal to adopt the modification proposed relieved him from the obligation under the guarantee. The contention is unsound. He entered into a contract plain and comprehensive in terms. There was no finding of mutual mistake, or of fraud, misrepresentation, or concealment on the part of the government or any of its officers or employees. Under such circumstances, the contractor cannot be relieved from an obligation deliberately assumed. *Wells Brothers Co. v. United States*, 254 U. S. 83, 41 Sup. Ct. 34, 65 L. Ed. 148; *MacArthur Bros. Co. v. United States*, 258 U. S. 6, 42 Sup. Ct. 225, 66 L. Ed. 433. If the warping had been caused entirely by the adoption of wood unsuitable to the climate, it may be that, as a matter of construction, the guaranty would not extend thereto. But the findings do not present such a case. The case is wholly unlike *United States v. Spearin*, 248 U. S. 132, 39 Sup. Ct. 59, 63 L. Ed. 166; *United States v. Atlantic Dredging Co.*, 253 U. S. 1, 40 Sup. Ct. 423, 64 L. Ed. 735; *United States v. Smith*, 256 U. S. 11, 41 Sup. Ct. 413, 65 L. Ed. 808.

Affirmed.

(261 U. S. 387)

**LAYNE & BOWLER CORPORATION v.
WESTERN WELL WORKS,
Inc., et al.**

(Argued March 5, 1923. Decided April 9,
1923.)

No. 278.

**Courts 383(1)—Patent decisions in different
circuits held not to entitle patentee to cer-
tiorari.**

A writ of certiorari to review the decision of a Circuit Court of Appeals in an ordinary patent infringement suit will be granted where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals as to the validity or construction of a patent, and the writ will be dismissed as improvidently granted, where the opinions of the different Circuit Courts of Appeals all sustained the patent and gave it substantially the same construction, but differed as to whether it was infringed by the devices of the defendants in the respective suits.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

Suit for infringement of a patent by the Layne & Bowler Corporation against the Western Well Works, Inc., and others. Decree for complainant was reversed by the Circuit Court of Appeals (276 Fed. 465), and complainant brings certiorari. Writ of certiorari dismissed.

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*Messrs. Frederick S. Lyon, of Los Angeles, Cal., and William K. White, of San Francisco, Cal., for petitioner.

Mr. C. E. Townsend, of San Francisco, Cal., for respondents.

Mr. David P. Wolhaupter, of Washington, D. C. (Messrs. Charles C. Montgomery and Raymond Ives Blakeslee, both of Los Angeles, Cal., of counsel), amici curiæ.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is an ordinary patent case. There was no reason for granting the application for a writ of certiorari except upon the ground that the Circuit Courts of Appeals for the Fifth and the Ninth Circuits had differed in respect to the validity and scope of the patent and that uniformity required a decision from this court. The arguments and the briefs have aroused further inquiry in the minds of the court as to whether there was in fact any conflict between the decisions of the two Circuit Courts of Appeals, and whether the writ of certiorari was not improvidently granted.

The Layne patent, now owned by the Layne & Bowler Corporation, the petitioner, was for apparatus for drawing water from deep wells, driven or artesian, and especially for adjusting a pump in them. In such wells it is essential that the adjustment, the alignment and the lubrication should be effected from the top because the bore of the well is so small that the operator can not descend to

the pump. The Layne patent covered many

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*different devices for assembling the various parts at the top, so that they could be thrust down the well hole and be adjusted in place at the bottom, so that the shaft of the rotary pump should be held in proper alignment as it rotated, so that it should not be clogged with sand and water as the pumping went on, and so that the shaft and the bearings in which it moved placed at intervals from top to bottom should be lubricated. To effect these objects the inventor used a casing or cylinder surrounding the shaft, divided them both into sections, united one section to another by a sleeve or screw thread, and in these sections pushed the apparatus down the well hole. There was a bearing at each end of each section of the casing in which the shaft was to revolve. Layne assembled, with this shaft and casing, wedges and spiders to hold the two in place against the sides of the well hole. The rotary pump was held suspended in alignment by the weight of the casing and was closed from the casing by a packed bushing in which the shaft revolved and which prevented water and sand and other detritus from clogging the shaft and its bearings. The water from the pump was carried to the top by a separate pipe. The lubrication was effected by pouring the oil in at the top of the casing, and allowing it to leak through each bearing to the bottom of the casing whence it was drawn at intervals out of the casing by forcing air through an air vent at the top of the casing. The pump with the rotary shaft was old, the use of sections was old generally though it does not seem to have been applied in this particular field before, and the closed casing or cylinder surrounding the shaft was old. In a prior patent to Crannell for a pump in wells large enough to permit a man to go to the bottom, a rotary shaft with a cylindrical casing closed against the pump is shown.

In practice, Layne did not use packing and bushing, but relied on a long sleeve to keep

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water and sand out of the *casing. Nor did he ever use the wedges and spiders for alignment.

The three claims sued on in this case were Nos. 9, 13, and 20, as follows:

9. In a well mechanism, the combination with a pump casing of a rotary pump of a jointed pump shaft and a closed casing surrounding the pump shaft from the pump to the top of the well.

13. The combination with a pump and its actuating shaft of a sectional casing therefor, provided at each end of each section with a fixed block with bearings for the shaft, the casing being closed at the top and provided with an air vent.

20. The combination of a well casing, a rotary pump therein, and a line shaft for the pump entirely closed off from the water in the well.

In 1912, in an infringement suit the validity of this patent and of claim No. 13 was considered by the Circuit Court of Appeals of the Fifth Circuit and sustained. Infringement by defendant of that claim was found and a decree for damages entered. *El Campo Mach. Co. v. Layne*, 195 Fed. 83, 115 C. C. A. 115. The decision is a per curiam and there is no discussion and no description of the defendant's device in the report.

In 1914, the same Circuit Court of Appeals had to consider the patent again in *Van Ness v. Layne*, 213 Fed. 804, 130 C. C. A. 462. The claims relied on were the fourth, the ninth, the thirteenth, and the twentieth. The fourth was found not to be infringed, and as we are not concerned with it here, we can disregard it. The court found that Van Ness, the alleged infringer, did not use an air vent to force his oil out of the casing as we are informed by this opinion the infringer *El Campo* had done in the previous case. So it was held that Van Ness did not infringe claim No. 13. The court held that the jointed feature of the shaft made part of claim 9 added nothing to the novelty or patentability of the device and that claims No. 20 and No. 9 really covered the same ground. The court held, however, that the use of the entirely closed casing to exclude water and detritus from the shaft and its bearing, to secure lubrication of the bearings from the top and to align the bearings and shaft so as to prevent lateral displacement in the well and keep the shaft in a vertical position was a novelty and did supply a want in the field of deep pumps. As to infringement the court held that the casing of Van Ness' apparatus, although not so completely as the patented device, did keep the water and detritus from all the bearings but one on the shaft; that the lubrication was effected in practically the same way and, though this was very doubtful in the mind of the court, the alignment was preserved by the downward thrust of the suspended casing and bearings. Accordingly it was held that the twentieth claim was infringed.

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In *Getty v. Layne*, 262 Fed. 141, the same court considered the patent a third time. In its opinion, it said (page 143):

"The Layne patent too nearly resembles the Crannell patent to be called a pioneer patent, though it did accomplish a revolution in the well-drilling industry. Its merit was in adapting the Crannell type of pump to a narrow and deep well hole, in a way that has been held by us to exhibit novelty. While the substitution of mere mechanical equivalents for the means adopted by Layne could not avoid infringement of his patent, it is also true that the range of equivalents can not be enlarged upon the idea that his patent was a pioneer one in the pump art. Its advance over Crannell prevented Crannell from being considered by us an anticipation, and was enough to show novelty, but it stops there. The Layne patent must rest, not upon the idea of closure, which

would not be patentable apart from the method by which it was accomplished, but upon the means of its accomplishment, as disclosed by the specifications of his patent."

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"The court then held that alignment in the alleged infringement was secured by resting on the bottom of the well and not by suspension from the top and the downward thrust of the weight. It further held that Layne effected his lubrication by stagnant oil removed by forced air at intervals, whereas the alleged infringer had a circulatory system by which the oil after leaking through the bearings escaped from the bottom into the water around the pump, and that finally the closure of the casing against water and detritus was effected not by a bushing or packing but by the downward flow of the oil. This led to a dismissal of the bill.

The Circuit Court of Appeals of the Ninth Circuit in this case, instead of differing from that of the Fifth Circuit, seems, on a careful examination of the opinions and the infringing devices under consideration in the different cases, to have followed the opinions in the Fifth Circuit. It sustained the validity of the ninth, thirteenth, and twentieth claims. It do not greatly consider the thirteenth claim because it was as clearly not infringed by the respondent here, as it was not infringed by the Van Ness device in the Fifth Circuit case. The Ninth Circuit Court held, as the Fifth Circuit Court had held in the *Getty* Case, that the scope of the Layne patent claims was much restricted by the prior art and that a circulatory system of lubrication was not the same as a closed stagnant system. The entirely closed casing as an element of the twentieth claim furnishing a stagnant lubrication did not, therefore, find its equivalent in the casing of the respondent which was open at the bottom to permit a circulatory lubrication.

It is manifest from this review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the ninth, thirteenth, and twentieth claims, that they were really in harmony and not in conflict and that there was no ground for our allowing the writ of certiorari to add to an already burdened

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"docket. If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head.

Precedents for dismissing a writ of certiorari

orari improvidently granted are found in *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n*, 242 U. S. 430, 37 Sup. Ct. 141, 61 L. Ed. 409, and in *United States v. Rimer*, 220 U. S. 547, 31 Sup. Ct. 596, 55 L. Ed. 578.

Writ of certiorari dismissed.

(261 U. S. 453)

GARDNER v. CHICAGO TITLE & TRUST CO.

In re O'GARA COAL CO.

(Argued March 15, 1923. Decided April 9, 1923.)

No. 317.

1. Bankruptcy ⇨326—Trustee held entitled to set off deposit by him in bank becoming insolvent against its claim.

Where a trustee in bankruptcy, under Bankruptcy Act, § 61 (Comp. St. § 9645), deposited money in a bank which became insolvent, he was entitled to set off the deposit against the bank's claim against the bankrupt estate, where the bank received the deposit with notice that it was part of a fund appropriated to pay the bankrupt's debts, including its own.

2. Bankruptcy ⇨326—Insolvent bank's creditors held to have no greater rights than bank to oppose set-off.

Where a trustee in bankruptcy deposited money in a bank which became insolvent, and which had a claim against the bankrupt estate, the bank's creditors stood in no better position than the bank to oppose the trustee's claim to a set-off.

3. Bankruptcy ⇨326—Dividend may be withheld until sum due trustee from claimant has been paid.

Where a trustee in bankruptcy deposited money in a bank which had a secured claim against the estate and which subsequently became insolvent, the court, under Bankruptcy Act, § 57e (Comp. St. § 9641), may allow the bank's claim for the sum owing above the value of the security and withhold dividend until the bank's debt to the trustee has been paid.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

In the matter of the O'Gara Coal Company, bankrupt. An order of the District Court confirming an order of the referee granting the petition of Frank G. Gardner, for trustee, for set-off against the Chicago Title & Trust Company, as receiver of the La Salle Street Trust & Savings Bank was reversed by the Circuit Court of Appeals (278 Fed. 509), and the trustee brings certiorari. Reversed.

Arthur M. Cox, of Chicago, Ill., for petitioner.

H. T. Gilbert, of Chicago, Ill., for respondent.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This case arises in the matter of O'Gara Coal Company, bankrupt, upon a petition for a set-off presented by the trustee of the bankrupt estate. The respondent is the receiver of the La Salle Street Trust & Savings Bank. When the Coal Company became bankrupt in 1913, the Bank held its note for \$15,000, with security. Between November 11, 1913, and June 11, 1914, the trustees of the Coal Company in bankruptcy deposited in the Bank, an authorized depository, and were credited as such trustees with funds of their estate, which amounted to nearly \$20,000 on June 12, 1914, when the Bank suspended business, insolvent. A receiver was appointed by a State Court a few days later. The trustees of the Coal Company filed a claim for the amount of their deposit in 1916, and in 1916 and again in 1918 received dividends upon it. On the other side the receiver of the bank filed a proof of the bank's claim as unsecured in 1914 but amended it to proof of a

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secured claim in 1917. The petition before us seeks to set off the claim of the petitioner for the deposit in the Bank, less the dividends received, against the claim of the Bank upon the note. The Circuit Court of Appeals denied the set-off and ordered the petition to be dismissed. *Chicago Title & Trust Co. v. Gardner*, 278 Fed. 509.

[1, 2] We assume that when money is deposited in a designated bank under § 61 of the Bankruptcy Law of July 1, 1898, c. 541, 30 Stat. 562 (Comp. St. § 9645), it is deposited as other money is, and becomes the property of the bank, leaving the bank a debtor for the amount. But when this money was deposited with this Bank it seems that the Bank had notice that it was part of a fund appropriated to paying the Coal Company's debts, of which the note held by the Bank was one. We think that it would be inequitable to allow the Bank to proceed to diminish that fund without accounting for the portion that it had received. When the Bank accepted deposits from a fund against which it had a credit it must be taken to have known that it could not profit by the fact at the expense of other claimants. The Bank knew the whole situation. There is nothing to show that the Trustees of the Coal Company when they made their deposits knew that the Bank held the Coal Company's note. If they had known this fact it would be going far to say that they altered or could alter the position of their cestuis que trust for the worse. On the other hand the creditors of the Bank can stand no better than the Bank.

[3] The Bankruptcy Court may allow the Bank's claim for such sum only as may seem to the Court to be owing above the value of the security, § 57e (Comp. St. § 9641), and may withhold dividends upon that sum until the

debt due to the trustee has been paid. *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 511, 25 Sup. Ct. 339, 49 L. Ed. 571.

Decree reversed.

(261 U. S. 592)

BALTIMORE & O. R. CO. v. UNITED STATES.

(Argued March 12, 1923. Decided April 9, 1923.)

No. 305.

1. United States ⇨68—Recovery not allowed under informal contract, if officer was not authorized to make it.

Dent Act March 2, 1919 (Comp. St. Ann. Supp. 1919, §§ 3115¹⁴/_{15a}–3115¹⁴/_{15e}) authorizing the award of compensation for expenditures connected with the prosecution of the war, made by the claimant on the faith of an agreement, express or implied, entered into with an officer or agent acting under the authority of the Secretary of War or the President, but not executed in the manner provided by law, does not entitle the claimant to compensation if the informally executed contract was made by an officer who was not acting within the scope of his authority.

2. United States ⇨69—"Implied agreement," under which recovery is allowed, must be implied in fact.

The implied agreement contemplated by Dent Act March 2, 1919 (Comp. St. Ann. Supp. 1919, §§ 3115¹⁴/_{15a}–3115¹⁴/_{15e}), as the basis of compensation for services rendered in the prosecution of the war, is not an "implied agreement" in law, more aptly termed a constructive or quasi contract, where by fiction of law a promise is imputed to perform a legal duty, but is an agreement implied in fact, founded on a meeting of the minds, which is not embodied in an express contract, but is inferred as a fact from conduct showing a tacit understanding.

[Ed. Note.—For other definitions, see Words and Phrases, Implied Agreement.]

3. Contracts ⇨4—Agreement will not be implied in fact, unless there is a meeting of the minds.

An agreement will not be implied in fact, unless there was a meeting of the minds of the parties, indicated by some intelligible conduct, act, or sign.

4. United States ⇨69—Facts held not to show implied agreement for construction of barracks.

Where a railroad company constructed a temporary barracks for troops who were guarding the piers belonging to the railroad company, one of which it had leased to the government, without request from the officer in charge, or intimation that it would expect payment from the government for such work, there was no implied agreement, entitling it to recover compensation therefor, under Dent Act March 2, 1919 (Comp. St. Ann. Supp. 1919, §§ 3115¹⁴/_{15a}–3115¹⁴/_{15e}).

Appeal from the Court of Claims.

Petition by the Baltimore & Ohio Railroad Company against the United States. From a judgment of the Court of Claims, dismissing the petition (57 Ct. Cl. 140), petitioner appeals. Affirmed.

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*Messrs. John F. McCarron and Geo. E. Hamilton, both of Washington, D. C., for appellant.

Mr. Justice SANFORD delivered the opinion of the Court.

The Railway Company filed its petition, under the Dent Act (March 2, 1919, c. 94, 40 Stat. 1272 [Comp. St. Ann. Supp. 1919, §§ 3115¹⁴/_{15a}–3115¹⁴/_{15e}]), to recover compensation for constructing temporary barracks for the use of United States troops under an "implied agreement" alleged to have been entered into by it with the United States, in December, 1917, through Col. Kimball, Expeditionary Quartermaster of the War Department, at Locust Point, Baltimore, Maryland, acting under the authority of the Secretary of War. The Court of Claims, after a hearing on the merits, and upon its findings of fact, dismissed the petition (57 Ct. Cl. 140).

The material facts shown by the findings are these: The Railroad Company owned at Locust Point, a suburb of Baltimore, eight piers, which were guarded by its civilian employees. At the request of Col. Kimball, who

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was *in charge of the expeditionary depot at Baltimore and of the supplies arriving for shipment to Europe, the company, in October, 1917, leased one of these piers to the Government. Two of the other piers with much other property belonging to the company were destroyed or damaged by a fire supposed to be of incendiary origin. Thereupon Col. Kimball and the president of the company separately requested the Secretary of War to send a guard; the vice president of the company offering to supply a wrecking train as quarters for them. Two companies of the National Guard were sent to Locust Point, with sufficient tentage. They were quartered for a time in the wrecking train furnished by the company. Their duty was primarily to protect the government property and the piers leased by it, sending patrols throughout the railroad yard to guard cars containing its property, and generally to guard all the piers and property at Locust Point. The company, however, also maintained the civilian guards and a fire department for all of its property, whether leased or not. Later, the wrecking train having been moved away by the company, the troops moved into tents. The weather during the fall and winter was very cold and inclement. Most of the soldiers were Baltimoreans and were frequently visited by their relatives. There was some sickness among them. Their

relatives complained to the railroad officials of hardships they had to undergo in the tents; and these officials were anxious to make them as comfortable as possible. Several times in very cold weather Col. Kimball remarked to the company's agent at Locust Point, whose duty it was to confer with him on railroad matters, that the troops ought to have better quarters. On one occasion this agent suggested fitting up an unused transfer shed belonging to the company, standing near the pier that had been leased to the Government. Col. Kimball agreed that it would be a fine thing to make the

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men as com*fortable as possible. He did not, however, ask that this work be done; and nothing was said about compensation. This agent having taken up with the company's officials the matter of fitting up the transfer shed, its chief engineering draftsman was directed to see as to the adaptability of the transfer shed for barracks. He made blue print plans for remodeling the shed; which he showed to the officer in command of the troops, to learn whether, in his opinion, they would satisfactorily house the troops. This officer, which not undertaking to approve the plans, suggested the amount of facilities that would be required. Nothing was said to him, however, about expense or compensation for the work. The construction of the temporary barracks was completed in the latter part of December; and the troops moved in. Two more piers were afterwards leased by the company to the Government. The barracks were occupied by the troops until May, 1919 and the piers were returned to the company in June, 1919. No government officials connected with the work at Locust Point had any authority to order the construction of the temporary barracks; and no orders were given by any of them for such construction. The subject of compensation was not mentioned in any conversations between these officers and the railroad officials until more than a week after the barracks had been completed, when the chief draftsman told the officer in command of the troops that he thought the Government should reimburse him for some of his trouble.

The Court of Claims made no finding as to the amount expended by the company in constructing the temporary barracks; the company having, as the court stated, submitted no evidence to establish the different items of its claim. In the absence of a finding as to the amount of the expenditures, as to which the company had the burden of proof, the judgment of the Court of Claims might be properly affirmed upon that ground.

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Crocker v. United *States. 240 U. S. 74, 82, 36 Sup. Ct. 245, 60 L. Ed. 533. However, as the Government does not here question the amount of the claim, we pass to its further consideration upon the merits.

Upon the findings of fact we conclude that the petition was rightly dismissed, without

reference to the amount of the claim, for two reasons:

[1] 1. The Dent Act authorizes the award of compensation for expenditures connected with the prosecution of the war when they were made by the claimant upon the faith of an "agreement, express or implied," entered into by him with an officer or agent acting under the authority of the Secretary of War or of the President, and such agreement was not executed in the manner provided by law. 40 Stat. 1272, 1273; *American Smelting Co. v. United States*, 259 U. S. 75, 79, 42 Sup. Ct. 420, 66 L. Ed. 833. The act was intended to remedy irregularities and informalities in the mode of entering into such agreements; not to enlarge the authority of the agents by whom they were made. To entitle the claimant to compensation under such an agreement it is essential that the officer or agent with whom it was entered into should not merely have been holding under the Secretary of War or the President, but that he should have been acting within the scope of his authority. It was not intended, for example, that an officer in one branch of the military service or one of inferior rank could bind the Government by an agreement as to matters relating to an entirely different branch of the service or within the control of his superior officers, as to which he had no authority whatever; or that an agreement into which he entered, although beyond his authority, should become binding upon the Government because it was made in the form of an express agreement not executed within the legal manner or of an implied agreement merely—that is, that his authority should be enlarged by the irregularity or informality with which it was exercised. See *United States v. North Amer-*

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ican Transportation & Trading Co., 253 U. S. 330, 333, 40 Sup. Ct. 518, 64 L. Ed. 935, and *Portsmouth Harbor Land Co. v. United States*, 260 U. S. 327, 43 Sup. Ct. 135, 67 L. Ed. —, decided by this Court, December 4, 1922.

Here, however, there is no finding that Col. Kimball had any authority to enter into the alleged agreement; and, on the contrary, such authority is negated by the finding that none of the government officials connected with the work at Locust Point had any authority to order the construction of a temporary barracks.

Hence an essential element in the establishment of the company's claim is lacking.

[2] 2. The "implied agreement" contemplated by the Dent Act as the basis of compensation is not an agreement "implied in law," more aptly termed a constructive or quasi contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement "implied in fact," founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of

the parties showing, in the light of the surrounding circumstances, their tacit understanding. See, by analogy, as to the construction of similar jurisdictional statutes, *United States v. Berdan Firearms Co.*, 156 U. S. 552, 566, 15 Sup. Ct. 420, 39 L. Ed. 530; *Russell v. United States*, 182 U. S. 516, 530, 21 Sup. Ct. 899, 45 L. Ed. 1210; *Harley v. United States*, 198 U. S. 229, 234, 25 Sup. Ct. 634, 49 L. Ed. 1029; *United States v. Anciens Etablissements*, 224 U. S. 309, 311, 320, 32 Sup. Ct. 479, 56 L. Ed. 778; *United States v. Buffalo Pitts Co.*, 234 U. S. 228, 232, 34 Sup. Ct. 840, 58 L. Ed. 1290; *Tempel v. United States*, 248 U. S. 121, 129, 39 Sup. Ct. 56, 63 L. Ed. 162; and *Sutton v. United States*, 256 U. S. 575, 581, 41 Sup. Ct. 563, 65 L. Ed. 1099, 19 A. L. R. 403; and, generally, *Railway Co. v. Gaffney*, 65 Ohio St. 104, 113, 61 N. E. 152; *Woods v. Ayres*, 39 Mich. 345, 350, 33 Am. Rep. 396; *Hertzog v. Hertzog*, 29 Pa. 465, 468; *Knapp v. United States*, 46 Ct. Cl. 601, 643; and 1 Bouv. Law Dict. (Rawle's 3d Rev.) 660. That this provision of the Dent Act relates only to such actual agreements, implied in fact from the circumstances, is not only indicated by its purpose, as expressed in the caption, of providing relief in cases of

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"contracts" connected *with the prosecution of the war, but is conclusively shown by the fact that the "agreement" is described as one "*entered into*, in good faith," by the claimant, with an officer or agent of the Government, upon the faith of which expenditures have been made or obligations incurred, and which has not been executed as prescribed by law; this language aptly describing an actual agreement implied in fact, but being manifestly inapplicable to a constructive agreement implied in law.

[3] Such an agreement will not be implied unless the meeting of minds was indicated by some intelligible conduct, act or sign. *Woods v. Ayres*, 39 Mich. 351, 33 Am. Rep. 396, and cases there cited. And so an agreement to pay for services rendered by the plaintiff will not be implied when they were rendered spontaneously, without request, as an act of kindness (*Woods v. Ayres*, 39 Mich. 351, 33 Am. Rep. 396); when the plaintiff did not expect payment, or under the circumstances did not have reason to entertain such expectation (*Coleman v. United States*, 152 U. S. 96, 99, 14 Sup. Ct. 473, 38 L. Ed. 368; *Lafontain v. Hayhurst*, 89 Me. 388, 391); when the defendant understood that the plaintiff would neither expect nor demand remuneration (*Harley v. United States*, 198 U. S. 235, 25 Sup. Ct. 634, 49 L. Ed. 1029); when unusual expenses were incurred, without special request or previous notice, and with-

out any intimation or suggestion that compensation would be looked for or made (*Baltimore & Ohio Railroad v. United States*, 261 U. S. 385, 43 Sup. Ct. 384, 67 L. Ed. — decided by this court March 19, 1923); when the defendant neither requested the services nor assented to receiving their benefit under circumstances negating any presumption that they would be gratuitous (*Railway Co. v. Gaffney*, 65 Ohio St. p. 116, 61 N. E. 152; 2 Abb. Tr. Ev. [3d Ed.] 912, and cases

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there cited;¹ and *when the circumstances account for the transaction on a ground more probable than that of a promise of recompense. *Wood v. Ayres*, 39 Mich. 351, 33 Am. Rep. 396.²

[4] In the present case the findings of fact show that Col. Kimball did not order the construction of the barracks, which was voluntarily undertaken by the company, without saying anything whatever about compensation, apparently from its own desire to provide for the comfort of the troops, who were guarding its property as well as that of the Government, after it had removed the wrecking train which it had offered to supply as their quarters. It does not appear from the findings that Col. Kimball requested the construction of the barracks; that the company intimated that it would expect payment from the Government or that Col. Kimball suggested that such payment would be made; or that the company in fact expected compensation. It is clear that these findings furnish no substantial basis for implying an agreement that the Government would pay the cost of the construction.

Hence, a second essential element in the establishment of the company's claim is lacking.

And the judgment of the Court of Claims is Affirmed.

¹ But an agreement to compensate the plaintiff for the use of his property will be implied when it was used by the defendant without claim of right, and the plaintiff consented to such use with the expectation of receiving compensation. *United States v. Palmer*, 128 U. S. 262, 269, 9 Sup. Ct. 104, 32 L. Ed. 442; *United States v. Berdan Firearms Co.*, 156 U. S. 552, 567, 15 Sup. Ct. 420, 39 L. Ed. 530; *United States v. Anciens Etablissements*, 224 U. S. 320, 32 Sup. Ct. 479, 56 L. Ed. 778. And see, as to the implied agreement to pay for property appropriated by legislative authority for a public use, without condemnation proceedings, *United States v. North American Co.*, 253 U. S. 330, 40 Sup. Ct. 513, 64 L. Ed. 935, and cases there cited.

² As to the character of evidence by which an implied agreement to pay for services is generally established, see 2 Abb. Tr. Ev. 913, and cases there cited.

(261 U. S. 514)

RUSSELL MOTOR CAR CO. v. UNITED STATES. FREYGANG et al. v. SAME. ALBERT & J. M. ANDERSON MFG. CO. v. SAME.

(Argued and Submitted March 6, 1923. Decided April 9, 1923.)

Nos. 485, 480, 740.

1. United States ⇐72—Statute held to authorize government to cancel war contracts.

Act June 15, 1917, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¹/_{16d}), authorizing the President to "modify, suspend, cancel or requisition any existing or future contract for the building, production, or purchase of ships or material," held not to apply to private contracts alone, but to authorize cancellation by the government of its own contracts.

2. Statutes ⇐193—Rule of noscitur a sociis not invariable.

The rule of noscitur a sociis, as applied to words, is not an invariable one, for a word may have a character of its own, not to be submerged by its association.

3. Statutes ⇐190 — Construction allowable only in case of ambiguity.

Rules of statutory construction have no place, except in the domain of ambiguity, and may not be used to create, but only to remove, doubt.

4. Statutes ⇐193—Doctrine of noscitur a sociis available only to resolve ambiguity.

The rule of noscitur a sociis is available, where words are of obscure or doubtful meaning, but only then its aid may be sought to remove obscurity or doubt by reference to the associated words.

5. United States ⇐28—Authority to cancel contracts held properly delegated by the President to the Secretary of the Navy.

As respects cancellation by Navy Department of material contracts, the authority of the President to cancel such contracts, under Act June 15, 1917, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¹/_{16d}), held validly delegated to the Secretary of the Navy by order dated August 21, 1917, delegating such authority "in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, * * * and all powers and authority applicable to and in furtherance of the production, purchase and requisitioning of materials for construction of vessels * * * and for war materials, equipment, and munitions," etc.

6. United States ⇐28—Delegation by President to department heads of his authority need not be in precise language.

Executive power in the main must of necessity be exercised by the President through the various departments, and these departments constitute his peculiar and intimate agencies, and in devolving authority on them meticulous precision of language is neither expected nor required.

7. United States ⇐72—Order canceling war contract need not refer to statutory authority.

Where a Navy Department war material contract was canceled by the Secretary of the Navy, under Act June 15, 1917, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¹/_{16d}), it was not necessary, in canceling the contract, that the statute should be expressly referred to.

8. United States ⇐72—Anticipated profits not recoverable on cancellation of war contract.

On cancellation by Secretary of the Navy of a Navy Department war material contract, under Act June 15, 1917, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¹/_{16d}), the contractor was not entitled to have included as just compensation, provided for in the statutes, its anticipated profits, but in fixing just compensation the court was required to consider the value of the contract at the time of its cancellation, and not what it would have produced by way of profits for the contractor if fully performed, for the possible loss of profits, in view of the statute authorizing cancellation, was presumably within the contemplation of the parties.

Appeals from the Court of Claims.

Actions against the United States by the Russell Motor Car Company, by Henry Freygang and others, and by the Albert & J. M. Anderson Manufacturing Company. From adverse judgments (57 Ct. Cl. 244, 464, 626), plaintiffs appeal. Affirmed.

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*Mr. Lyman M. Bass, of Buffalo, N. Y., for appellant Russell Motor Co.

Messrs. George A. King and Wm. B. King, both of Washington, D. C., for appellants Freygang and others.

Messrs. Arthur H. Russell, of Boston, Mass., and Chapman W. Maupin, of Washington, D. C., for appellant Anderson Mfg. Co.

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*Messrs. Solicitor General Beck, of Washington, D. C., Assistant Attorney General Lovett, and Alfred A. Wheat, of New York City, for the United States.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

These cases, here on appeal from the Court of Claims, differ in details of fact, but are controlled by the same principles of law, and depend alike upon the construction and application of the same statutory provisions.

The salient facts in the case of the Motor Car Company are as follows: That company, on May 14, 1918, entered into a contract, numbered 1498, with the United States, acting through the Secretary of the Navy, to make 250 anti-air craft gun mounts, at an agreed price of \$7,860 each, to be delivered at stipulated periods; the last being the 60 days ending April 30, 1919.

Prior to the making of the foregoing contract, viz. in November, 1917, a similar contract, numbered 949, had been entered into by the same parties; the last period for delivery being the 60 days ending January 15, 1919. The actual work under contract 949 was begun about March, 1918, and some time later, and after the making of contract 1498, at the request of the company, the Secretary consented to allow all shipments of mounts to be applied upon contract 949 until its completion. Deliveries under that contract were finished in June, 1919.

On November 18, 1918, the Navy Department expressed a desire that the manufacture of gun mounts under both contracts be greatly decreased and that the company resume production of peace-time products as soon as possible, "so that the minimum of

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economic disturbance will be felt during the transition." In its communication the Navy Department requested that immediate arrangements be made for the reduction and eventual stoppage of production of materials under these contracts and the substitution therefor of commercial products, and that the company "initiate preparations for the cancellation along the lines indicated." On November 23, 1918, the company was notified that the Secretary had authorized the cancellation of contract 1498, directed to cease work in connection therewith not later than December 2, 1918, and informed that a just and fair settlement would be made as provided by contract and in accordance with the statute covering such cases. Extended negotiations followed, in an effort to bring about a settlement, and the Secretary finally fixed the sum of \$444,847.68 as just compensation for the cancellation of the contract. Seventy-five per cent. of this amount was paid and accepted by the company, expressly without prejudice to its rights.

The Court of Claims, after hearing the case, found that just compensation for the cancellation of the contract was the sum of \$495,250.34, which amount included a number of elements and items not necessary to be set forth. The court further found that, if the company had been permitted to complete the contract according to its terms, it could and would have earned a profit, in round figures, of \$960,000, but held that the action of the Secretary of the Navy in canceling the contract was within the authority conferred by the statute, presently to be mentioned, and that the company consequently was not entitled to an award including anticipated profits.

The statute upon which this determination rested was the Act of June 15, 1917 (40 Stat. p. 182, c. 29), making deficiency appropriations for the military and naval establishment on account of war expenses, and for other purposes. This act contained a provi-

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sion authorizing and *empowering the Presi-

dent, within the limits of the amounts appropriated:

" * * * (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material." Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 31151/16d.

The President was authorized to exercise the authority conferred upon him by the act and expend the money therein and thereafter appropriated "through such agency or agencies as he shall determine from time to time." The authority so far as it concerned the Navy, was by him delegated to the Secretary of the Navy in an order dated August 21, 1917,

"in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, and the completion thereof, and all powers and authority applicable to and in furtherance of the production, purchase and requisitioning of materials for construction of vessels for the Navy and for war materials, equipment, and munitions required for the use of the Navy, and the more economical and expeditious delivery thereof."

The word "material," the act provided, should include stores, supplies and equipment for ships and everything required for or in connection with the production thereof, and in our opinion included the articles contracted for in this as well as in the other two cases. The act provided that whenever the United States should cancel, modify, suspend, or requisition any contract just compensation should be made therefor to be determined by the President. If the amount so determined should be unsatisfactory, the person entitled to receive it could accept 75 per cent. thereof and bring suit to recover such further sum as added to the 75 per cent. would make just compensation. By the terms of the act the authority granted to the President or delegated by him was to "cease six months after the final treaty of peace is proclaimed between this government and the German Empire."

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[1] *The Motor Car Company contends that subdivision (b) of the statute above quoted applies to private contracts alone and affords no authority for the cancellation by the government of its own contracts. The Court of Claims held otherwise and whether its holding or the company's contention is correct presents the principal question for our consideration.

[2, 3] It must be apparent, we think, that the words of the provision, "any existing or future contract," read with literal exactness, include all contracts, whether private or governmental. But it is pointed out that the power to "requisition" cannot apply to a governmental contract; and this may be conceded, since the government cannot requisition what it already has. Then it is

said that inasmuch as the application of the word "requisition" must be confined to private contracts, the other words associated with it must be likewise restricted by virtue of the maxim "*noscitur a sociis*." That a word may be known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association. Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this court has many times held, except in the domain of ambiguity. *Hamilton v. Rathbone*, 175 U. S. 414, 421, 20 Sup. Ct. 155, 44 L. Ed. 219; *United States v. Barnes*, 222 U. S. 513, 518-519, 32 Sup. Ct. 117, 56 L. Ed. 291. They may not be used to create but only to remove doubt. *Id.* Moreover, in cases of ambiguity the rule here relied upon is not exclusive. The problem may be submitted to all appropriate and reasonable tests, of which "*noscitur a sociis*" is one. Here we have one word which it may be conceded applies only to private contracts, but the other three words, standing alone, it likewise must be conceded, naturally apply to governmental contracts as well. Indeed, they more nat-

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urally apply to such contracts. The *power to modify the obligations of a private contract is, to say the least, a most unusual one for governmental exercise. To modify a contract is in effect to make a new one, and it puts something of a strain on our conception of the functions of government to concede its power to make contracts between private parties, to which neither may assent, and which, consequently, neither will be bound to perform.

[4] We do not mean to deny the power of Congress, in time of war, to authorize the President to modify private contracts (leaving the parties free, as between themselves, to accept or not), nor do we suggest that Congress has not done so by the present statute; but the contention here is, not that the power in question extends to private contracts, but that it is limited to them. This cannot be conceded. The meaning of the four predicate words is not doubtful; in that respect, as well as in their operative scope, they obviously differ from one another. The question we are called upon to answer is whether, because the words "*any * * * contract*" must be given a narrower meaning when qualified by the predicate "requisition," their meaning must be limited in like manner when qualified by one of the other three predicates. "*Noscitur a sociis*" is a well-established and useful rule of construction, where words are of obscure or doubtful meaning, and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words. *Virginia v. Tennessee*, 148 U. S. 503, 519, 13 Sup. Ct. 728, 37 L. Ed. 537; *Benson v. Chicago*,

etc., *R. R. Co.*, 75 Minn. 163, 77 N. W. 798, 74 Am. St. Rep. 444. But here the meaning of the words considered severally is not in doubt, and the rule is invoked not to remove an obscurity, but to import one. There is nothing in the rule or in the statute which requires us to assimilate the words "modify" and "cancel" to the scope of the word "requisition," simply because the latter has a

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necessarily narrower application. The *meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu*, giving to each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate "requisition" will be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well. An illustration is afforded by the commerce clause of the Constitution. The power to regulate interstate and foreign commerce is found in the same clause and conferred by the same words, but the scope of the power when applied to the former may be narrower than when applied to the latter. *Groves v. Slaughter*, 15 Pet. 449, 505, 10 L. Ed. 800.

This disposition of the question also accords with the broad purposes of the legislation. When the act was passed we were in the midst of a great war, which called for the utilization of all our resources. The necessities were great, beyond the power of statement. The government was confronted with the vital necessity, not only of producing ships and supplies in unprecedented quantities, but of producing them with the utmost haste. Hence it was necessary that everything which stood in the way of or hindered such production should be put aside. But this was a necessity which Congress, of course, realized must sooner or later come to an end, suddenly and completely. With the termination of the war the continued production of war supplies would become, not only unnecessary, but wasteful. Not to provide, therefore, for the cessation of this production, when the need for it had passed, would have been a distinct neglect of the public interest. The situation, it is plain, required that production should proceed while the war lasted to the utmost limit of the nation's power, but that it should come to an end as soon as possible upon the pass-

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ing of the emergency. In the light of these circumstances, it is not unreasonable to regard the statute now under consideration as intended to accomplish both results, that is: (1) To enable the President, during the emergency, to utilize his powers over contracts to stimulate production to the utmost; and then, (2) upon the passing of the emergency, to enable him to utilize these same powers to stop that production as quickly as possible. To the latter accomplishment au-

thority to modify and cancel government war contracts would contribute most effectively. These considerations lend support to the judgment of the court below construing the statute as having this effect.

In this connection it is not without significance that the authority granted to the President was to cease six months after the final treaty of peace. Obviously, the powers granted to him—among them to modify and cancel contracts—were to continue during the six months' period, not for the purpose of forwarding war production, but, on the contrary, for the purpose of stopping it. To that end, we conclude, he was authorized to cancel the government's own contracts, such as the one here involved, upon making just compensation to the parties concerned.

We are referred to the utterances of certain members of Congress in debate, which it is argued show that the provision under consideration was meant to cover private contracts. Whether they come within the rule forbidding resort to legislative debates (*Lapina v. Williams*, 232 U. S. 78, 90, 34 Sup. Ct. 196, 58 L. Ed. 515; *Omaha Street Railway v. Interstate Commerce Commission*, 230 U. S. 324, 333, 33 Sup. Ct. 890, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385; *Standard Oil Co. v. United States*, 221 U. S. 1, 50, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States v. Freight Association*, 166 U. S. 290, 318, 17 Sup. Ct. 540, 41 L. Ed. 1007), or within the exception (*Wisconsin R. R. Comm. v. C., B. & Q. R. Co.*, 257 U. S. 563, 588, 42 Sup. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086), we need not consider, since, for reasons already stated, extrinsic aid for ascertaining the meaning of the language here under review is not required. Besides, though

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they *may tend to show that the statute was meant to apply to private contracts, these utterances do not justify the conclusion that the statute was not meant to apply to governmental contracts also.

[5-7] Certain other contentions of the Car Company may be briefly disposed of. In the first place, it is said that the President did not delegate his power respecting contracts to the Secretary of the Navy, and it is suggested that that officer did not in fact pretend to cancel this contract under the statute. The order of the President delegating his authority to the Secretary is in sweeping terms and it is impossible to conclude otherwise than that it was intended to cover the whole field of power in so far as it pertained to the Navy. Executive power, in the main, must of necessity be exercised by the President through the various departments. These departments constitute his peculiar and intimate agencies and in devolving authority upon them meticulous precision of

language is neither expected nor required. In canceling the contract it was not necessary that the statute should be expressly referred to. It was public law of which every one was bound to take notice.

[8] It is contended, further, that even if the action of the Secretary of the Navy was warranted by the statute, the Car Company was nevertheless entitled to have included as just compensation its anticipated profits.

This contention confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of property by the power of eminent domain. In fixing just compensation, the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company, if it had been fully performed. It is evident that no prudent person, desiring to acquire this contract, would have paid for it the full amount which could be realized

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upon completion, leaving no chance of *return to himself upon the investment, or for the risk and labor incident to its performance. The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties. The lower court was right in refusing to allow anticipated profits, and, there being nothing in the findings to justify the contrary, we must accept the amount fixed on the basis of just compensation as adequate.

Our attention is directed to the fact that prior to the cancellation of contract No. 1498, the Car Company had manufactured 25 mounts, which it would have delivered under that contract, except for the fact that they were made applicable to the former contract, No. 949, and it is insisted that the profit which the Car Company would have made upon these mounts should have been included in the amount of its compensation in any event. It is sufficient to say that the Car Company was permitted to deliver these mounts under its former contract at its own request. Presumably the full contract price therefor was paid in the adjustment of that contract.

It is unnecessary to burden this opinion with a statement of the facts in the *Freygang and Anderson Manufacturing Company Cases*. They are not differentiated in any essential respect from the case of the Motor Car Company, and are governed by the same reasons and conclusions.

The judgments of the Court of Claims are severally

Affirmed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1922

(261 U. S. 607)

No. 314. **THE BRASHER LUMBER COMPANY**, for the use of itself, et al., appellants, v. **SOUTHERN RAILWAY COMPANY**. March 12, 1923. Appeal from the District Court of the United States for the Southern District of Alabama. Messrs. T. M. Stevens, of Mobile, Ala., and Edgar Watkins, of Atlanta, Ga., for appellants.

PER CURIAM. Affirmed upon the authority of *Baltimore & Ohio R. Co. v. Koontz*, 104 U. S. 5, 15, 26 L. Ed. 643; *General Investment Co. v. Lake Shore & Michigan Southern Railway Co.*, 260 U. S. 261, 43 Sup. Ct. 106, 67 L. Ed. —, decided November 27, 1922; *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, 43 Sup. Ct. 230, 67 L. Ed. —, decided January 22, 1923.

(261 U. S. 628)

No. 687. **ATLANTIC & YADKIN RAILWAY COMPANY**, appellant, v. **A. D. WATTS**, etc., Commissioner of Revenue, et al. March 12, 1923. Appeal from the District Court of the United States for the Western District of North Carolina. Mr. S. R. Prince, of Washington, D. C., for appellant. Dismissed with costs, on motion of counsel for the appellant.

(261 U. S. 620)

No. 764. **TIDAL OIL COMPANY** et al., plaintiffs in error, v. **J. P. FLANAGAN**. March 12, 1923. For opinion below, see 209 Pac. 729. Messrs. P. C. West and A. A. Davidson, both of Tulsa, Okl., for plaintiffs in error. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(261 U. S. 619)

No. 805. **LEHIGH & HUDSON RIVER RAILWAY COMPANY**, petitioner, v. **Florence M. OTTERSTEDT**, on behalf of herself and minor children. March 12, 1923. For opinion below, see 234 N. Y. 203, 137 N. E. 26. Mr. J. J. Beattie, of Warwick, N. Y., for petitioner. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Department, of the State of New York, denied for failure to submit the petition within the time prescribed by the rule.

(261 U. S. 820)

No. 829. **George H. SEVER**, petitioner, v. **DIRECTOR GENERAL OF RAILROADS**. March 12, 1923. For opinion below, see 234 N. Y. 590, 138 N. E. 458. Mr. J. E. Benton, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(261 U. S. 620)

No. 837. **Henry M. GOLDSFOGLE**, President, et al., petitioners, v. **HANOVER NATIONAL BANK OF THE CITY OF NEW YORK**. March 12, 1923. For opinion below,

see *People ex rel. Hanover Nat. Bank v. Goldsogle*, 234 N. Y. 345, 137 N. E. 611. Mr. George P. Nicholson, of New York City (Messrs. Frank B. Kellogg, of St. Paul, Minn., William Herbert King, and Eugene Fay, both of New York City, and Carl Sherman, of Buffalo, N. Y., Owen C. Becker, of Oneonta, N. Y., Charles L. Pierce, of Rochester, N. Y., and F. J. Cregg, of Syracuse, N. Y., of counsel), for petitioners. Messrs. Morris, Plante & Saxe, of New York City, and Edward F. Colladay, of Washington, D. C. (Messrs. Martin Saxe, Percy S. Dudley, Charles R. McSparren, Curtis A. Peters, Frank M. Patterson, and Merton E. Lewis, all of New York City, of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(261 U. S. 620)

No. 842. **NORFOLK SOUTHERN RAILROAD COMPANY**, petitioner, v. **Thomas V. GORDON**. March 12, 1923. For opinion below, see 114 S. E. 826. Messrs. Robert N. Simms, of Raleigh, N. C., and C. M. Bain, of Norfolk, Va., for petitioner. Messrs. William C. Douglass and Clyde A. Douglass, both of Raleigh, N. C., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied.

(261 U. S. 621)

No. 849. **Nathaniel P. LE SUEUR** et al., etc., petitioners, v. **MANUFACTURERS' FINANCE COMPANY**. March 12, 1923. For opinion below, see 285 Fed. 490. Messrs. Jas. S. Pilcher and K. T. McConico, both of Nashville, Tenn., for petitioners. Messrs. John J. Vertrees, of Nashville, Tenn., and Frank, Emory & Beeuwkes, of Baltimore, Md., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(261 U. S. 621)

No. 857. **James C. DAVIS**, as Agent, etc., petitioner, v. **Marguerite CLARK**, administratrix, etc. March 12, 1923. For opinion below, see 190 N. W. 45. Messrs. R. Bruce Scott, of Chicago, Ill., A. A. McLaughlin, of Washington, D. C., J. A. Connell, of Chicago, Ill., Harry S. Stearns, of St. Paul, Minn., and Russell B. James, of Chicago, Ill. (O. M. Spencer, of Chicago, Ill., of counsel), for petitioner. Messrs. Tom Davis, of Marshall, Minn., and Ernest A. Michel, of Minneapolis, Minn., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied.

(261 U. S. 621)

No. 858. **THE CITY OF NEW YORK**, petitioner, v. **RODGERS & HAGERTY (Inc.)**. March 12, 1923. For opinion below, see 285 Fed. 362. Mr. George P. Nicholson, of New

York City (Messrs. Edmund L. Mooney and Terence Farley, both of New York City, of counsel), for petitioner. Mr. C. C. Calhoun, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 621)

No. 860. Samuel C. PANDOLFO, petitioner, v. The UNITED STATES of America. March 12, 1923. For opinion below, see 286 Fed. 8. Messrs. Patrick J. Lucey, of Chicago, Ill., Carl W. Cummins, John M. Bradford, and E. Howard Morphy, all of St. Paul, Minn., Gerald G. Barry and Bernhardt Frank, both of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(261 U. S. 621)

No. 861. ALABAMA GROCERY COMPANY, petitioner, v. L. P. HAMMOND, Trustee, etc. March 12, 1923. For opinion below, see 285 Fed. 723. Mr. Lee C. Bradley, of Birmingham, Ala. (Messrs. L. J. Haley, of Frankfort, Kan., and John S. Coleman, of Birmingham, Ala., of counsel), for petitioner. Mr. Forney Johnston, of Washington, D. C. (Messrs. W. R. C. Cocke and Jelks H. Cabaniss, both of Birmingham, Ala., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 25. Albert B. FALL, Secretary of the Interior, plaintiff in error, v. The UNITED STATES of America ex rel. W. T. MOSIER et al. March 19, 1923. See, also, *Payne v. United States*, 50 App. D. C. 219, 269 Fed. 871. Mr. James M. Beck, Sol. Gen., of Washington, D. C., for plaintiff in error. Hubert Work, present Secretary of the Interior, substituted as the party appellant herein, on motion of Mr. Solicitor General Beck in that behalf.

No. 258. Albert B. FALL, Secretary of the Interior, et al., appellants, v. The UNITED STATES ex rel. McALLISTER-EDWARDS COAL COMPANY. March 19, 1923. See, also, 51 App. D. C. 171, 277 Fed. 573. Mr. James M. Beck, Sol. Gen., of Washington, D. C., for appellants. Hubert Work, present Secretary of the Interior, substituted as a party appellant herein, on motion of Mr. Solicitor General Beck in that behalf.

(261 U. S. 608)

No. 313. The J. M. MacDONALD COAL MINING COMPANY, appellant, v. The UNITED STATES. March 19, 1923. Appeal from the Court of Claims. For opinion below, see 56 Ct. Cl. 440. Mr. William S. Hammers, of Washington, D. C., for appellant.

PER CURIAM. Affirmed upon the authority of *Morrisdale Coal Co. v. The United States*, 259 U. S. 188, 42 Sup. Ct. 481, 66 L. Ed. 892.

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(261 U. S. 608)

No. 326. Jewel REDWINE, plaintiff in error, v. The STATE OF TEXAS. March 19, 1923. In error to the Court of Criminal Appeals of the State of Texas. For opinion below, see 91 Tex. Cr. R. 83, 236 S. W. 96. Mr. A. H. Carrigan, of Wichita Falls, Tex., for plaintiff in error.

PER CURIAM. Affirmed with costs upon the authority of *Ughbanks v. Armstrong*, 208 U. S. 481, 28 Sup. Ct. 372, 52 L. Ed. 582.

(261 U. S. 609)

No. 327. Virginia HUEY et al., plaintiffs in error, v. D. A. BROCK et al. March 19, 1923. In error to the Supreme Court of the State of Alabama. For opinion below, see 207 Ala. 175, 92 South. 904. Mr. Geo. H. Lamar, of Washington, D. C., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U. S. 1, 5-6, 40 Sup. Ct. 255, 64 L. Ed. 421.

(261 U. S. 622, 629)

No. 410. Mary PARTRIDGE, plaintiff in error, v. J. E. CROSBIE et al. March 19, 1923. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 205 Pac. 758. Mr. Henry B. Martin, of Tulsa, Okl., for plaintiff in error. Messrs. A. A. Davidson and Preston C. West, both of Tulsa, Okl., for defendants in error. Writ of error dismissed pursuant to the 10th rule, and petition for a writ of certiorari herein dismissed for failure to comply with the rule as to printing record.

(261 U. S. 608)

No. 522. JAY BURNS BAKING COMPANY et al., plaintiffs in error, v. Samuel R. McKELVIE, as Governor of the State of Nebraska, et al., etc. March 19, 1923. See, also, 261 U. S. 625, 43 S. Ct. 359, 67 L. Ed. —. Mr. Matthew A. Hail, of Omaha, Neb., for plaintiffs in error. Motion to reinstate cause on the docket granted, but a rule is ordered to issue to show cause why the case should not be dismissed for lack of statutory authority to substitute the new governor for the ex-governor, in view of *Irwin v. Webb*, 42 Sup. Ct. 185, decided March 20, 1922, and *United States v. Butterworth*, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. Ed. 873.

(261 U. S. 622)

No. 854. Walter BURKE, petitioner, v. The UNITED STATES of America. March 19, 1923. Messrs. P. H. Martin, of Green Bay, Wis., Willet M. Spooner, of Milwaukee, Wis., and S. R. Rush, of Chicago, Ill., for petitioner. Mr. James M. Beck, Sol. Gen., of Washington, D. C., John W. H. Crim, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(261 U. S. 622)

No. 879. **GEORGE P. CLARK COMPANY**, petitioner, v. **KUEBLER FOUNDRIES (Inc.)**. March 19, 1923. For opinion below, see 285 Fed. 568. Messrs. J. Willard Paff, and Calvin F. Smith, both of Easton, Pa., for petitioner. Messrs. A. Mitchell Palmer and Frank Davis, Jr., both of Washington, D. C. (Mr. F. W. Edgar, of Easton, Pa., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(261 U. S. 612)

No. 889. **LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA**, petitioner, v. **James A. BEAR**, Trustee, etc., et al. March 19, 1923. For opinion below, see 285 Fed. 703. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted.

(261 U. S. 622)

No. 902. **Peter RULOVITCH et al.**, petitioners, v. **The UNITED STATES of America**. March 19, 1923. For opinion below see 286 Fed. 315. Messrs. Thomas Brown, of Perth Amboy, N. J., and Thomas H. Hagerty, of New Brunswick, N. J. (Mr. J. J. O'Brien, of counsel), for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(261 U. S. 629)

No. 912. **Vincente GORDERO and Pedro Rodriguez**, plaintiffs in error, v. **The UNITED STATES of America**. March 19, 1923. In error to the District Court of the United States for Porto Rico. Mr. James M. Beck, Sol. Gen., of Washington, D. C., for the United States. Docketed and dismissed, and mandate granted, on motion of Mr. Solicitor General Beck for the defendant in error.

(261 U. S. 600)

HODGES et al. v. SNYDER et al.(Submitted on Motion to Dismiss or Affirm
Feb. 26, 1923. Decided April 9, 1923.)

No. 432.

1. Courts ⇐397—Writ properly directed to lower state court, to which record had been returned.

Where the original papers, which had been transmitted to the Supreme Court of South Dakota as the record on appeal, were remitted to the circuit court of that state, with copies of the judgment and opinion of the Supreme Court, under Rev. Code S. D. 1919, § 3170, no copy of the record being retained by the Supreme Court, the writ of error was properly directed to the lower court, in which the record then was.

2. Courts ⇐400—State court's judgment affirmed on motion, if questions are wanting in substance.

A motion to affirm the judgment of the state Supreme Court will be granted, under Supreme Court Rule 6, § 5 (32 Sup. Ct. v), if the questions on which the decision depends are so wanting in substance as not to need further argument.

3. Constitutional law ⇐110—Private rights vested by judgment cannot be taken away by legislation.

Private rights of parties, which have been vested by the judgment of a court, cannot be taken away by subsequent legislation, but must be thereafter enforced by the court, regardless of such legislation.

4. Constitutional law ⇐110—Subsequent legislation can affect public rights declared by judgment previously rendered.

A public right may, even after it has been established by the judgment of a court, be annulled by subsequent legislation, and cannot be thereafter enforced, though in so far as a private right has been incidentally established by such judgment it may not be taken away, so that Laws S. D. 1920 (2d Sp. Sess.) c. 47, validating the defective organization of a consolidated school district, authorizes the dissolution of a previous injunction against the organization of the district, so long as the judgment for the plaintiff's costs in the injunction suit was not disturbed.

In error to the Circuit Court of Kingsbury County, Ninth Judicial Circuit, of the State of South Dakota.

Suit by J. H. Hodges and others against G. T. Snyder and others, as members of the Board of Education of a purported consolidated school district. Judgment for plaintiffs was reversed by the Supreme Court of South Dakota (186 N. W. 867), and plaintiffs bring error. Motion to dismiss writ of error denied, and motion to affirm judgment granted.

Mr. Samuel Herrick, of Washington, D. C., for plaintiffs in error.

Messrs. Max Royhl and T. H. Null, both of Huron, S. D., for defendants in error.

Mr. Justice SANFORD delivered the opinion of the Court.

The defendants in error move to dismiss the writ of error or affirm the judgment.

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[1] 1. *The ground of the motion to dismiss is that there is want of jurisdiction because the writ is not directed to the Supreme Court of the State. It was sued out to review a final judgment of that court reversing, on appeal, an order of the Circuit Court, and remanding the cause with direction to vacate the same. Under the local practice the original papers, that had been transmitted to the Supreme Court as the record on the appeal, were remitted to the Circuit Court, with copies of the judgment and opinion of the Supreme Court (Rev. Code S. D. 1919, § 3170); no copy of such record being retained by the Supreme Court. The rule of practice has been long established that in such case, in order to bring up the record which is essential to a review of the judgment of the appellate court, the writ of error is properly directed to the lower court in which the record is then found. *Gelston v. Hoyt*, 3 Wheat. 246, 304, 335, 4 L. Ed. 381; *McGuire v. Commonwealth*, 3 Wall. 382, 386, 18 L. Ed. 164; *Atherton v. Fowler*, 91 U. S. 143, 148, 23 L. Ed. 265; *Polleys v. Black River Co.*, 113 U. S. 81, 82, 5 Sup. Ct. 369, 28 L. Ed. 938; *McDonald v. Massachusetts*, 180 U. S. 311, 312, 21 Sup. Ct. 389, 45 L. Ed. 542; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 200, 35 Sup. Ct. 57, 59 L. Ed. 193 (involving a similar writ of error to another circuit court of South Dakota); and other cases therein cited. Hence the motion to dismiss is denied.

[2] 2. The ground of the alternative motion to affirm the judgment of the Supreme Court is that the writ was taken for delay only and presents no substantial question for review. It should be granted if the questions on which the decision depends are so wanting in substance as not to need further argument. Rule 6, § 5 (32 Sup. Ct. v); *Missouri Pacific Railway v. Castle*, 224 U. S. 541, 544, 32 Sup. Ct. 606, 56 L. Ed. 875; *Chicago Railway v. Devine*, 239 U. S. 52, 54, 36 Sup. Ct. 27, 60 L. Ed. 140; *City of Boston v. Jackson*, 260 U. S. 309, 43 Sup. Ct. 129, 67 L. Ed. —, decided by this Court December 4, 1922.

A single question is presented, which arises as follows: The plaintiffs in error, as resident taxpayers, filed a complaint in the Circuit Court challenging the validity of a consolidated school district which had been or-

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ganized by *the merger of several smaller districts, and praying that the defendants in error, as its officers, be enjoined from fur-

ther maintaining schools or erecting school buildings therein, or issuing bonds thereof. The Supreme Court, on an appeal from the Circuit Court, held that the attempted organization of the consolidated district "was not authorized by any law then in force * * * and was wholly futile" (43 S. D. 166, 176, 178 N. W. 575), and entered judgment remanding the cause for further proceedings in accordance with its decision. The legislature thereupon passed a curative act legalizing and validating all proceedings relating to the organization of any consolidated school district attempted to be made as this had been, as of the date when such district was organized (Laws S. D. 2d Sp. Sess. 1920, c. 47). Before this curative act went into effect the Circuit Court, in accordance with the decision of the Supreme Court, entered judgment adjudging the invalidity of the consolidation, permanently enjoining the defendants from conducting the consolidated district, as prayed in the complaint, and awarding costs to the plaintiffs. At a later day of the term, after the curative act had gone into effect, a motion by the defendants to set aside this injunction was denied. Thereafter, on a second appeal, the Supreme Court held that the curative act had validated the defective organization of the consolidated district (186 N. W. 867), and entered the judgment now sought to be reviewed, reversing the order of the Circuit Court granting the permanent injunction and remanding the cause with direction to vacate so much of its judgment as awarded such injunction; but not reversing its judgment as to costs.

The plaintiffs in error concede that the legislature, in the general exercise of its inherent power to create and alter the boundaries of school districts, may create new districts by the consolidation of others. *Stephens v. Jones*, 24 S. D. 97, 100, 123 N. W. 705. And they likewise recognize that, since the legislature had the power to ratify that

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*which it might have originally authorized, there would have been no violation of due process if the curative act had been enacted and become effective before any adjudication had been made in the pending litigation as to the invalidity of the consolidated district. *United States v. Heinszen & Co.*, 206 U. S. 370, 386, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688; *Rafferty v. Smith, Bell & Co.*, 257 U. S. 226, 232, 42 Sup. Ct. 71, 66 L. Ed. 208; *Charlotte Harbor Railway v. Wells*, 260 U. S. 8, 43 Sup. Ct. 3, 67 L. Ed. —, decided by this Court October 16, 1922. And see, generally as to giving effect to acts passed pendente lite but before the hearing, *Stockdale v. Insurance Co.*, 20 Wall. 323, 331, 22 L. Ed. 348; *Mills v. Green*, 159 U. S. 651, 656, 16 Sup. Ct. 132, 40 L. Ed. 293; and *Duplex Co. v. Deering*, 254 U. S. 443, 464, 41 Sup. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196.

Their sole contention is that as the curative act was not enacted until after the Su-

preme Court had decided, on the first appeal, that the consolidated district was invalid, and did not go into effect until after the Circuit Court had entered judgment adjudging its invalidity and enjoining the defendants from further conducting its affairs, it deprived them, as applied by the Supreme Court, without due process, of the private property rights which had been vested in them under these adjudications.

[3] It is true that, as they contend, the private right of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. *State of Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 429, 15 L. Ed. 435; *The Clinton Bridge*, 10 Wall. 454, 463, 19 L. Ed. 969; *United States v. Klein*, 13 Wall. 128, 146, 20 L. Ed. 519; *McCullough v. Virginia*, 172 U. S. 102, 124, 19 Sup. Ct. 134, 43 L. Ed. 382 (in which the repealing act was passed after judgment by the trial court).

[4] This rule, however, as held in the *Wheeling Bridge Case*, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incident-

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ally *established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away. *State of Pennsylvania v. Wheeling Bridge Co.*, 18 How. 431, 439, 15 L. Ed. 435. This case has been cited with approval in *The Clinton Bridge*, 10 Wall. 463, 19 L. Ed. 969 (likewise involving a public, as distinguished from a private, right of action); *United States v. Klein*, 13 Wall. 146, 20 L. Ed. 519; *Stockdale v. Insurance Co.* 20 Wall. 332, 22 L. Ed. 348; *Mills v. Green*, 159 U. S. 655, 16 Sup. Ct. 132, 40 L. Ed. 293. And so a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of such judgment, a statute has been passed legalizing and ratifying such taxation. *Rafferty v. Smith, Bell & Co.*, 257 U. S. 232, 42 Sup. Ct. 71, 66 L. Ed. 208.

In the *Wheeling Bridge Case*, as in the *Clinton Bridge Case*, the public right involved was that of abating an obstruction to the navigation of a river. The right involved in the present suit, of enjoining the maintenance of an illegal school district and the issuance of its bonds, is likewise a public right shared by the plaintiffs with all other resident taxpayers. And while in the *Wheeling Bridge Case* the bill was filed by the State, although partly in its proprietary capacity as the owner of certain canals and railways (9 How. 647, 648, 13 L. Ed. 294), the doctrine that a judgment declaring a public right may be annulled by subsequent

legislation, applies with like force in the present suit, although brought by individuals primarily for their own benefit; the right involved and adjudged, in the one case as in the other, being public, and not private.

The judgment of the Supreme Court in this case affected merely the public right involved—the plaintiffs' judgment for costs not being impaired—and was clearly in accordance with the doctrine of the Wheeling Bridge Case. And since the question does not require further argument, the alternative motion of the defendants in error is granted and the judgment is

Affirmed.

(261 U. S. 502)

OMNIA COMMERCIAL CO., Inc., v. UNITED STATES.

(Argued March 1, 1923. Decided April 9, 1923.)

No. 229.

Eminent domain §2(1)—Government's requisition of steel company's entire steel plate production held not "taking of property" of customer under contract with company.

The government's requisition, under Act March 4, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¹/_{16b}, 3115¹/_{16c}), or Act June 15, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¹/_{16d}), of a steel company's entire production of steel plate for a certain year, as respects one having a contract with such company for steel plate, which, by reason of the requisition, became impossible of performance, was not a taking or appropriation for public use of property in such contract compensable by the government by virtue of Const. Amend. art. 5, since for consequential loss or injury resulting from lawful governmental action the law affords no remedy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking (in Eminent Domain).]

Appeal from the Court of Claims.

Action by the Omnia Commercial Company, Inc., against the United States. From a judgment of dismissal (56 Ct. Cl. 392), plaintiff appeals. Affirmed.

Mr. Geo. Maurice Morris, of Washington, D. C., for appellant.

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*Mr. Assistant Attorney General Riter, for the United States.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The appellant, on May 19, 1917, by assignment, became the owner of a contract, by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company, of Pittsburgh, at a price under the market. The contract was of

great value, and if carried out would have produced large profits.

In October, 1917, before any deliveries had been made, the United States government requisitioned the steel company's entire production of steel plate for the year 1918, and directed that company not to comply with the terms of appellant's contract, declaring that if an attempt was made to do so the entire plant of the steel company would be taken over and operated for the public use.

Appellant brought an action in the Court of Claims alleging, in addition to the foregoing,

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that by the orders *of the government the performance of the contract by the steel company had been rendered unlawful and impossible; that the effect was to take for the public use appellant's right of priority to the steel plate expected to be produced by the steel company and thereby appropriate for public use appellant's property in the contract. As a result it alleged that it had incurred losses in a large sum which it sought to recover, as just compensation, by virtue of article 5 of the Amendments to the Constitution. To this petition the United States interposed a demurrer, which was sustained, and the petition dismissed. From this judgment the case comes here by appeal.

A question is raised as to the statutory authority of the officer, who made the order of requisition and gave the directions respecting noncompliance with the contract, to bind the government; but, for the purposes of the case, we assume he was authorized, as he could have been under 39 Stat. 1193, c. 180 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¹/_{16b}, 3115¹/_{16c}), or 40 Stat. 182, 183, c. 29 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¹/_{16d}). We also pass, without deciding, a contention challenging the sufficiency of the complaint and come to the case on the merits.

The contract in question was property within the meaning of the Fifth Amendment (Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 690, 17 Sup. Ct. 718, 41 L. Ed. 1165; Cincinnati v. Louisville & Nashville Ry. Co., 223 U. S. 390, 400, 32 Sup. Ct. 267, 56 L. Ed. 481), and if taken for public use the government would be liable. But destruction of, or injury to, property is frequently accomplished without a "taking" in the constitutional sense. To prevent the spreading of a fire, property may be destroyed without compensation to the owner, Bowditch v. Boston, 101 U. S. 16, 18, 25 L. Ed. 980, a doctrine perhaps to some extent resting on tradition. Pennsylvania Coal Co., Inc., v. Mahon, 260 U. S. 393, 43 Sup. Ct. 158, 67 L. Ed. —, December 11, 1922.

There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of build-

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ings, destruction of diseased *cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property. See *Calhoun v. Massie*, 253 U. S. 170, 40 Sup. Ct. 474, 64 L. Ed. 843, where an act of Congress invalidating contracts made with attorneys for compensation exceeding a certain percentage for the prosecution of claims against the government was sustained, although it had the effect of putting an end to an existing contract. This court said (253 U. S. 175, 176, 40 Sup. Ct. 476, 64 L. Ed. 843):

"An appropriate exercise by a state of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values, and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results. *Lottery Case*, 188 U. S. 321, 357; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 58; *Hoke v. United States*, 227 U. S. 308, 323; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146. The sovereign right of the government is not less because the property affected happens to be a contract. *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 484; *Union Dry Goods Company v. Georgia Public Service Corporation*, 248 U. S. 372."

In *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, it was held that an act of Congress, prohibiting the issuance of free transportation by interstate common carriers, which invalidated a contract for transportation previously entered into and valid when made, did not have the effect of taking private property without compensation. The court, speaking through Mr. Justice Harlan, said (219 U. S. 484, 31 Sup. Ct. 271, 55 L. Ed. 297, 34 L. R. A. [N. S.] 671):

"It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In *Knox v. Lee*, 12 Wall. 457, above cited, the court, re-

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fer*ring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts."

The conclusion to be drawn from these and other cases which might be cited is that for consequential loss or injury resulting from lawful governmental action the law affords no remedy. The character of the power exercised is not material. *C., B. & Q. Railway v. Drainage Com'rs*, 200 U. S. 561, 583-585,

592, 593, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175. If, under any power, a contract or other property is *taken* for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable. What was here requisitioned was the future product of the steel company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, ipso facto, took the latter. This, however, is to confound the contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. "It [the contract] may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other." *Dartmouth College v. Woodward*, 4 Wheat. 629, 654 (4 L. Ed. 629). Plain-

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ly here there was *no acquisition of the obligation or the right to enforce it. If the steel company had failed to comply with the requisition, what would have been the remedy? Not enforcement of the contract, but enforcement of the statute. If the government had failed to pay for what it got, what would have been the right of the steel company? Not to the price fixed by the contract, but to the just compensation guaranteed by the Constitution.

In exercising the power to requisition, the government dealt only with the steel company, which company thereupon became liable to deliver its product to the government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated, but ended.

Parties and a subject-matter are necessary to the existence of a contract, but neither constitutes any part of it; the contract consists in the agreement and obligation to perform. If one makes a contract for the personal services of another, or for the sale and delivery of property, the government, by drafting one of the parties into the army, or by requisitioning the subject-matter, does not thereby take the contract. In *Marshall v. Glanville et al.*, [1917] L. R. 2 K. B. 87, the plaintiff had been employed by the defendants upon a contract of service. While the agreement was in force the former was called into the military service. It was held that this put an end to the contract. The court said:

"Here the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services. The rendering and acceptance of these services ceased to be lawful

in July, 1916, and thereupon the bargain came to an end."

The American and English cases all agree that the result is the same where the subject-

^{*512} matter of the contract ^{*is} requisitioned. *Tex. as Co. v. Hogarth Shipping Co.*, 256 U. S. 619, 629-631, 41 Sup. Ct. 612, 65 L. Ed. 1123; *The Claveresk* (C. C. A.) 264 Fed. 276, 282-284; *The Frankmere* (D. C.) 262 Fed. 819, 822. In *re Shipton* [1915] L. R. 3 K. B. 676; *Steamship Co. v. Le Nickel Société Anonyme*, 8 British Ruling Cases, 546; *Bank Line, Limited, v. Arthur Capel & Co.* [1919] L. R. App. Cases, 435, 445.

In *The Frankmere*, *supra*, where a ship under charter was requisitioned by the British government, the court said that:

"* * * The contract was thereby frustrated when the government took possession of the ship, and the rights of the charterer were absolutely ended and terminated, and those of the owner, subject, however, to the paramount power of the government to use the ship, without consulting the desire of the owner, revived, as though the charter had never been entered into."

In *Re Shipton*, *supra*, a parcel of wheat then lying in a warehouse was sold, for future payment and delivery. The wheat was subsequently requisitioned by the English government, and, in consequence, the sellers were unable to deliver. A claim for damages was put forward against the sellers, but the Court of King's Bench Division held that they were not liable, upon the ground that performance had become impossible without their fault. *Darling, Justice*, agreeing with the opinion of *Lord Reading*, said (pages 683, 684):

"If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy. It must be here presumed that the crown acted legally, and there is no contention to the contrary. We are in a state of war; that is noto-

^{*513} rious. The subject-matter of this contract ^{*has} been seized by the state acting for the general good. 'Salus populi suprema lex' is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it."

In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the government.

The government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound, the government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

There is nothing in *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, or in the other cases cited by appellant, which in any way conflicts with what we have said.

In the *Monongahela* Case the property which was taken was a lock and dam, built by the company, pursuant to the invitation of the United States and the state of Pennsylvania, the latter, in consideration, giving the company a franchise to exact tolls. The franchise, therefore, was not merely a contract in respect of the property taken, but was an integral part of it, and this court (148 U. S. 329, 13 Sup. Ct. 627, 37 L. Ed. 463) said:

"So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property, the franchise to take tolls."

The lock and dam constituted, in effect, a going concern, whose value was of course affected by what it would produce. Moreover, the case rested primarily upon the doctrine of estoppel, as this court has in several cases

^{*514} since ^{*pointed} out. *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 264, 35 Sup. Ct. 551, 59 L. Ed. 939; *Oyster Co. v. Briggs*, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. 1083, *Ann. Cas.* 1915A, 232.

In *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165, the statute providing for condemnation expressly included contracts, and these were in fact taken and compensation therefor specifically allowed. This was pointed out in the opinion of this court (166 U. S. 691, 17 Sup. Ct. 720, 41 L. Ed. 1165):

"In other words, the condemnation proceedings did not repudiate the contract, but appropriated it and fixed its value."

We have examined the other cases relied upon, but find nothing to justify a conclusion other than that which we have reached.

The judgment of the court below is Affirmed.

(261 U. S. 481)

THOMAS, Sheriff, et al. v. KANSAS CITY SOUTHERN RY. CO. et al.

(Argued March 9-12, 1923. Decided April 9, 1923.)

No. 303.

1. Drains ⚡—Legislature, if consistent with Constitution, may establish a district, set the boundaries, and apportion burden.

The Legislature of a state may, if consistent with its Constitution, establish a drainage district, set the boundaries, and apportion the burden, by fixing the basis of assessment and of taxation.

2. Constitutional law ⚡—Legislative determination land will be benefited by improvement not assailable, unless palpably arbitrary or discriminatory.

The Legislature's determination that lands will be benefited by an improvement for which it authorizes a special tax is ordinarily conclusive, and its action in so doing cannot be assailed under the Fourteenth Amendment to the Constitution, unless it is palpably arbitrary or discriminatory.

3. Drains ⚡—Proportion of railroad franchise may be included within district.

A proportion of the franchise of a railroad may, consistently with the federal Constitution, be included as real estate within a drainage district.

4. Drains ⚡—To justify assessment, benefit need not be direct.

To justify an assessment on the property, the benefit from a drain need not be a direct one; but it may, in case of a railroad, consist of gains derived from increased traffic.

5. Drains ⚡—Vague speculation as to benefits does not justify assessment manifestly unequal.

Vague speculation as to future increased traffic receipts will not justify a basis of taxation against a railroad for a drainage district which necessarily produces manifest inequality.

6. Appeal and error ⚡—1094(1)—Concurrent findings by two lower courts accepted.

Findings concurred in by the two lower courts will be accepted.

7. Drains ⚡—79—Assessment of railroad held grossly discriminatory.

Assessment for drainage district under Acts Ark. 1915, p. 747, as amended by Acts Ark. 1917, p. 348, on the basis of the assessed valuation of the lands and railroad tracks within the district, as a result of which the railroads were required to pay 57 per cent. of the tax, though they received no direct benefit, and would receive no indirect benefit until the other lands had been drained and put in cultivation, so as to increase the traffic, while the lands which paid the other 43 per cent. of the tax would be, immediately on the completion of the drain, very largely increased in value, was manifestly and grossly discriminatory, so that

enforcement of the tax against the railroads was properly enjoined.

Appeal from United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Kansas City Southern Railway Company and another against Will F. Thomas, Sheriff and Collector, and others, to restrain the enforcement of a tax levied for a drainage district. A decree for permanent injunction was affirmed by the Circuit Court of Appeals (277 Fed. 708), and defendants appeal. Affirmed.

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*Messrs. James D. Head, of Texarkana, Ark., Otis Wing, of De Queen, Ark., and Henry Moore, Jr., of Texarkana, Ark., for appellants.

Messrs. S. W. Moore, of New York City, and James B. McDonough, of Ft. Smith, Ark., for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Legislature of Arkansas created, by a special law, the Little River drainage and levee district of Sevier county, No. 1, a body corporate, and defined its boundaries. Act 186 of Acts of 1915, p. 747, amended by Act 79 of Acts of 1917, p. 348. This suit was brought in the federal court for the Western District of Arkansas, Texarkana Division, by two railroad companies to restrain enforcement of a tax levied in the year 1918 under that act. The defendants below were the district, its officers, and the sheriff and collector of Sevier county. The statute (section 4) named a board of directors, imposed upon it the duty of constructing drainage works, empowered it to raise the necessary money by construction notes and an issue of bonds to the amount of \$100,000, and directed it—

"to assess and levy annually a tax upon the valuation as it shall appear each year on the assessment book of Sevier county, Arkansas, upon all lands and * * * upon the railroad tracks of companies in said district, as appraised by the Board of Railroad Commissioners; * * * not to exceed, however, in any one year, the sum of six per cent. of the assessed valuation of the said property within the district."

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*The estimated cost of the improvement was about \$75,000. For the purpose of defraying a part of this cost the directors levied in the year 1918, a tax of \$7,346.12, being 6 per cent. of the assessed value of all real estate within the district. Of this amount it levied upon the railroads \$4,191.60, being 6 per cent. of the assessed value of their property. Upon the 12,000 acres of land, being all the other real estate in the district, the directors laid, in the aggregate, taxes of \$3,151.52, being 6 per cent. of its assessed val-

ue. Thus 57 per cent. of the burden was imposed upon the railroads, and 43 per cent. upon the owners of all the other real estate. Plaintiffs claimed that the tax was void. After a hearing, at which much evidence was introduced, the District Court entered a decree for a permanent injunction. Its decree was affirmed by the Circuit Court of Appeals, on the ground that the facts reveal an instance of discrimination so palpable and arbitrary as to amount to a denial of equal protection of the laws. 277 Fed. 708. The case is here on appeal.

[1-6] The applicable rules of law are settled. The Legislature of a state may, if consistent with its Constitution, establish a drainage district, may set the boundaries, and may apportion the burden by fixing the basis of assessment and of taxation. The Legislature's determination that lands will be benefited by a public improvement for which it authorizes a special tax is ordinarily conclusive. Its action in so doing cannot be assailed under the Fourteenth Amendment, unless it is palpably arbitrary or discriminatory. *Houck v. Little River Drainage District*, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266; *Valley Farms Co. v. County of Westchester*, No. 136, 261 U. S. 155, 43 Sup. Ct. 261, 67 L. Ed. —, decided February 19, 1923. A proportion of the franchise of a railroad may, consistently with the federal Constitution, be included as real estate within the district. To justify an assessment upon property, the benefit from the improvement need not be a direct one. It may, in case of a railroad, consist of gains derived

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from increased traffic. *Branson v. Bush*, 251 U. S. 182, 40 Sup. Ct. 113, 64 L. Ed. 215. But vague speculation as to future increased traffic receipts will not justify a basis of taxation which necessarily produces manifest inequality. Compare *Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, 256 U. S. 658, 661, 41 Sup. Ct. 604, 65 L. Ed. 1151. In the case at bar the lower courts concurred in their findings of controverted facts. We accept these findings. *Dun v. Lumbermen's Credit Association*, 209 U. S. 20, 28 Sup. Ct. 335, 52 L. Ed. 663, 14 Ann. Cas. 501. The question for decision is whether facts, admitted and found, establish that the tax levied upon plaintiffs violates rights guaranteed by the Fourteenth Amendment.

[7] The district is wholly rural. Little river bounds it on the west and south. It contains about 12,000 acres of rich land. Only one-tenth is under cultivation. The rest is wild and untillable, because marshy or subject to overflow. The aggregate assessed value of the 12,000 acres was in 1918

only \$52,525.33. The lands were then worth from \$8 to \$40 an acre. The proposed improvement would increase their value at least \$250,000. Along the northerly part of its western boundary the district is traversed for a distance of about two miles, by a single-track railroad. The total length of track within the district, including a detour line and sidings, is 3.61 miles. The railroad is owned by the Texarkana & Ft. Smith, and is operated by the Kansas City Southern, as part of its line from Missouri to the Gulf. The railroad property is 40.43 acres in area, and is assessed at \$69,910. It would derive no direct benefit from the construction of the ditches and embankment designed to drain and to protect the district from overflow, because the tracks are laid upon a fill or dump (with the exception of one trestle) and are above flood level. The railroad would derive some measure of indirect benefit, because the drained land would doubtless be cultivated, and more extensive cultivation would probably increase traffic over the line.

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*The tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden, and the lands, which will receive a large direct (and possibly immediate) benefit, are required to bear only a very small part of the burden. The market value of the 12,000 acres may increase largely before any additional land is cultivated, or even before the improvement is made. The railroad can derive the indirect benefit, through increased traffic, only after the drainage of the wild lands has been effected and the reclaimed lands are being cultivated. The work of reclamation had not even begun. Obviously there could not be any increase in traffic receipts during the year 1918, in which the tax is laid. Appellants argue that the assessed valuation of the lands would probably be greatly raised in later years, that the assessment upon the railroad property would probably not be raised, that the proportion of the annual burden imposed upon the railroad would diminish from year to year, and that, in course of time, the aggregate of the taxes levied upon each piece of property would be thus adjusted, so as to correspond to the benefits received. This argument is relied upon to save the scheme of apportionment. But it rests wholly upon prophecy. The fact is that the tax levied is grossly discriminatory. The best that can be said of the scheme of taxation (so far as it concerns the railroad) is that the burdens imposed will grow less, as its ability to bear them grows greater.

Affirmed.

(261 U. S. 581)

**ALBERT HANSON LUMBER CO., Limited,
v. UNITED STATES.**(Argued Feb. 28, 1923. Decided April 9,
1923.)

No. 300.

**1. Eminent domain ⇨56—Facts held to show
condemnation of land beside canal was neces-
sary.**

Under Act July 25, 1912, authorizing the Secretary of War to purchase the Hanson Canal, the resolution of the board of directors of the company owning the canal, reciting that it was necessary for the United States to have a right of way 300 feet in width in order to improve and enlarge the canal, and empowering its chief executive officer to convey such property to the United States, shows that the acquisition of the land on either side of the canal to the width specified was essential to the enterprise.

**2. Eminent domain ⇨8—Statute held to au-
thorize condemnation of canal.**

Act Aug. 1, 1888 (Comp. St. §§ 6909, 6910), providing that, in every case in which an officer is authorized to procure real estate for public use, he may condemn it, if necessary, was not prevented from applying to the acquisition of property necessary for the improvement of rivers and harbors by Act April 24, 1888 (Comp. St. § 9878); authorizing condemnation of property for rivers and harbors, so that the Secretary of War, under Act Aug. 1, 1888, may condemn a canal and strip of land adjoining which he was authorized to purchase by Act July 25, 1912.

**3. Eminent domain ⇨8—Limitation of pur-
chase price does not deny authority to con-
demn.**

The fact that Act July 25, 1912, limited the purchase price which could be paid for a canal does not exclude authority to condemn the canal, since the act does not attempt to fix or limit the just compensation to be paid, under Const. Amend. 5, for property condemned.

**4. Evidence ⇨222(2)—Resolutions of defend-
ant, admitting necessity, are admissible on
that issue.**

In condemnation proceedings, where the issue of the necessity of taking a strip of land 300 feet wide, inclusive of the canal, was raised, resolutions adopted by the company owning the canal, which recited that it was necessary for the United States to acquire a strip of that width, and authorized a transfer by the company's executive officer, are admissible against the owner as an admission of necessity.

**5. Evidence ⇨222(2), 263(1)—Resolutions of
owner, accepting offer to purchase, held ad-
missible as evidence of value, and circum-
stances may be explained.**

Resolutions adopted by an owning corporation before condemnation proceedings had been commenced, fixing the price for the property and showing a completed agreement of

purchase and sale, are admissible against the owner in subsequent condemnation proceedings as the owner's admission of the then value of the property, and it was not error to receive them in evidence, giving the owner an opportunity to explain the circumstances attending the adoption of the resolution and the fixing of the price therein.

**6. Eminent domain ⇨222(4)—Charge as to
compensation for taking of canal held cor-
rect.**

A charge that the jury should consider what it did cost, and would cost now, to dig the canal sought to be condemned, the reasons that induced the company owning the canal to make a contract for its sale, and stating that the jury were not bound by the price agreed on, and might find an amount greater or less than that, was correct.

**7. Eminent domain ⇨205—Verdict fixing
compensation held not unsupported by evi-
dence.**

In proceedings to condemn a canal, evidence tending to show that the original cost of the canal was \$65,000, and that it would cost much more to reproduce it, with evidence as to the size of the canal, its suitability for use, and the condition of the property, held to support a verdict fixing just compensation for the taking of the canal at \$65,000.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Condemnation proceedings by the United States against the Albert Hanson Lumber Company, Limited. A judgment of condemnation was affirmed by the Circuit Court of Appeals (277 Fed. 894), and defendant brings error. Affirmed.

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*Mr. E. Howard McCaleb, of New Orleans, La., for plaintiff in error.

Mr. Alfred A. Wheat, of New York City, for the United States.

Mr. Justice BUTLER delivered the opinion of the Court.

The United States instituted condemnation proceedings in the District Court for the Eastern District of Louisiana to acquire the so-called Hanson Canal, and a strip of land 300 feet wide including the canal. Plaintiff in error was the owner and objected to the taking on grounds hereinafter stated. Judgment was given condemning the property and vesting title in the United States when the amount found in favor of the owner shall have been paid. The case was taken by the

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owner to the Circuit Court of Appeals, and there the judgment was affirmed. The case is here on writ of error to that court.

The owner contends that the District Court and Circuit Court of Appeals erred in holding that the acts of Congress relied upon by the government confer authority to condemn the canal proper and the land adjacent to and outside the limits thereof within a

strip of a total width of 300 feet inclusive of the canal.

[1] The property is sought to be taken to constitute a part of the intracoastal canal projected by the government extending from Boston to the Rio Grande. A number of acts of Congress¹ must be considered. Prior to the

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Act approved July 25, 1912, it was contemplated that the right of way necessary for the enterprise would be secured to the United States free of cost. That act authorized the Secretary of War to purchase the Hanson Canal for use as a part of the waterway from Franklin to Mermentau, La., included in the intracoastal project, at a cost not to exceed \$65,000. September 29, 1913, the board of directors of the owning company adopted resolutions which referred to the pertinent provisions of the Acts of Congress

¹ Act approved March 2, 1907, 34 Stat. c. 2509, p. 1089, makes appropriation for: "Improving inland waterway channel from Franklin to Mermentau, Louisiana. * * *"

Act approved March 3, 1909, 35 Stat. c. 264, pp. 815, 816, § 3, provides:

"That appropriations or authorizations for appropriations heretofore made may * * * be diverted or applied upon modified projects for the rivers and harbors hereinafter named, as follows: * * *

"Inland waterway between Franklin and Mermentau, Louisiana: To secure a suitable right of way for the proposed inland waterway channel from Franklin to Mermentau, adopted by Congress in the River and Harbor Act of March second, nineteen hundred and seven, the location of the eastern terminus of said channel may be changed from the town of Franklin, on Bayou Teche, to such other point on said bayou as the Secretary of War may select: Provided, that the modification herein authorized shall not be made unless a valid title to the necessary right of way be secured to the United States free of cost."

Act approved February 27, 1911, 36 Stat. c. 166, pp. 942, 943, makes appropriation for: "Inland waterway between Franklin and Mermentau, Louisiana: To insure the selection of the most suitable route for the inland waterway channel from Franklin to Mermentau adopted by Congress in the River and Harbor Act of March second, nineteen hundred and seven, the Secretary of War is hereby authorized, on the recommendation of the Chief of Engineers, to make such changes in the location of said channel as may be considered desirable: Provided, that no change shall be made under this authorization unless the necessary right of way is secured to the United States free of cost."

Act approved July 25, 1912, 37 Stat. c. 253, pp. 201-212.

Act approved April 24, 1888, 25 Stat. c. 194, p. 94 (Comp. St. § 9878)—an act to facilitate the prosecution of works projected for the improvement of rivers and harbors—provides: "That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted. * * *"

Act approved August 1, 1888, 25 Stat. c. 728, p. 357 (Comp. St. §§ 6909, 6910).

respectively approved March 2, 1907, and July 25, 1912, and recited that "It is necessary for the United States to have and own a right of way three hundred feet in width in order to improve and enlarge said canal and make the same a part of the said inland waterway"; that the United States has proposed and agreed to purchase the canal, including a 300 feet wide strip of right of way and certain locks and other constructions thereon, and authorized and empowered the vice president, who was the chief executive officer of the corporation, upon the payment of \$65,000 as compensation, to convey the property to the United States.

These resolutions and the other circumstances disclosed by the record make it sufficiently clear that the land on either side of the canal is essential to the enterprise. It

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*follows that, if the condemnation of the canal proper is authorized, the land may also be taken.

[2] For authority to condemn, the United States relies on the Acts of July 25, 1912 and August 1, 1888. The pertinent provisions are:

"Improving waterway from Franklin to Mermentau, Louisiana: The Secretary of War is hereby authorized to purchase, for use as a part of said waterway, the so-called Hanson Canal * * * at a cost not to exceed \$65,000. * * *" 37 Stat. c. 253, p. 212.

"That in every case in which the Secretary of the Treasury or any other officer of the government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so, * * *" and jurisdiction is conferred upon the District Courts of proceedings for such condemnation, and the practice, pleadings, forms and proceedings are made to conform as near as may be to those existing in like cases in the courts of the state within which such District Courts are held. 25 Stat. c. 728, p. 357.

Plaintiff in error argues that the Act of April 24, 1888, cited in the margin, conferring power upon the Secretary of War to condemn land, right of way and material needed to enable him to carry on work in connection with improvement of rivers and harbors, is exclusive and evidences an intention that the Act of August 1, 1888, shall not apply in that field, and that the acts of 1907, 1909, 1911, and 1912 engraft an exception on the Act of April 24, 1888, to the effect that, as to the Hanson Canal property here sought to be taken, no power to condemn exists, and that it must be acquired, if at all, by contract of purchase at a price not

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in excess of the sum specified. It is true that the authority granted by the Act of August 1, 1888, to some extent overlaps that

granted by the earlier statute (April 24, 1888), but there is no conflict between them. The earlier does not operate to limit the effect of the later act. The act of 1912 specifically authorizes the purchase of the property because deemed necessary for public use. It would have been futile to authorize the purchase of an essential part of a great project, withholding power to condemn, and so leave it within the power of the owner to defeat the program by demanding a price in excess of \$65,000 or by refusing to sell at all. The argument is without force.

[3] Another contention of plaintiff in error is that the provision of the Act of July 25, 1912, limiting the authorized purchase price to \$65,000, negatives and necessarily excludes authority to condemn. This is not a case where attempt is made by legislation to fix or limit the just compensation to be paid for private property condemned. It is not like *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, where Congress sought to exclude the value of the owner's franchise right to exact tolls for service performed, thereby violating the Fifth Amendment. The provision authorizing the Secretary to purchase at a cost not to exceed a specified amount has nothing to do with the judicial ascertainment of just compensation for the property condemned. *Shoemaker v. United States*, 147 U. S. 282, 302, 13 Sup. Ct. 361, 37 L. Ed. 170. Neither the right of the owner to be put in as good position pecuniarily as he would have been if his property had not been taken,² nor the right to have ascertainment and payment of just compensation as a condition of the taking³ is attempted to be im-

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paired by *legislation here under consideration. It is not necessary that the exact amount required shall be appropriated or that legislation shall indicate no limit upon the expenditure for property to be taken. There is no declaration or evidence of legislative purpose to violate the just compensation clause or to secure the property in question for less than the full amount to which the owner was entitled.⁴ The power of eminent domain is not dependent upon any specific grant; it is an attribute of sovereignty, limited and conditioned by the just compensation clause of the Fifth Amendment. The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain and adequate

provision is made for obtaining just compensation. *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641, 659, 10 Sup. Ct. 965, 34 L. Ed. 295; *Bauman v. Ross*, 167 U. S. 548, 598, 599, 17 Sup. Ct. 966, 42 L. Ed. 270; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568, 569, 18 Sup. Ct. 445, 42 L. Ed. 853; *United States v. Jones*, 109 U. S. 513, 518, 3 Sup. Ct. 346, 27 L. Ed. 1015; *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206.⁵ The authority to condemn is not negated or affected by the limit set upon cost in the authorization of the Secretary to purchase.

The Acts of July 25, 1912, and of August 1, 1888, make it obvious that the Secretary of War was authorized to acquire the property by purchase or condemnation. The authority to condemn conferred by the last-mentioned act extends to every case in which an officer of the government is authorized to procure real estate for public uses. See *United States v. Beaty* (D. C.) 198 Fed. 284 (reviewed in 203 Fed. 620, 122 C. C. A. 16) but not overruled on this point, and writ of error dismissed in 232 U. S. 463, 34 Sup. Ct. 392, 58 L. Ed. 686; *United States v. Graham & Irvine* (D. C.) 250 Fed. 499.⁶

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*Plaintiff in error contends that the court erred in receiving in evidence the resolutions of the directors, in giving to the jury the instructions following:

"Coming to consider the value. You have heard what it cost to dig, what it would cost to dig it now, this contract that they made to sell it, and the reasons that induced them to make the contract. All that evidence you will consider.

"Now you are not bound by the \$65,000 that they agreed to; if you think they ought to get more than that why you can award them more than that. If you think they ought to get less than that, you can award them less,"

—and also in holding that the verdict is supported by the evidence.

There were two principal issues of fact: (1) The necessity of taking the strip of land 300 feet wide, inclusive of the canal; and (2) the amount of compensation to which the owner was entitled.

The resolutions hereinbefore mentioned stated that it is necessary for the United States to have and own a right of way 300 feet in width in order to improve and enlarge said canal and make the same a part of the said inland waterway, that the United States had agreed to purchase the property from the company for \$65,000, and authorized the conveyance of the same to the United States upon payment of that sum, possession to be re-

² *Seaboard Air Line Railway Co. v. United States*, 261 U. S. 299, 43 Sup. Ct. 354, 67 L. Ed. —, decided March 5, 1923, and cases there cited.

³ *United States v. Jones*, 109 U. S. 513, 518, 3 Sup. Ct. 346, 27 L. Ed. 1015; *Searl v. School District, Lake County*, 133 U. S. 553, 562, 10 Sup. Ct. 374, 33 L. Ed. 740; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 337, 13 Sup. Ct. 622, 37 L. Ed. 463; *United States v. Sargent*, 162 Fed. 81, 83, 89 C. C. A. 81.

⁴ *In re Manderson*, 51 Fed. 501, 2 C. C. A. 490.

⁵ *Cf. In re Military Training Camp* (D. C.) 260 Fed. 986, 990; Act of July 2, 1917 (40 Stat. c. 35, p. 241 [Comp. St. 1913, Comp. St. Ann. Supp. 1919, § 6911a]).

⁶ For legislative history of the act, see 19 Congressional Record, pt. 2, p. 1387; pt. 7, pp. 6401, 6505.

tained until the purchase price was actually paid, and the right to cut trees thereon for a specified time, and right of ingress and egress from lateral canals to be reserved.

[4] Two grounds of objection are urged: (1) That the issue of necessity was cognizable in equity and that the court, sitting as a chancellor, should have determined the equity issue prior to the trial of the law issue; and (2) that the resolutions offered in

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evidence constitute, and tend *merely to prove, an attempt to compromise. The resolutions contained a distinct admission of fact that it was necessary to take the strip of land in question. This admission was made for the purpose of showing the right of the Secretary of War to purchase the property. They were admissible in evidence for that purpose. The judge rightly decided at the trial that the taking was for a public purpose and the government had a right to take.

[5] The only question submitted to the jury was the amount the owner was entitled to receive for the property. At the time of the adoption of the resolutions, condemnation proceedings had not been commenced; they were voluntarily adopted; the specified price was fixed with perfect freedom; they show a completed agreement of purchase and sale; and there is no reason why they should not be considered as the owner's admission of the then value of the property. The company had opportunity to and did introduce evidence in explanation of the circumstances attending the adoption and the fixing of the price therein. The court did not err in receiving the evidence on the question of fact submitted to the jury. *Seaboard Air Line v. Chamblin*, 108 Va. 42, 60 S. E. 727; *O'Malley v. Commonwealth*, 182 Mass. 196, 65 N. E. 30; *Montana Tonopah Mining Co. v. Dunlap*, 196 Fed. 612, 617, 116 C. C. A. 286; *Spring Valley Waterworks v. City and County of San Francisco* (D. C.) 192 Fed. 137, 164; *City of Springfield v. Schmook*, 68 Mo. 394; *Froysell v. Lewelyn* (Eng.) 9 Price 122, 147 Reprint 41.

[6] The court instructed the jury to consider what it did cost, and what it would cost now, to dig the canal, the reasons that induced the company to make the contract, and that in reaching a verdict they were not bound by the \$65,000 agreed upon and might find an amount greater or less than that. The objections urged against the charge are not well founded.

[7] The evidence tended to show that the original cost of the canal was \$65,000, and

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that it would cost \$152,000 to *reproduce it. There was evidence disclosing the size of the canal, and its suitability for use, together with the condition of the property. It cannot be said the verdict for \$65,000 is without support. *Erie Railroad Co. v. Winter*, 143 U. S. 60, 75, 12 Sup. Ct. 356, 36 L. Ed. 71.

The judgment of the Circuit Court of Appeals is affirmed.

(261 U. S. 428)

KELLER et al., Public Utilities Commission of District of Columbia, v. POTOMAC ELECTRIC POWER CO., Inc., et al.

(Argued Feb. 26, 27, 1923. Decided April 9, 1923.)

No. 260.

1. Constitutional law ☞61—Court held exercising legislative power in reviewing action of Public Utilities Commission and making order which it should have made.

Under Act March 4, 1913, § 8, par. 64, providing for a proceeding in equity to vacate, set aside, or modify any decision or order of the Public Utilities Commission of the District of Columbia, if the court has power to review the exercise of discretion by the commission, and itself raise or lower valuations or rates, or restrict or expand orders as to service, and to make the order which the commission should have made, it is exercising legislative power.

2. Public service commissions ☞25—Statute held to intend court to revise legislative discretion and make order which commission should have made.

Under Act March 4, 1913, § 8, par. 64, authorizing proceeding in equity to vacate, set aside, or modify any decision or order of the Public Utilities Commission of the District of Columbia, it is intended that the court shall revise the legislative discretion of the commission by considering the evidence and full record of the case, and entering the order which it deems the commission ought to have made.

3. Courts ☞258—Congress may confer jurisdiction of both federal and state courts on courts of district.

Under Const. art. 1, § 8, cl. 17, Congress possesses a dual authority over the District of Columbia, and may clothe the courts of the District, not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts, subject only to the guaranties of personal liberty in the Constitution and its amendments.

4. Statutes ☞64(7) — Statute providing for review of discretion of Public Utilities Commission by courts of District of Columbia held constitutional in part.

Though Act March 4, 1913, § 8, par. 64, authorizing proceeding in equity to vacate, set aside, or modify any decision or order of the Public Utilities Commission of the District of Columbia, requires the court to revise the legislative discretion of the commission, and to enter the order which it deems the commission ought to have made, it is valid so far as it provides for review of the commission's proceedings by the District Supreme Court, and for appeal to the District Court of Appeals.

5. Constitutional law ☞61, 74—Statute providing for appeal to Supreme Court on review of Public Utilities Commission's proceedings held unconstitutional.

Act March 4, 1913, § 8, par. 64, so far as it provides for appeal to the United States

Supreme Court in proceeding to vacate, set aside, or modify any decision or order of the Public Utilities Commission of the District of Columbia, the proceedings in which are required to conform to equity procedure, is unconstitutional, as Congress cannot confer on such court the legislative or administrative jurisdiction which it would be required to exercise on such appeal.

6. Appeal and error ⚡847(1), 1009(3)—An appeal in equity brings up the whole record; appellant court in equity cases can make such order or decree as trial court might have made giving proper weight to findings or disputed issue of fact.

An appeal in equity brings up the whole record, and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact, which should be accorded to a tribunal which heard the witnesses.

7. Constitutional law ⚡69—Jurisdiction of Supreme Court and inferior courts does not extend to advisory opinions asked by Congress.

The jurisdiction of the Supreme Court and inferior courts of the United States, established by Congress under Const. art. 3, is limited to cases and controversies in such form that the judicial power is capable of acting on them, and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of the court, without real parties or a real case, or to administrative or legislative issues or controversies.

8. Statutes ⚡64(7)—Unconstitutional provision for appeal to Supreme Court in proceedings to review decision of Utilities Commission in District of Columbia held not to render whole paragraph unconstitutional.

The unconstitutionality of Act March 4, 1913, § 8, par. 64, so far as it provides for appeal to United States Supreme Court in proceedings to review decision or order of the Public Utilities Commission of the District of Columbia, does not render the paragraph invalid as a whole, in view of paragraph 92 concerning partial invalidity.

9. Statutes ⚡64(7)—Unconstitutional provision of Utilities Commission statute as to recourse to courts and burden of proof held not to render whole act unconstitutional.

If Act March 4, 1913, § 8, par. 65, forbidding recourse to the courts to set aside, vacate, and amend orders of the Public Utilities Commission of the District of Columbia after 120 days, and paragraph 69, putting burden on the party adverse to the commission to show by clear and satisfactory evidence the inadequacy, unreasonableness, or unlawfulness of the order complained of, are unconstitutional, they do not render the whole act unconstitutional, in view of paragraph 92.

Appeal from the Court of Appeals of the District of Columbia.

Suit by the Potomac Electric Power Company, Inc., against Keller and others constituting the Public Utilities Commission of the District of Columbia. A decree dismissing

the bill was reversed by the Court of Appeals (51 App. D. C. 77, 276 Fed. 327), and the defendant named appeals. Appeal dismissed.

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*Messrs. Frank H. Stephens, of Chicago, Ill., and Conrad H. Syme, of Washington, D. C., for appellant.

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*Mr. John A. Garver, of New York City, for appellee.

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*Mr. Chief Justice TAFT delivered the opinion of the Court.

This is an appeal from the Court of Appeals of the District of Columbia. It is an appeal provided for in paragraph 64 of the law creating the Public Utilities Commission of the District. The law is section 8 of an act approved March 4, 1913, making appropriations for the District for the year ending June 30, 1914 (37 Stat. 938, 974). Paragraph 7 requires the commission created thereby to value the property of every public utility within the District actually used and useful for the convenience of the public

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at the fair value thereof at the *time of the valuation. The commission, after a public hearing, fixed the value of the Potomac Electric Power Company at \$11,231,170.43. The company then filed a bill in equity in the Supreme Court of the District against the commission, seeking to enjoin the order as unlawful, unreasonable and inadequate under paragraph 64 of the law. It made a party defendant to the bill the Washington Railway & Electric Company, because it is the sole stockholder of the Power Company.

The Supreme Court of the District upheld the findings of the commission in every particular and dismissed the bill. From this decree the company appealed to the Court of Appeals of the District, on the ground that the commission and the Supreme Court had found the value as of July 1, 1914, whereas the time of the valuation was December 31, 1916, and between the two dates there had been a sharp rise in values, for which the company was not made any allowance in the valuation, and also because under the circumstances of the case, and the challenge by the company that the valuation was arbitrary, the court should disregard the prima facie effect given by the statute to the findings of the commission, and exercise its own independent judgment as to both law and facts, so far as it was necessary to determine whether the use of such valuation as a basis of rate making would result in confiscation. The Court of Appeals sustained the appeal on these grounds, and remanded the cause for further proceedings not inconsistent with its opinion.

When this appeal was opened by counsel at the bar we declined to hear the merits, and postponed the case to give both sides an opportunity to prepare to discuss the questions, first whether Congress had the consti-

tutional power to vest the District Courts and this court with jurisdiction to review the proceedings of the commission, and, second, whether if the power existed, the appeal to this court was only intended to apply to a

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final decree, *and finally whether this was such a decree. Briefs have accordingly been filed and we have had an oral argument upon these questions.

The Public Utilities Law is a very comprehensive one. It applies to all public utilities in the District, except steam railways and steamboat lines. It creates a commission to supervise and regulate them in the matter of rates, tolls, charges, service, joint rates, and other matters of interest to the public. It directs investigation into the financial history and affairs of each utility and its valuation at a fair value as of the time of valuation. It requires a public hearing on this subject. It also provides that while the utility may fix a schedule of rates, not exceeding the lawful rates at the passage of the act, which it must publish, the commission may of its own initiative, or upon the complaint of another, or indeed of the utility itself, investigate the reasonableness, lawfulness, and adequacy of the rate or service and may change the same. The utility must then adopt the change and publish its schedules accordingly. The law further provides that, in such proceedings, the utility shall have notice and a hearing, that a stenographic record of the proceedings shall be kept and produced by the commission in any court proceeding thereafter instituted to question the validity, reasonableness, or adequacy of the action of the commission.

The relevant part of paragraph 64 is given in full in the margin.¹ In short, it en-

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ables the commission by action *in equity to invoke the advice of the District Supreme Court upon the elements in value to be by it considered in arriving at a true valuation of the property of a utility. It further grants to any utility or any person or corporate in-

terest dissatisfied with any valuation, rate or rates, or regulation, or requirement, act, service, or other thing fixed by the commission the right to begin a proceeding in equity in the Supreme Court, to vacate, set aside, or modify the order on the ground that the valuation, rate, regulation, or requirement is unlawful, inadequate, or unreasonable. Paragraph 65 limits the time within which such a proceeding to vacate, set aside, or amend

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the order of *the commission may be begun to 120 days, and thereafter the right to appeal or of recourse to the courts shall terminate absolutely. Paragraph 67 provides that, if new evidence is introduced by the plaintiff different from that offered in the hearing before the commission, unless the parties otherwise agree, the new evidence shall be sent to the commission to enable it to change its order if it sees fit, and then the court shall proceed to consider the appeal either on the original order or the changed order as the case may be. Paragraph 69 provides that in such proceedings the burden of proof is upon the party adverse to the commission to show by clear and satisfactory evidence that the determination, requirement, direction, or order of the commission complained of is inadequate, unreasonable, or unlawful as the case may be.

[1] What is the nature of the power thus conferred on the District Supreme Court. Is it judicial or is it legislative? Is the court to pass solely on questions of law, and look to the facts only to decide what are the questions of law really arising, or to consider whether there was any showing of facts before the commission upon which, as a matter of law, its finding can be justified? Or has it the power, in this equitable proceeding, to review the exercise of discretion by the commission and itself raise or lower valuations, rates, or restrict or expand orders as to service? Has it the power to make the order the commission should have made? If it has, then the court is to exercise legislative pow-

¹"Par. 64. That if at any time the commission shall be in doubt of the elements of value to be by them considered in arriving at the true valuation under the provisions of this section, they are authorized and empowered to institute a proceeding in equity in the Supreme Court of the District of Columbia petitioning said court to instruct them as to the element or elements of value to be by them considered as aforesaid, and the particular utility under valuation at the time shall be made party defendant in said action.

"That any public utility and any person or corporation interest[ed] being dissatisfied with any order or decision of the commission fixing any valuation, rate or rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service or other thing complained of may commence a proceeding in equity in the Supreme Court of the District of Columbia against the commission, as defendants, to vacate, set aside, or modify any such decision or order on the ground that the valuation, rate or rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service or other thing complained of fixed in such order is unlawful, inadequate, or unreasonable. The

answer of the commission, on any such action being instituted against it, or the answer of any public utility on any such action being commenced by said commission against it, shall be filed within ten days, whereupon said proceeding shall be at issue and stand ready for trial.

"All such proceedings shall have precedence over any civil cause of a different nature pending in such court, and the Supreme Court of the District of Columbia shall always be deemed open for the trial thereof, and the same shall be tried and determined as are equity proceedings in said court. Any party, including said commission, may appeal from the order or decree of said court to the Court of Appeals of the District of Columbia, and therefrom to the Supreme Court of the United States, which shall hereupon have and take jurisdiction in every such appeal. Pending the decision of said appeal the commission may suspend the decision or order appealed from for such a period as it may deem fair and reasonable under the circumstances: Provided, that no appeal, unless the court or the commission shall so order, shall operate to stay any order of the commission. • • •"

er, in that it will be laying down new rules, to change present conditions and to guide future action, and is not confined to definition and protection of existing rights. In *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 226, 29 Sup. Ct. 67, 69 (53 L. Ed. 150) we said:

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future

*and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind. * * *

[2] Under the law, the proceeding in the District Supreme Court is of a very special character. The court may be called in to advise the commission as to the elements of value to be by it considered, at any stage of the hearing before the commission. To modify or amend a valuation, or a rate, or a regulation of the commission as inadequate, as the court is authorized to do, seems to us necessarily to import the power to increase the valuation, or rate, or to make a regulation more comprehensive, and to consider the evidence before it for this purpose. In other words, the proceeding in court is an appeal from the action of the commission in the chancery sense. In the briefs of counsel for the commission it is so termed. The form which the bill filed is given by the electric company is that of a series of exceptions to the rulings of the court on the evidence and at every stage of the hearing and finally to the conclusions of fact as against the weight of the evidence. Paragraph 69 is significant in its indication that issues of fact as to inadequacy of the action by the commission are to be passed on by the court.

Counsel seek to establish an analogy between the jurisdiction of the District Supreme Court to review the action of the commission, and that conferred on, and exercised by, the federal District Courts in respect of the orders of the Interstate Commerce Commission. We think, however, that the analogy fails. The act for the creation of the Commerce Court provided (Judicial Code, § 207 [Comp. St. § 993]) that it should have the jurisdiction of the then Circuit Courts of all cases brought to enjoin, set aside or annul or suspend in whole or in part any order of the commission. When the Commerce

*442 Court was abolished by the *Act of October 22, 1913 (38 Stat. 219 [Comp. St. § 992]), this jurisdiction was conferred on the several District Courts of the United States. This permits these courts to consider all relevant questions of constitutional power or right and all pertinent questions whether the administrative order is within the statutory au-

thority, or is an attempted exercise of it so unreasonable as not to be within it; but these are questions of law only. *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 470, 30 Sup. Ct. 155, 54 L. Ed. 280. Of course the consideration and decision of questions of law may involve a consideration of controverted facts to determine what the question of law is, but it is settled that any finding of fact by the commission, if supported by evidence, is final and conclusive on the courts. *Interstate Commerce Commission v. Union Pacific R. R.*, 222 U. S. 541, 547, 32 Sup. Ct. 108, 56 L. Ed. 308. A similar distinction exists between the jurisdiction here conferred and that vested in circuit courts of appeals in reference to proceedings before the Trade Commission. Act Sept. 26, 1914, c. 311, § 5, 38 Stat. 719 (Comp. St. § 8836e). The language of the act under discussion is much wider than that of the Interstate Commerce Act or of the Federal Trade Commission provisions. It brings the court much more intimately into the legislative machinery for fixing rates than does the Interstate Commerce Act. We cannot escape the conclusion that Congress intended that the court shall revise the legislative discretion of the commission by considering the evidence and full record of the case and entering the order it deems the commission ought to have made.

[3] Can the Congress vest such jurisdiction in the courts of the District of Columbia? By the Constitution (clause 17, section 8, article 1) Congress is given power "to exercise exclusive legislation in all cases whatsoever, over" the District of Columbia. This means that as to the District Congress possesses, not only the power which belongs to it in respect of territory within a state, but

*443 the power of *the state as well. In other words, it possesses a dual authority over the District, and may clothe the courts of the District, not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts. *Kendall v. United States*, 12 Pet. 524, 619, 9 L. Ed. 1181. Instances in which congressional enactments have been sustained which conferred powers and placed duties on the courts of the District of an exceptional and advisory character are found in *Butterworth v. Hoe*, 112 U. S. 50, 60, 5 Sup. Ct. 25, 28 L. Ed. 656, *United States v. Duell*, 172 U. S. 576, 19 Sup. Ct. 286, 43 L. Ed. 559, and *Baldwin Co. v. R. S. Howard Co.*, 256 U. S. 35, 41 Sup. Ct. 405, 65 L. Ed. 816. Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state Legislature has in conferring jurisdiction on its courts. In *Prentiss v. At-*

lantic Coast Line, *supra*, we held that, when "a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned." 211 U. S. 225, 29 Sup. Ct. 67, 69 (53 L. Ed. 150); *Dreyer v. Illinois*, 187 U. S. 71, 83, 84, 23 Sup. Ct. 28, 47 L. Ed. 79.

[4-7] It follows that the provisions in the law for a review of the Commission's proceedings by the Supreme Court of the District and for an appeal to the District Court of Appeals are valid. A different question arises, however, when we come to consider the validity of the provision for appeal to this court. It is contained in the following sentence in paragraph 64:

"Any party, including said commission, may appeal from the order or decree of said court to the Court of Appeals of the District of Columbia, and therefrom to the Supreme Court of the United States, which shall thereupon have and take jurisdiction in every such appeal."

The court proceedings to review the orders of the commission authorized by para-

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graph 64 are expressly required *to conform to equity procedure. In that procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses. This court is therefore given jurisdiction to review the entire record, and to make the order or decree which the commission and the District Courts should have made.

Such legislative or administrative jurisdiction, it is well settled cannot be conferred on this court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the court in *Musk-rat v. United States*, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246. The principle there recognized and enforced on reason and authority is that the jurisdiction of this court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does

not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to administrative or legislative issues or controversies. *Hayburn's Case*, 2 Dall. 410, note (1 L. Ed. 436); *United States v. Ferreira*, 13 How. 40, 52, 14 L. Ed. 42; *Ex parte Siebold*, 100 U. S. 371, 398, 25 L. Ed. 717; *Gordon v. United States*, 117 U. S. 697, appendix; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 215 U. S. 216, 30 Sup. Ct. 86, 54 L. Ed. 164.

[8] The fact that the appeal to this court is invalid does not, however, render paragraph 64 invalid as a whole. Paragraph 92 of the law declares each paragraph to be independent and directs that the holding of any paragraph or any part of it invalid shall not affect the validity of the rest. More-

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over, we think Congress would have *given the appeals to the courts of the District, even if it had known that the appeal to this court could not stand.

[9] Some question has been made as to the validity of paragraph 65, which forbids all recourse to courts to set aside, vacate and amend the orders of the commission after 120 days, and of paragraph 69, which puts the burden upon the party adverse to the commission to show by clear and satisfactory evidence the inadequacy, unreasonableness, or unlawfulness of the order complained of. It is suggested that this deprives the public utility of its constitutional right to have the independent judgment of a court on the question of the confiscatory character of an order, and so brings the whole law within the inhibition of the case of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908. It is enough to say that, even if paragraphs 65 and 69 were invalid, the whole act would not fail, in view of paragraph 92 already referred to. It will be time enough to consider the validity of those sections, when it is sought to apply them to bar or limit an independent judicial proceeding raising the question whether a rate or other requirement of the commission is confiscatory. Our conclusion that the provision for appeal to this court in paragraph 64 is invalid makes it unnecessary to decide whether the appeal must be from a final decree, or whether the decree of the Court of Appeals was final.

Appeal dismissed.

(261 U. S. 463)

FEDERAL TRADE COMMISSION v. SINCLAIR REFINING CO. SAME v. STANDARD OIL CO. (New Jersey). SAME v. GULF REFINING CO. SAME v. MALONEY OIL & MFG. CO.

(Argued March 8 and 9, 1923. Decided April 9, 1923.)

Nos. 213, 637, 638, 639.

1. Monopolies $\hookrightarrow$ 17(1) — Trade-marks and trade-names and unfair competition $\hookrightarrow$ 80½, New, vol. 8A Key-No. Series—Leasing for nominal rental tanks and pumps for gasoline purchased from lessor held not "unfair method of competition."

The practice of wholesale gasoline dealers in leasing to retailers at a nominal rental tanks and pumps for gasoline purchased solely from the lessor does not violate Clayton Act, § 3 (Comp. St. § 8835c), as to restrictive leases of machinery, where neither the leasing contract nor the circumstances of the business restrict the lessee's freedom to buy or deal in gasoline sold by other wholesalers; nor is such practice an "unfair method of competition," within Federal Trade Commission Act, § 5 (Comp. St. § 8836e).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]

2. Trade-marks and trade-names and unfair competition $\hookrightarrow$ 80½, New, vol. 8A Key-No. Series—Powers of Federal Trade Commission are limited.

Under Federal Trade Commission Act, § 5 (Comp. St. § 8836e), empowering the commission to prevent unfair methods of competition, the commission has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Petitions by the Sinclair Refining Company, by the Standard Oil Company (New Jersey), by the Gulf Refining Company, and by the Maloney Oil & Manufacturing Company to review orders of the Federal Trade Commission. The orders were set aside (Sinclair Refining Co. v. Federal Trade Commission, 276 Fed. 686; Standard Oil Co. v. Federal Trade Commission, 282 Fed. 81), and the Federal Trade Commission brings certiorari. Judgments affirmed.

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*The Attorney General, and Messrs. Adrien F. Busick and Eugene W. Burr, both of Washington, D. C., for petitioner.

Mr. Roy T. Osborn, of Chicago, Ill., for respondent Sinclair Refining Co.

Mr. C. D. Chamberlin, of Cleveland, Ohio, for respondent Maloney Oil & Mfg. Co.

Mr. R. T. Batts, of Pittsburgh, Pa., for respondent Gulf Refining Co.

Mr. J. H. Hayes, of New York City, for respondent Standard Oil Co. (New Jersey).

Mr. Justice McREYNOLDS delivered the opinion of the Court.

In separate proceedings against 30 or more refiners and wholesalers, the Federal Trade Commission condemned and ordered them to

abandon the practice of leasing* underground tanks with pumps to retail dealers at nominal prices and upon condition that the equipment should be used only with gasoline supplied by the lessor. Four of these orders were held invalid by the Circuit Courts of Appeals for the Third and Seventh Circuits in the above entitled causes (Sinclair Refining Co. v. Federal Trade Commission, 276 Fed. 686; Standard Oil Co. v. Federal Trade Commission, 282 Fed. 81), and like ones have been set aside by the Circuit Courts of Appeals for the Second and Sixth Circuits (Standard Oil Co. v. Federal Trade Commission, 273 Fed. 478, 17 A. L. R. 389; Canfield Oil Co. v. Federal Trade Commission, 274 Fed. 571). The proceedings, essential facts, and points of law disclosed by the four records now before us are so similar that it will suffice to consider No. 213 as typical of all.

July 18, 1919, the commission issued a complaint charging that respondent, Sinclair Refining Company, was purchasing and selling refined oil and gasoline and leasing and loaning storage tanks and pumps as part of interstate commerce in competition with numerous other concerns similarly engaged, and that it was violating both the Federal Trade Commission Act (38 Stat. 717 [Comp. St. §§ 8836a-8836k]), and the Clayton Act (38 Stat. 730 [Comp. St. §§ 8835a-8835p]).

The particular facts relied on to show violation of the Federal Trade Commission Act are thus alleged:

"Paragraph 3. That respondent in the conduct of its business, as aforesaid, with the effect of stifling and suppressing competition in the sale of the aforesaid products, and in the sale, leasing, or loaning of the aforesaid devices and other equipments for storing and handling the same, and with the effect of injuring competitors who sell such products and devices, has within the four years last past sold, leased, or loaned, and now sells, leases, or loans, the said devices and their equipment for prices or considerations which do not represent reasonable returns on the investments in such devices and their equipments; that many such sales, leases, or loans of the aforesaid devices are made at prices below the cost

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of producing and vend*ing the same; that many of such contracts for the lease or loan of such devices and their equipments provide or are entered into with the understanding that the

lessee or borrower shall not place in such devices, or use in connection with such devices and their equipments, any refined oil or gasoline of a competitor; that only a small proportion of the dealers in gasoline and refined oil under such agreements and understandings deal also in similar products of respondent's competitors, and that only a small proportion of such dealers require or use more than a single pump outfit in the conduct of their said business; that there are numerous competitors in the sale of such products, who are unable to enter into such lease agreements or understandings because of the large amount of investment required to carry out such lease agreements as a competitive method of selling refined oil and gasoline; that there are numerous other competitors of respondent engaged in the manufacture and sale of said devices and their equipments, who do not deal in refined oil and gasoline, and therefore do not sell or lease said devices and their equipments for a nominal consideration on a condition or understanding that their products only are to be used therein; that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent, because of the business practices of respondent hereinbefore set forth; that the said numerous other competitors of respondent who manufacture and sell said devices and their equipments, but do not sell refined oil and gasoline as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and equipments, because of the said business practices of respondent, as hereinbefore set forth."

To show violation of the Clayton Act the complaint alleged:

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"Paragraph 3. That the respondent, for four years last past, in the conduct of its business as aforesaid, has leased and made contracts for the lease, and is now leasing and making contracts for the lease, of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement, or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent, and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings, may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative."

Respondent answered and evidence was taken. In October, 1919, the commission announced its report, findings, and conclusions, the substance of which follows:

"1. That the respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maine, with its principal business office located at the city of Chicago, in the state of Illinois, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, hereinafter referred to as products, and is largely engaged in refining crude petroleum, and that it is now and has

been since January 25, 1917, in connection with the aforementioned business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks, and containers and their equipment, hereinafter referred to as devices, in various states of the United States, but not in the District of Columbia, in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged; that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

"2. That the respondent, in the conduct of its business, as aforesaid, and as hereinafter

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more particularly described, extensively refines petroleum and its products and purchases refined oil and gasoline, all hereinafter referred to as 'products,' and also purchases all pumps, storage tanks, or containers, hereinafter referred to as 'devices,' the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of its business of purchasing and selling such products, and selling, leasing, or loaning such devices, the same are constantly moved from one state to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between various states of the United States; that there are numerous competitors of respondent, who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce; that the aforesaid products are sold, and the aforesaid devices sold, leased, or loaned, by such competitor of respondent to various persons, firms, corporations, and copartnerships; that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one state to another, and there is conducted by said competitors a constant current of trade in such products and devices between the various states of the United States; that respondent has conducted its said business in a similar manner to that above described since January 25, 1917.

"3. That respondent now leases and loans, and has for the period of its business existence

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leased and loaned, *devices and equipment for storing and handling its products, and that the monetary considerations received by respondent do not represent reasonable returns upon the investment in such devices and equipment; and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same, when the business of leasing or loaning said devices and equipment and the returns received thereon are considered separate and apart from the general business and sales policy of the respondent; that respondent's form of contract with the users of such devices and equipment provides in substance that the devices and

equipment shall be used for the sole purpose of storing and handling gasoline supplied by respondent, and that the uniform contract used by respondent for leasing such devices and equipment is in form, tenor, and substance as follows: [The ordinary form of contract (printed in the margin¹) is here set out. It recites

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the *customer's desire to install certain equipment, and, among other things, provides that this shall be used only for storing and han-

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dling gasoline supplied by the lessor; that *if put to any other use the lessee's right therein shall terminate; and that upon termination of the lease, by whatever means effected, the lessee may purchase the equipment for a specific sum.]

"4. That the contracts mentioned in the preceding paragraph also provide that such equipments shall be used by the lessee only for the purpose of holding and storing the respondent's petroleum products; that a small proportion of such lessees handle similar products of respondent's competitors, and that only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single pump outfit in the conduct of their said business; that the practice of leasing such devices requires a large capital investment; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as respondent does as aforesaid, partly by reason of which such competitors have lost numerous customers to respondent; that the effect of the practice of leasing by contract such equipments, where such contracts contain the said provision restricting the use of the same to the storage and handling of respondent's products as aforesaid, may be to

¹ Equipment Contract.

This agreement, made and entered into this ____ day of ____, 19____, between Sinclair Refining Company of ____, party of the first part, and ____, of the city of ____, state of ____, party of the second part witnesseth:

Whereas, party of the second part is now being supplied with gasoline by the party of the first part and desires to install on his premises situated at ____ the following equipment for the better storing and handling of such gasoline: ____.

Now, therefore, in consideration of the premises and of the sum of one dollar by the party of the second part to the party of the first part (the receipt of which is hereby acknowledged), the above named parties do hereby agree as follows:

1. The above described equipment shall be used by the party of the second part for the sole purpose of storing and handling the gasoline supplied by the party of the first part.

2. The party of the second part agrees, at his own cost, to maintain said equipment in good condition and repair so long as he shall continue to use the same.

3. The party of the second part agrees that he will not incumber or remove said equipment, or do or suffer to be done anything whereby said equipment or any part thereof may be seized, taken on execution, attached, destroyed or injured, or by which the title of the party of the first part thereto may in any way be altered, destroyed or prejudiced.

4. In the event party of the second part should at any time use said equipment for any other purpose than the storing and handling of gasoline supplied by the party of the first part, or should cease for ____ days to handle gasoline secured from the party of the first part the right or license

substantially lessen competition and tend to create for the respondent a monopoly in the business of selling petroleum products.

"Conclusions. That the methods of competition and the business practices set forth in the foregoing findings as to the facts are, under the circumstances set forth therein, unfair methods of competition, in interstate commerce, in violation of the provisions of section 5 of an act of Congress approved September 26, 1914 (Comp. St. § 8836e), entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and are in violation of section 3 of an act of Congress approved October 15, 1914 (Comp. St. § 8835c), entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.'"

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*Thereupon the commission ordered that respondent cease and desist from—

"1. Directly or indirectly leasing pumps or tanks or both and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

"2. Entering into contracts or agreements with dealers of its petroleum products or from

of the party of the second part to said equipment shall at once terminate, and thereupon party of the first part shall have the right to enter upon said premises and remove said equipment and every part thereof.

5. The party of the second part shall indemnify and save harmless the party of the first part of and from any liability for loss, damage, injury, or other casualty to persons or property caused or occasioned by any leakage, fire, or explosion of gasoline stored in said tank or drawn through said pump.

6. This agreement shall terminate forthwith upon the sale or other disposition of said premises by party of the second part, and in any event upon the expiration of ____ months from the date hereof; and in the event that by mutual consent said equipment remains in the possession of the party of the second part at the expiration of said period, it is agreed that the same shall be used by party of the second part subject to all of the terms and conditions of this agreement, and such may be terminated at any time after the expiration of ____ months from the date hereof by the party of the first part giving ten days' notice to that effect. Upon the termination of this license by whatever means effected, the party of the first part shall have the right to enter upon said premises and remove the said equipment and each and every part thereof: Provided, however, that the party of the second part shall have the right and option at such time to purchase said equipment by paying therefor the sum of ____.

This contract is executed in triplicate, and it is agreed that the contract held by the party of the first part is to be considered the original and to be the binding agreement in case the duplicate varies from it in any particular.

In witness whereof, the parties hereto have caused this agreement to be executed the day and year first above written.

continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipments the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made."

The Clayton Act provides:

"Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, sup-

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*plies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Comp. St. § 8835c.

[1] Respondent's written contract does not undertake to limit the lessee's right to use or deal in the goods of a competitor of the lessor, but leaves him free to follow his own judgment. It is not properly described by the complaint and is not within the letter of the Clayton Act. But counsel for the commission insist that inasmuch as lessees generally—except garage men in the larger places—will not incur themselves with more than one equipment, the practical effect of the restrictive covenant is to confine most dealers to the products of their lessors; and we are asked to hold that, read in the light of these facts, the contract falls within the condemnation of the statute. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 42 Sup. Ct. 360, 66 L. Ed. 653, and *United Shoe Machinery Corporation v. United States*, 258 U. S. 451, 42 Sup. Ct. 363, 66 L. Ed. 708, are relied upon.

In the *Standard Fashion Co.* Case the purchaser expressly agreed not to sell or permit sale of any other make of patterns on its premises. It had a retail store in Boston and sales elsewhere were not within contemplation of the parties. This court construed the contract as embodying an undertaking not to sell other patterns. In *United Shoe Machinery Corporation v. United States*, when speaking of certain "tying" restrictions, this court said:

"While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical

effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act, which

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cover all conditions, agreements, or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, equally apparent. When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants, signed by the lessee and binding upon him, effectually prevent him from acquiring the machinery of a competitor of the lessor, except at the risk of forfeiting the right to use the machines furnished by the United Company, which may be absolutely essential to the prosecution and success of his business. This system of 'tying' restrictions is quite as effective as express covenants could be, and practically compels the use of the machinery of the lessor, except upon risks which manufacturers will not willingly incur."

There is no covenant in the present contract which obligates the lessee not to sell the goods of another, and its language cannot be so construed. Neither the findings nor the evidence show circumstances similar to those surrounding the "tying" covenants of the Shoe Machinery Company. Many competitors seek to sell excellent brands of gasoline and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his needs.

The cases relied upon are not controlling.

Is the challenged practice an unfair method of competition within the meaning

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of section 5 of the Federal Trade Commission Act?² Reviewing the circumstances, four Circuit Courts of Appeals have answered, No. And we can find no sufficient reason for a contrary conclusion. Certainly the practice is not opposed to good morals, because characterized by deception, bad faith, fraud, or oppression. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427, 40 Sup. Ct. 572, 64 L. Ed. 993. It has been openly adopted by many competing concerns. Some dealers regard it as the best practical method of preserving the integrity of their brands

² Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

and securing wide distribution. Some think it is undesirable. The devices are not expensive. (\$300 to \$500), can be purchased readily of makers and, while convenient, they are not essential. The contract, open and fair upon its face, provides an unconstrained recipient with free receptacle and pump for storing, dispensing, advertising, and protecting the lessor's brand. The stuff is highly inflammable, and the method of handling it is important to the refiner. He is also vitally interested in putting his brand within easy reach of consumers, with ample assurance of its genuineness. No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads.

[2] The powers of the commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards

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for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs.

The suggestion that the assailed practice is unfair because of its effect upon the sale of pumps by their makers is sterile and requires no serious discussion.

The judgments below must be Affirmed.

(261 U. S. 491)

PUSEY & JONES CO. v. HANSSEN.

(Argued Feb. 27, 1923. Decided April 9, 1923.)

No. 431.

1. Courts ⚡371(2)—Federal court held without jurisdiction to appoint receiver under Delaware statute.

Rev. Code Del. 1915, § 3883, provides that, on insolvency of a corporation, "the Chancellor, on the application and for the benefit of any creditor," may appoint a receiver. *Held*, that a federal court sitting in equity has not, by reason of this statute, jurisdiction to appoint a receiver of an insolvent Delaware corporation on application of an unsecured simple contract creditor, as the statute confers a remedy available in the state court, rather than a substantive right available in either a state or federal court.

2. Creditors' suit ⚡16—Unsecured contract creditor entitled to sue after execution returned unsatisfied.

An unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor, and has no right whatsoever in equity until he has exhausted his legal remedy, but after execution on a judgment recovered at law has been returned unsatisfied he may proceed in equity by a creditors' bill.

3. Courts ⚡259, 371(2)—Remedies in federal courts cannot be affected by state statute.

A remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute, nor can it be narrowed, and hence a federal court may be obliged to deny an equitable remedy, which the plaintiff might have secured in the state court.

4. Equity ⚡42(1)—Lack of equity jurisdiction may be waived in federal court.

The objection, in a suit in equity in the federal court, that the bill does not make a case properly cognizable in a court of equity, does not go to the court's jurisdiction as a federal court, and the objection may be taken by the court of its own motion; but lack of equity jurisdiction, if not objected to by defendant, may be ignored by the court, in cases where the subject-matter of the suit is of a class of which a court of equity has jurisdiction, and where the defendant has expressly consented to action by the court, or has failed to object reasonably, the objection will be treated as waived.

5. Equity ⚡42(1)—Lack of equity jurisdiction held not cured by intervention after entry of decree.

In receivership suit instituted by a simple contract creditor, lack of equity jurisdiction held not cured by intervention of a creditor secured by mortgage, where such intervention did not occur until two months after decree appointing receiver.

6. Courts ⚡383(1)—Contention, not considered below, not considered on certiorari.

Respondent complainant's contention that, even if there was no jurisdiction of the suit as a creditors' bill, it should be sustained as a creditors' bill, would not be considered by the Supreme Court on certiorari, where such claim was left undetermined by both the District Court and Circuit Court of Appeals.

Mr. Justice McKenna and Mr. Justice Sutherland, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Suit in equity by Hans Karluf Hanssen against the Pusey & Jones Company. Order appointing receivers for defendant (276 Fed. 296) was affirmed (279 Fed. 488), and defendant brings certiorari. Reversed.

Mr. Lindley M. Garrison, of New York City, for petitioner.

Mr. Wm. H. Button, of New York City, for respondent.

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*Mr. Justice BRANDEIS delivered the opinion of the Court.

[1] Section 3883 of the Revised Code of Delaware of 1915 (which embodies the Act of March 25, 1891, chapter 181; 19 Del. Laws, p. 359) provides:

"Whenever a corporation shall be insolvent, the Chancellor, on the application and for the benefit of any creditor or stockholder thereof, may, at any time, in his discretion, appoint one or more persons to be receivers of and for such corporation, to take charge of the estate, effects, business and affairs thereof, and to collect the outstanding debts, claims, and property due and belonging to the company, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by such corporation and may be necessary and proper; the powers of such receivers to be

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such and continued so long as the Chancellor shall think necessary: Provided, however, that the provisions of this section shall not apply to corporations for public improvement."

Whether the federal court sitting in equity has, by reason of the above statute, jurisdiction to appoint a receiver of an insolvent Delaware corporation upon application of an unsecured simple contract creditor is the main question presented.¹

Invoking the power conferred by the statute, Hanssen, a subject of Norway, brought in the federal court for the District of Delaware this suit in equity against the Pusey & Jones Company, a corporation organized under the general laws of that state. The

¹ It will be assumed that the words "any creditor," as used in the statute, include an unsecured simple contract creditor. It was so held by the District Court and by the Circuit Court of Appeals in this case (276 Fed. 296; 279 Fed. 483); and it had been previously so held in the Circuit Court. *Jones v. Mutual Fidelity Co.* (C. C.) 123 Fed. 506. The question, which is one of construction, does not appear to have been expressly decided by the courts of Delaware. The reported cases do not disclose that it has been raised in the state courts. In those cases in which jurisdiction was taken, the plaintiff was apparently a stockholder. *Thoroughgood v. Georgetown Water Co.*, 9 Del. Ch. 84, 77 Atl. 720; *Ross v. South Delaware Gas Co.*, 10 Del. Ch. 236, 89 Atl. 593; *Sill v. Kentucky Coal & Timber Development Co.*, 11 Del. Ch. 93, 97 Atl. 617; *Hopper v. Fessler Sales Co.*, 11 Del. Ch. 209, 99 Atl. 82; *Badenhausen Co. v. Kidwell* (Del.) 107 Atl. 297. See, also, *Du Pont v. Standard Arms Co.*, 9 Del. Ch. 315, 81 Atl. 1089; *Mark v. American Brick Manufacturing Co.*, 10 Del. Ch. 58, 84 Atl. 837; *In re D. Ross & Son, Inc.*, 10 Del. Ch. 434, 95 Atl. 311; *Fell v. Securities Company of North America*, 11 Del. Ch. 101, 97 Atl. 610; *Whitmer v. Wm. Whitmer & Sons, Inc.*, 11 Del. Ch. 185, 93 Atl. 940; *Jones v. Maxwell Motor Co.* (Del. Ch.) 115 Atl. 312; *Wheeler v. Walton & Whann Co.* (C. C.) 64 Fed. 664; *Maxwell v. Wilmington Dental Mfg. Co.* (C. C.) 82 Fed. 214; *Hitner v. Diamond State Steel Co.* (C. C.) 176 Fed. 384; *Adler v. Campeche Laguna Corporation* (D. C.) 257 Fed. 789.

bill, which was prosecuted on behalf of all creditors and stockholders, alleged that the corporation was insolvent, that plaintiff was a creditor, holding promissory notes issued by it, and that he was also a stockholder.

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It prayed that a receiver be appointed.² The bill was filed on June 9, 1921, receivers were appointed ex parte, and an order issued that the defendant show cause, on June 18, why the receivers should not be continued during the pendency of the cause. On June 11, the defendant moved to vacate the receivership. The motion was denied. Then, by answer, the defendant objected that the court had no jurisdiction either at law or in equity, denied that plaintiff was either a creditor or a stockholder, denied that defendant was insolvent, and asserted that defendant was entitled under the federal Constitution to have determined in an action at law the question whether plaintiff was a creditor.

Upon a hearing of the order to show cause, had on bill, answer, affidavits, and exhibits, a decree was entered confirming the appointment of the receivers and continuing them pendente lite. 276 Fed. 296. This decree was affirmed by the Circuit Court of Appeals for the Third Circuit, 279 Fed. 488. Neither the District Court, nor the Circuit Court of Appeals, passed upon the question whether Hanssen was a stockholder. Both courts held that, by reason of the state statute, the federal court sitting in equity had jurisdiction and power to appoint a receiver of a Delaware corporation upon application of a simple contract creditor, whose claim had not been reduced to judgment and who had no lien upon the corporate property. Both courts held that the controverted question whether the plaintiff was a creditor could be determined in the equity suit; and both held (upon the evidence submitted by affidavit) that the plaintiff was a creditor. The case is here on writ of certiorari.

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[2] *That this suit could not be maintained in the absence of the statute is clear. A receiver is often appointed upon application of a secured creditor who fears that his security will be wasted. *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 395, 2 Sup. Ct. 911, 27 L. Ed. 609. A receiver is often appointed upon application of a judgment creditor who has exhausted his legal remedy. See *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67. But an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true, whatever the nature of

² It prayed, also, that the defendant be directed to issue to plaintiff a certificate for the stock which he claimed to own, and that the receiver be directed to institute appropriate proceedings to set aside a large judgment recently entered against defendant in that court, which was alleged to have been recovered collusively. The answer denied the collusion.

the property, and although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied, he may proceed in equity by a creditors' bill. *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. Compare *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577; *National Tube Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; *Pierce v. United States*, 255 U. S. 398, 403, 41 Sup. Ct. 365, 65 L. Ed. 697. He may, by such a bill, remove any obstacle to satisfy his execution at law, or may reach assets equitable in their nature, or he may provisionally protect his debtor's property from misappropriation or waste, by means either of an injunction or a receiver. Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right, nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights.

[3] That a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute is likewise clear. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct.

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712, 35 L. Ed. 358; *Cates v. Allen*, *149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804. Nor can it be so narrowed. *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; *Guffey v. Smith*, 237 U. S. 101, 114, 35 Sup. Ct. 526, 59 L. Ed. 856. The federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court.³ *Hansen's* contention is that the statute does not enlarge the equitable jurisdiction or remedies, and that it confers upon creditors of a Delaware corporation, if the company is insolvent, a substantive equitable right to have a receiver appointed. If this were true the right conferred could be enforced in the federal courts (*Scott v. Neely*, 140 U. S. 106, 109, 11 Sup. Ct. 712, 35 L. Ed. 358),⁴ since

³ The oft-quoted statement in *Davis v. Gray*, 16 Wall. 203, 221 (21 L. Ed. 447), "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality," must be taken with this qualification. See, also, *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624; *Case of Broderick's Will*, 21 Wall. 503, 520, 22 L. Ed. 599.

⁴ See, also, *Brine v. Insurance Co.*, 96 U. S. 627, 639, 24 L. Ed. 858; *Gormley v. Clark*, 134 U. S. 338, 348, 10 Sup. Ct. 554, 33 L. Ed. 909; *Bardon v. Land & River Improvement Co.*, 157 U. S. 327, 330, 15

the proceeding is in pleading and practice conformable to those commonly entertained by a court of equity. But it is not true that this statute confers upon the creditor a substantive right.⁵ *Bankruptcy Act* July 1, 1898, c. 541, §§ 3, 18, 30 Stat. 544, 546, 551 (Comp. St. §§ 9587, 9602), does confer upon

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*creditors of a corporation (or individual) the right, under certain conditions, to have the property of an insolvent debtor taken possession of and administered by an officer of the court. Compare *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 309, 310, 32 Sup. Ct. 96, 56 L. Ed. 208; *Vulcan Sheet Metal Co. v. North Platte Valley Irrigation Co.*, 220 Fed. 106, 136 C. C. A. 198. The Delaware statute does not confer upon creditors the right to have a receiver appointed, although the insolvency of the corporation may be palpable, hopeless and attended by indisputable fraud or mismanagement. Insolvency is made a condition of the Chancellor's jurisdiction; but it does not give rise to any substantive right in the creditor. *Jones v. Maxwell Motor Co. (Del. Ch.)* 115 Atl. 312, 314, 315. It makes possible a new remedy, because it confers upon the Chancellor a new power. Whether that power is visitatorial (as the appellant insists), or whether it is strictly judicial, need not be determined in this case. Whatever its exact nature, the power enables the Chancellor to afford a remedy which theretofore would not have been open to an unsecured simple contract creditor. But because that which the statute confers is merely a remedy, the statute cannot affect proceedings in the federal courts sitting in equity.

The case is wholly unlike *Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.*, 234 U. S. 369, 34 Sup. Ct. 810, 58 L. Ed. 1356, and other cases in which federal courts, because of a state statute, entertained suits to remove a cloud upon title, which otherwise must have been dismissed. In those cases, as pointed out in *Clark v. Smith*, 13 Pet. 195, 203, 10 L. Ed. 123, the statute changed a rule of substantive law.

Sup. Ct. 650, 39 L. Ed. 719; *Cowley v. Northern Pacific R. R. Co.*, 159 U. S. 569, 582, 16 Sup. Ct. 127, 40 L. Ed. 263; *Lawson v. United States Mining Co.*, 207 U. S. 1, 9, 28 Sup. Ct. 15, 52 L. Ed. 65; *Grether v. Wright*, 75 Fed. 742, 746, 23 C. C. A. 493.

⁵ The same contention was made in the lower federal courts in cases brought under similar statutes enacted in other states. In some of these cases the court took jurisdiction under varying conditions. *Darragh v. Wetter Mfg. Co.*, 78 Fed. 7, 23 C. C. A. 609; *Land Title & Trust Co. v. Asphalt Co.*, 127 Fed. 1, 62 C. C. A. 23; *McGraw v. Mott*, 179 Fed. 646, 103 C. C. A. 204; *Kessler v. William Necker, Inc.*, 258 Fed. 654. In others it refused to do so. *Atlanta & Florida R. R. Co. v. Western Ry. Co.*, 50 Fed. 790, 794, 1 C. C. A. 676; *Morrow Shoe Mfg. Co. v. New England Shoe Co.*, 60 Fed. 341, 8 C. C. A. 652, 24 L. R. A. 417; *Harrison v. Farmers' Loan & Trust Co.*, 94 Fed. 728, 36 C. C. A. 443; *Davidson-Wesson Implement Co. v. Parlin & Orendorff Co.*, 141 Fed. 37, 72 C. C. A. 525. Compare *Mathews Slate Co. v. Mathews (C. C.)* 148 Fed. 490.

For instance, a statute provides that a deed, void on its face, shall be deemed a cloud, whereas theretofore it was not. It declares "what shall form a cloud on titles." As stated in *Reynolds v. Crawfordsville First National Bank*, 112 U. S. 405, 410, 55 Sup. Ct. 213, 216 (28 L. Ed. 733), the federal court looks "to the legislation of the state in which the court

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sits [and the land is situated] to ascertain what constitutes a cloud upon the title, and what the state laws declare to be such the courts of the United States sitting in equity have jurisdiction to remove." In such cases, as the statute confers upon the landowner a substantive right, he is entitled to the aid of the federal court for its enforcement. But where a state statute relating to clouds upon title is held merely to enlarge the equitable remedy, it will not support a bill in equity in the federal court. Thus, in *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873, the statute relied upon authorized a suit in equity by one out of possession against one in possession. As an action at law in the nature of ejectment afforded an adequate legal remedy, the bill to quiet title was dismissed.

[4] The case at bar is also unlike *In re Metropolitan Railway Receivership*, 208 U. S. 90, 109, 110, 28 Sup. Ct. 219, 52 L. Ed. 403, and many others, in which there was express consent by the corporation to the appointment of the receiver, or where the indebtedness to plaintiff and the corporation's insolvency were admitted, or the lack of jurisdiction in equity was waived. The objection that the bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a federal court. *Smith v. McKay*, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731; *Blythe v. Hinckley*, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783. The objection may, as pointed out in *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. Ed. 934, be taken by the court of its own motion. But, unlike lack of jurisdiction as a federal court, *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462, lack of equity jurisdiction (if not objected to by a defendant) may be ignored by the court, in cases where the subject-matter of the suit is of a class of which a court of equity has jurisdiction. And where the defendant has

expressly consented to action by the court, or has failed to object seasonably, the objection will be treated as waived. *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 535, 536, 10 Sup. Ct. 604, 33 L. Ed. 1021; *Southern Pacific R. Co. v. United States (No. 1)*,

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200 *U. S. 341, 349, 26 Sup. Ct. 296, 50 L. Ed. 507. In cases relied upon by respondent there was such waiver. But, here, the company strenuously insisted throughout upon the absence of jurisdiction and denied every material allegation on which it is sought to support the bill.

[5] Respondent contends that, even if there was originally lack of equity jurisdiction, the defect was cured on October 8, 1921, when the intervention of the United States Shipping Board Emergency Fleet Corporation was filed and allowed. That corporation claimed to be a creditor and to have a mortgage lien on all the real estate of the Pusey & Jones Company. The contention is that the original defect in jurisdiction was thus cured, because the existence of a direct lien gives equity jurisdiction for the appointment of receivers, unhampered by the obstacles that confront unsecured simple contract creditors. The contention is clearly unsound, among other reasons, because the intervention did not occur until two months after entry of the decree here under review.

[6] Respondent contends, also, that, even if there was no jurisdiction of the suit as a creditors' bill, it should be sustained now as a stockholder's bill. The answer denied that Hanssen was or ever had been a stockholder, denied that any certificate of stock ever had been assigned or transferred to him, denied that any certificate ever became his property, and denied that he was the holder or owner of any stock. The bill prayed that the corporation be directed to issue to plaintiff a certificate for the stock which he claims to own. Both the District Court and the Circuit Court of Appeals left undetermined this claim that he was or should be made a stockholder. We do not decide it. And we have no occasion to consider whether the bill could be sustained, if Hanssen proved to be a stockholder.

Reversed.

Mr. Justice McKENNA and Mr. Justice SUTHERLAND dissent.

(261 U. S. 299)

TOLEDO SCALE CO. v. COMPUTING SCALE CO.**FIDELITY & DEPOSIT CO. OF MARYLAND et al. v. COMPUTING SCALE CO. et al.**

(Argued March 16, 1923. Decided April 9, 1923.)

Nos. 339, 388.

1. Courts ⇨383(2)—Supreme Court cannot review merits of final decree on writ of certiorari applied for more than three months after final decree.

Under Act Sept. 6, 1916, § 6 (Comp. St. § 1228a), where the Supreme Court denied a writ of certiorari to review the final decree in a patent infringement suit, it cannot consider the merits of such decree on a writ of certiorari applied for more than three months after final decree for review of a decree subsequently rendered on rule to show cause.

2. Equity ⇨455—Patents ⇨324(6)—Applications to Circuit Court of Appeals based on alleged newly discovered evidence addressed to its discretion and properly refused, when lack of diligence was not negatived.

After affirmance of a decree sustaining a patent, defendant applied to the Circuit Court of Appeals to frame the mandate to permit rehearing on newly discovered evidence of prior use. The application was denied, and accounting had, and, after affirmance of the final decree, defendant again made a motion to reopen the case on the same ground. *Held* that, whether such applications were mere motions for rehearing or applications in the nature of bills of review, they were addressed to the sound discretion of the court and properly denied, when it was not shown that the failure to discover the evidence in time for the trial was not due to defendant's lack of diligence.

3. Equity ⇨455—Patents ⇨324(6)—Holding that failure to investigate patent under which anticipation subsequently claimed was not excused held not abuse of discretion.

Where the agents and counsel of defendant in a patent infringement suit, who subsequently claimed prior manufacture, sale, and commercial use of an anticipating device never visited the home of the patentee of the anticipating device before the hearing, it was not an abuse of discretion to hold that such failure was not sufficiently excused by the fact that the model in the Patent Office led counsel to think that it was not an anticipation.

4. Judgment ⇨443(3)—Decree not set aside for fraud, unless preventing full and fair defense.

To justify setting aside decree for fraud, whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense.

5. Judgment ⇨443(3)—Alleged fraud by patentee held not to have interfered with discovery of evidence by defendant.

The alleged fraud of the owner of a patent in conspiring to monopolize the business of

making and selling scales, and to put defendant out of business, by means of suits brought on a patent which it knew to be invalid because of prior use, and in buying up as many of the anticipating scales as it could secure, held not to have interfered with defendant in its search for evidence of prior use, so as to justify setting aside the decree.

6. Judgment ⇨443(2)—Statement in brief on appeal could not have misled defendant in preparing for trial, so as to justify setting aside of decree for fraud.

Statements in plaintiff's brief on appeal in a patent infringement suit that an earlier patentee had not made scales for commercial use referred to the record then before the court, and, having been made after trial, could not have misled defendant in its preparation for trial, so as to entitle it to have the decree set aside as for fraud.

7. Judgment ⇨460(4)—Additional allegations in suit to enjoin enforcement held not to add anything to the fraud charged in the suit in which the judgment was rendered.

Where, in a patent infringement suit, defendants sought in the Circuit Court of Appeals to have the case reopened for newly discovered evidence of prior use and charged and produced evidence tending to show concealment by plaintiff of the anticipating devices, a suit by defendant in another court to enjoin enforcement of the decree on the ground of fraud merely sought a review of the discretion of the Circuit Court of Appeals on the same facts and was beyond the province of the court, though it was alleged therein that such concealment was the result of a conspiracy to monopolize trade or grew out of a malicious feeling towards defendant, as facts these added nothing to the weight of the evidence before the Circuit Court of Appeals.

8. Appeal and error ⇨1237—Judgment properly directed against sureties, though they had been enjoined from paying judgment and prevented from using principal's funds for that purpose.

In issuing its mandate after affirmance of a final decree in a patent infringement suit, the Circuit Court of Appeals had jurisdiction to direct, and did not err in directing, entry of a summary decree against the sureties on supersedeas bonds for the amount due, though the sureties had been enjoined by another court from complying with the decree, or from using money deposited by their principal for that purpose, and the banks in which it was deposited had been enjoined from paying it out.

9. Appeal and error ⇨456—Circuit Court of Appeals could enjoin defendant from maintaining suit to restrain enforcement of decree, or direct District Court to do so.

Where a suit to enjoin enforcement of a decree was instituted while the decree was still in the Circuit Court of Appeals, to be enforced by its mandate, it could, under Judicial Code, § 262 (Comp. St. § 1239), enjoin defendant from thus interfering with execution of its decree, or direct the District Court to do so.

10. Appeal and error  **1206—Circuit Court of Appeals held authorized to determine whether suit by defendant was contempt, and, if so, to punish it or remand case to District Court for that purpose.**

Where a suit to enjoin enforcement of a decree was instituted while the decree was still before the Circuit Court of Appeals for enforcement by its mandate, and on rule to show cause why prosecution of the injunction suit should not be restrained, the character of such suit was disclosed on a full hearing, the Circuit Court of Appeals had jurisdiction to determine whether the filing and maintenance thereof was in contempt of its jurisdiction, and, if so, to punish it by a compensatory imposition, or to remand the case to the District Court for that purpose.

11. Judgment  **466—Court whose decree is enjoined may nevertheless proceed with its enforcement.**

A suit to enjoin enforcement of the decree of another court is in personam, and does not affect the power or functions of the court whose decree is in question, and, if the party enjoined is willing to risk punishment for contempt by applying for enforcement, the court, if it finds no real ground for impeachment of its decree advanced, may properly proceed with enforcement of the decree.

12. Contempt  **20—Suit to enjoin plaintiff from enforcing decree and sureties from complying therewith held a contempt.**

Where the unsuccessful party to a patent infringement suit sought, not only to enjoin the successful party from enforcing the decree, but to enjoin the sureties on its own supersedeas bond from complying therewith, the institution of the injunction suit was in contempt of the court rendering the decree, and might be punished as such.

13. Contempt  **74—Imposition as penalty of amount of expenses incurred in defending suit brought in contempt of another court not abuse of discretion.**

Where the unsuccessful party to a patent infringement suit, in contempt of the court rendering the decree, brought suit to enjoin its enforcement and to restrain the sureties on its own supersedeas bond from complying therewith, it was not an abuse of discretion to impose as a penalty compensation for the expenses incurred by the successful party in defending his rights in the injunction suit.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by the Computing Scale Company against the Toledo Scale Company, in which the Fidelity & Deposit Company of Maryland and another became sureties on a supersedeas bond. To review a decree rendered by the Circuit Court of Appeals on rule to show cause (281 Fed. 488), defendant and the sureties bring separate writs of certiorari. Affirmed.

This case comes here by writs of certiorari granted to the Circuit Court of Appeals of the Seventh Circuit to review the proceed-

ings of that court in enforcement of a final decree in a suit to enjoin infringement of a patent and for an accounting of profits. The patent had expired pending the litiga-

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tion, but the accounting resulted *in a decree of the District Court for Northern Illinois for profits of more than \$400,000 in favor of the Computing Scale Company against the Toledo Scale Company. The Circuit Court of Appeals, which had sustained the patent (208 Fed. 410, 125 C. C. A. 622), affirmed the decree for profits (279 Fed. 648), but stayed the mandate to permit an application to this court for a writ of certiorari, which was denied January 9, 1922 (257 U. S. 657, 42 Sup. Ct. 184, 66 L. Ed. 420). On the same day, the Toledo Company, a corporation of New Jersey, filed a bill in the District Court for the Northern District of Ohio against the Computing Company, a corporation of Ohio, to enjoin it from enforcing the decree of the Circuit Court of Appeals of the Seventh Circuit on the ground that it was obtained by fraud. The Computing Scale Company filed an answer, raising first a special plea to the jurisdiction and then responding on the merits, denying fraud, and pleading *res judicata*. The bill also made parties defendant the sureties on the supersedeas bond in the Circuit Court of Appeals, the Fidelity Deposit Company and the United States Fidelity & Guaranty Company, both corporations of Maryland, as well as three Toledo banks, citizens of Ohio, which held money deposited to the credit of the surety companies by the Toledo Company as indemnity, and asked that they all be enjoined from in any way satisfying or aiding to satisfy the decree. The Computing Company then filed in the Circuit Court of Appeals a petition for a rule against the Toledo Company, to show cause why it should not be enjoined from maintaining the bill in Ohio, and why a summary decree should not issue against the sureties. Pending a hearing as to this rule, the Ohio court granted a temporary injunction restraining the Computing Scale Company, and the sureties and the banks as prayed by the Toledo Company. The Circuit Court of Appeals thereafter heard the petition for the rule to which the Toledo

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Company had made answer, in which by way of exhibit to its averments it set up as a defense the complete record in the injunction suit in Ohio. The Circuit Court of Appeals then made the order which is here for review. It reads as follows:

"We now receive from the Computing Company the certified copy of the Supreme Court's order denying Toledo Company's petition for writ of certiorari, and we direct the clerk to file it in this cause.

"Unless the mandate which we now formulate be stayed on Toledo Company's motion filed within five days, the clerk is directed to

issue and transmit to the court below the following mandate:

"(1) Enter of record our affirmance of the final decree on accounting.

"(2) Enjoin Toledo Company from further maintaining its Ohio bill and from filing elsewhere any similar bill.

"(3) Enter summary decree against the sureties on the supersedeas bonds for the amount due upon the accounting decree, including all costs in both courts, but not exceeding the penalties of the bonds.

"(4) Ascertain Computing Company's expenses in this matter, including reasonable attorney's fees, paid or incurred since the Supreme Court's denial of the petition for writ of certiorari on January 9, 1922, and enter summary decree therefor against Toledo Company, but not against the sureties on the supersedeas bonds."

281 Fed. 488.

The patent, the subject of controversy in this case, was for an automatic computing scale, issued to one Smith in September, 1895, and reissued April 28, 1896. It related to improvements in weighing scales, wherein the weight and selling price could be seen by the weigher at a glance without mental calculation. It consisted of a pan weighing device attached to an indicator drum inside of a casing with a slot through

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which the figures on the drum as it *revolved in response to the effect of the weight would so co-ordinate with figures on the casing as to show the weight and correct price on the same line. The patentee in his specifications admitted that the general combination was an old one, but said that the object of his improvement was to provide scales, extraordinarily sensitive to weights of small amount, and accurately registering them. He explained that an essential feature of the indicator drum in his improvement was that it should be made of very light material because scales of this kind theretofore would not weigh alike successively, due to the inertia of the revolving drum, the force required to operate it, and the difficulty of stopping, and so he had constructed his drum of a skeleton frame of aluminum with a periphery of a thin sheet of paper.

The claims in controversy were:

"5. An indicator drum for weighing mechanism consisting of a spindle provided with a plurality of skeleton frames of light material and secured to said spindle, and having secured to their periphones a sheet of paper forming a cylinder.

"6. An indicator drum for weighing mechanism consisting of a spindle provided with a plurality of skeleton disks or frames of thin aluminum, having a sheet of paper extending around and secured to their periphones to form a cylinder."

The Computing Scale Company and the Toledo Scale Company were competitors in business. The former had acquired the Smith patent by the purchase of the assets of the Boston Computing Scale Company,

and before 1906 was manufacturing scales using the Smith cylindrical drum in competition with scales of the Toledo Company having a fan-shaped registering dial. There had been patent suits between them concerning other parts of the weighing mechanism than the indicator. Each had other patents in this field. In 1906, the Toledo Company

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*did not give up its fan-shaped scales, but began the manufacture of scales with an indicator drum of skeleton aluminum frame and paper periphery, and so increased its sales of them, so that they ultimately constituted the larger part of its business. This led to two suits by the Computing Scale Company in 1907 against the Toledo Company in the District Court for the Northern District of Ohio. Nothing was done with them until the suit at bar was brought in the District Court for Northern Illinois in 1910. Then, as a condition of getting extension of time to take evidence herein, the Computing Scale Company was required by the court to dismiss the Ohio suits. In its answer to the bill in this case, filed in August, 1910, the Toledo Company alleged that the Smith patent and the claims 5 and 6 had been anticipated by a patent granted to one Phinney in 1870 and further averred anticipation "by reason of prior public use and sale by various persons at various places and among others at Pawtucket by William H. Phinney, then and now, as defendant is informed and believed residing at said Pawtucket."

On the trial, the Toledo Company's expert testified that he had built a Phinney scale following the patent to Phinney, but that he could not get it to stop twice within an ounce of the same weight, and that a scale which would not weigh within a very small fraction of an ounce was not an instrument of precision and not a commercial article at all. It should be said that the specifications of the Phinney patent made no reference to the material of which the cylinder of the scales was to be made or its weight, or the importance of those features. The District Court held that the fourth and fifth claims of the Smith patent were valid, and this was affirmed by the Circuit Court of Appeals, April 15, 1913 (208 Fed. 410, 413, 125 C. C. A. 622), holding that Smith had put in the hands of the world's vendors of commodities

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the first usable computing scale; *that long before the "paper" art, including a patent to Phinney in 1870, had proposed to teach practical scale makers how to build automatic computing scales, but all attempts to make them were failures, that in the 25 years between Phinney and Smith the brightest and most skillful men had sought the necessarily tremendous commercial success of a reliable computing scale, but had not found it until Smith had the happy conception that the lightest possible drum

would secure the required accuracy of revolution and stopping.

On May 14, 1913, the Toledo Company made a motion in the Circuit Court of Appeals that the court include in its mandate, affirming the decree of the District Court for an accounting leave to rehear the cause and to permit the Toledo Company to introduce proof that computing scales had been made and sold and introduced into use by the patentee Phinney of Pawtucket, R. I., which had a cylinder drum of light wood skeleton covered with thin paper and anticipated the drum of Smith. Three Phinney scales and 13 supporting affidavits were introduced. These included one of the son of Phinney, the patentee, who had been with his father during his manufacture and sale of the scales until his death and who still lived at Pawtucket, of Phinney's widow, and also those of residents of Pawtucket who said they had bought and used the scales. The affidavits also disclosed that in a suit against the Federal Company for infringement of the Smith patent brought by the Computing Scale Company in Philadelphia, which never came to trial, all this evidence had been taken and was on file. The three Phinney scales which were exhibits there had been in the custody of Church & Church who had been counsel for the Computing Scale Company in Philadelphia. It was also shown that the Computing Scale Company had three or four of these scales and drums in their possession at Dayton. It also ap-

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peared from young Phinney's affidavit that the Boston Computing Company, which owned the Smith patent and which subsequently was bought out by the complainant Computing Scale Company, was trying to buy the scales which Phinney had. The evidence tended to show that only 20 scales had been made by Phinney, and that no scales were made after 1895. The president of the Toledo Company in his affidavit excused failure earlier to discover this evidence by saying that the company made every effort to learn of prior use. His counsel explained that he had been led away from investigation into manufacture of Phinney scales at Pawtucket, which was not visited by agents of the Toledo Company till after June, 1912, by the fact that the model of the Phinney patent at the Patent Office was only a small one of solid wood and not of light material, and that he only acquired knowledge of Phinney's manufacture and use of scales with indicator drums by accident after June, 1912, from counsel for defendant in a suit brought by the Computing Company against the Standard Company in 1911. There was no direct charge in these 1913 affidavits that the Computing Scale Company was purchasing and gathering in these Phinney scales to conceal them, but there were averments in the affidavits which were only relevant to

sustain such a charge and were evidently inserted for that purpose. The 1913 motion for a rehearing was overruled by the Circuit Court of Appeals.

The case went back for an accounting, and in 1917 the Toledo Company took depositions of the witnesses whose affidavits had been filed in 1913, and sought to use the evidence to reduce the damages by showing what kind of a scale might have been constructed by the Toledo Company without infringing the Smith patent, but the evidence was not given weight for that purpose. The expert of the Toledo Company in these depositions said he did not test the Phinney scales of

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wood and paper cylinders *when they were in the custody of the Toledo Company, because he did not think they would weigh properly. The District Court confirmed the master's report of the accounting and made a decree accordingly for \$420,000. This was carried on appeal to the Circuit Court of Appeals, which affirmed it in October, 1921. 279 Fed. 648.

The Toledo Company at the same time again made a motion for leave to open up the case that it might introduce the evidence contained in the affidavits presented in May, 1913, and the depositions taken in 1917, and retry the issue of validity of the patent and show its invalidity by reason of the Phinney prior manufacture, sale and use. In brief of counsel urging the granting of this motion for the Toledo Company, it was said:

"To refuse to consider the evidence in the present record respecting the Phinney scale, as affecting the validity of the patent in suit, would be to permit the plaintiff to take advantage of essential facts known to it and unknown to the defendant or the court and its consequent imposition on both."

In the subsequently filed petition for certiorari to this court, counsel for the Toledo Company, in discussing this same issue, said:

"The affidavits further showed that plaintiff had full knowledge of the Phinney scales for more than 10 years, that evidence and numerous samples of them had been introduced in a suit which plaintiff had brought at Philadelphia 10 years earlier upon the reissued patent here in suit, that the prosecution of said suit had been abandoned because of such evidence, and that plaintiff had suppressed and concealed such fact from the court and defendant throughout the litigation in the present cause."

The motion to reopen the case was denied by the Circuit Court of Appeals. 279 Fed. 674. An application to review this October, 1921, decree by certiorari was made and was denied by this court January 9, 1922. 257 U. S. 657, 42 Sup. Ct. 184, 66 L. Ed. 420.

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*At once, the Toledo Company filed its bill in the United States Court for the Northern District of Ohio, which is summarized by the Circuit Court of Appeals in its opinion.

281 Fed. 488, 491. It charged that since 1901 the Computing Company had formed a conspiracy with certain of its officers and agents to monopolize the computing scale business of the country, and to put the Toledo Company out of business; that in 1902 it built and sold a dishonest scale that the Toledo Company exposed in circulars, which the Computing Company sought, but failed, to enjoin, which increased its malicious hatred toward the Toledo Company; that then the Toledo Company was making a fan scale, which on the strength of patents held by it the Computing Company sought unsuccessfully to enjoin, but dismissed the suits without a trial; that in 1901 the Computing Company brought suit in the Eastern Pennsylvania District to enjoin the Federal Company from infringing the Smith patent, and introduced three Phinney scales as exhibits in evidence and depositions already referred to; that the suit was dismissed, because the Computing Company was advised by counsel that the Phinney defense was dangerous, and that the exhibits were by stipulation retained by counsel for the Federal Company, who lent them to counsel for Computing Company, in whose custody they were until after the issue of validity had been decided in Chicago in favor of the Computing Company; that a suit brought against one Randall in Pennsylvania in 1901, and against the Standard Company in Wisconsin in 1911, on the Smith patent, by the Computing Company, had been dismissed after production of similar evidence of the Phinney prior use; that after 1906 the Computing Company secretly purchased and took into its possession all the Phinney scales it could get, being all of the 20 which Phinney ever made, except one or two then in the hands of users, and except those in the Federal, Randall,

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and Standard *suits; that these purchases were made in pursuance of the conspiracy, secretly and fraudulently, for the purpose of preventing the Toledo Company and the District Court of Northern Illinois and the Circuit Court of Appeals of the Seventh Circuit from learning of the Phinney commercial practice; that the Toledo Company made diligent effort and investigation to find the Phinney commercial practice, and also evidence of the Computing Company's fraudulent suppression of evidence thereof; that, while Toledo Company had had knowledge of the Phinney commercial practice since 1913, it had no knowledge of Computing Company's fraudulent suppression thereof until December 20, 1921, which was after the affirmance of the accounting decree. The bill further averred that counsel for the Computing Company in 1913, in their brief on appeal from the District Court in this case, said that Phinney had never made a successful scales or put it on the market, which the Computing Company knew to be false, and that this deceived the Toledo

Company and its counsel into damaging admissions in the Circuit Court of Appeals as to the material of which Phinney's scales were actually made.

This bill was supported by the same evidence used in the Seventh Circuit applications of 1913 and 1921, and also by the affidavit of one Koehne, who said that he was a patent lawyer and solicitor, and had been in the employ of the Computing Company for a number of years; that he was privy to the conspiracy charged in the bill and a participant in it, but that the counsel employed to defend the various patent suits referred to in the bill were not; and that the agents and managers of the Computing Company with whom he worked and talked were dead.

Messrs. Frederick P. Fish, of Boston, Mass., Geo. D. Welles, of Toledo, Ohio, and H. K. Tenney, of Chicago, Ill., for Toledo Scale Co.

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*Mr. Charles Markell, of Baltimore, Md., for Fidelity & Deposit Co. of Maryland.

Mr. John M. Zane, of Chicago, Ill., for Computing Scale Co.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

[1] It is insisted by counsel for the petitioner that it is within our power, and it is our duty on this writ, to go into the merits of the issue of the validity of the Smith patent and of the correctness of the money decree for profits. We were asked to do this by an application for writ of certiorari, which we denied January 9, 1922. 257 U. S. 657, 42 Sup. Ct. 184, 66 L. Ed. 420. The decree then sought to be reviewed was entered in October, 1921. The application for this second writ of certiorari, which we are now considering, was not made until May 22,

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1922, more than three months after *the final decree in the Circuit Court of Appeals for the payment of profits. Section 6 of Act of September 6, 1916 (chapter 448, 39 Stat. 726, 727 [Comp. St. § 1228a]), directs:

"That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of."

This deprives us of jurisdiction to consider the merits of the decree of October, 1921.

The case of *Hamilton Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629, is cited to sustain a contrary view, but it fails to do so. In that case, a writ of certiorari had been applied for to this court to review an interlocutory decree of the Circuit Court of Appeals and denied. The case went back to the District Court for a final accounting for infringement of a trade-mark, and after a final decree for profits came again to the Circuit Court of Ap-

peals and was affirmed. Then a second application was made for a certiorari and it was allowed. The respondent contended that this court could not review the whole case, including the merits of the interlocutory decree because of the denial of the first application for certiorari. We held that the denial constituted no bar because the decree sought then to be reviewed was not final. Our power to grant writs of certiorari extends to interlocutory as well as final decrees, and a mere denial of the writ to an interlocutory ruling of the Circuit Court of Appeals does not limit our power to review the whole case when it is brought here by our certiorari on final decree. In the case before us, the decree of October, 1921, which we declined to review in January, 1922, was a final decree, and we are expressly denied power to review it after three months.

What we are to consider on this writ is whether the Circuit Court of Appeals on the

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petition for a rule against the *Toledo Company had anything presented to it in the record in the Ohio court which required it to stay its hand in using available process to enforce its final decree. We are very clear that it had not. It has been necessary to make an elaborate statement to show the complicated facts; but when they are arrayed in order so as to be understood, there is no escape from the conclusion that the action of the Ohio court could not, and should not, interfere with or stay the due course of proceedings to enforce the Seventh Circuit decree.

[2, 3] The application to the Circuit Court of Appeals in 1913 to frame its mandate, so as to permit that court to rehear the issue on the merits of the validity of the patent already found and affirmed by both courts, was addressed to the discretion of that court, and it was exercised to deny the application, presumably because the application showed on its face a lack of the due diligence in not producing the alleged newly discovered evidence in time to have presented it to the trial court at the hearing on the merits in June, 1912. The Toledo Company had been advised of the claim of its infringement of the Smith patent within a year after it began to make and sell the aluminum cylinder scale in 1906 by two suits of the Computing Scale Company, and its attention had been directed to the necessity of preparing for a defense. This was further stimulated by the Chicago suit, the one at bar, in 1910, in which the Toledo Company filed an answer averring, among other defenses, that the Smith patent had been anticipated, not only by the Phinney patent itself, but by prior manufacture, sale, and commercial use by Phinney of scales which embraced the device whose invention was claimed by Smith, and that this prior use was at Pawtucket, R. I.

In spite of this, the agents and counsel of

the Toledo Company never visited Pawtucket before the hearing on the validity of the

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Smith patent in June, 1912. The only *reason for this failure is the suggestion that the model of the cylinder deposited by Phinney in the Patent Office with his application was a small solid wooden cylinder, not full size, which led counsel to think that no practice under the patent would show lightness of material and weight. It was a matter of equitable discretion for the Circuit Court of Appeals to determine whether this was sufficient excuse. *Hopkins v. Hebard*, 235 U. S. 287, 35 Sup. Ct. 26, 59 L. Ed. 232. Certainly it was not an abuse of its discretion to hold that it was not a good one. The natural and obvious course of one tracing out evidence of prior commercial use of Phinney which was formally averred in the Toledo Company's bill to have taken place at Pawtucket, would have been to go to Pawtucket and look up Phinney, or, if dead, his family and successors. Had this course been pursued, Phinney's widow and son would have been found there, and several of those whose affidavits and depositions are now produced, who say that they bought and used the Phinney scales made with light wood and paper cylinders. From those witnesses, too, the investigator would have been led directly to the proceedings in Federal Company suit in Philadelphia, the record of which contained all this evidence, and he would have found without difficulty the three original Phinney scales that were exhibits in that case. Nor can we say that it was an abuse of discretion for the Circuit Court of Appeals to refuse a similar application, made in October, 1921, to open up the case to permit a rehearing of an issue, settled 9 years before, when the evidence as to the lack of diligence of the Toledo Company was just the same.

It is unnecessary to determine whether the applications of 1913 and 1921 come within the proper definition of a bill of review in a court of chancery. It is enough to say that whether they were merely motions for rehearing, like a motion for new trial at law, or were applications in the nature of a bill

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of review, they were addressed to the *sound discretion of the court, and based as they were upon the ground of newly discovered evidence, the indispensable condition of their being granted was that the failure to discover the evidence in time for the trial was not due to a lack of diligence on the part of the applicant. That condition precedent was not fulfilled.

[4-6] Do the additional facts averred in the bill filed in the Ohio court change the situation? It is said they show extrinsic fraud committed by the Computing Scale Company upon proof of which a court of equity, although in another jurisdiction, having jurisdiction of the parties, may enjoin the one guilty of the fraud from profiting by a

decree so obtained. There has been much discussion as to whether extrinsic fraud is here alleged, and the case of *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, is cited and numerous other authorities since that case. We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule, because in any case to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense. If it does not so appear, then proof of the ultimate fact, to wit, that the decree was obtained by fraud fails. That is the case here.

The allegations of the bill and of the affidavits are of a conspiracy by the inner circle of the Computing Scale Company's agents commenced in 1902, years before the Toledo Company began to make and sell cylinder drum scales, to monopolize the business of making and selling scales, to put the Toledo Company out of business, and after it began to make cylinder scales, to prevent it from so doing by suits brought on the Smith patent, which it knew to be invalid because of the Phinney prior use. In pursuance of the conspiracy it is charged that it proceeded to buy up and keep from the Toledo Company

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knowledge *of, and access to, the Phinney scales. Proof is adduced to show that the Computing Scale Company did buy up as many of the Phinney scales as it could secure. But there is not anywhere in the record, which we can find, or which has been pointed out to us, any real evidence that the Toledo Company was, in the slightest degree, interfered with by acts of the Computing Company in its search for evidence of the Phinney prior use. Had the Toledo Company found, as it might easily have done, the witnesses in Pawtucket, it would have found the oral evidence as to the existence of the Phinney scales, and would have been led directly to the Philadelphia suit, where it would have found the cylinders it did find after June, 1912. Moreover, there were the Randall suit in Philadelphia in 1901 and the Standard suit in Wisconsin, where other Phinney scales were also exhibits and open to inspection by the Toledo Company before 1912. There is not a scintilla of evidence to show any effort on the part of the Computing Scale Company to induce any witnesses not to testify, or to spirit them away from contact with the Toledo Company. There is nothing to show that, if the Computing Scale Company had not bought the Phinney scales, the Toledo Company would have found them any earlier. The passages in the brief on behalf of the Computing Company in the first hearing of the case on appeal in the Circuit Court of Appeals, which stated that Phin-

ney had not made scales for commercial use, had reference, of course, to the record before the court, were made after the trial in the District Court, and so could not have misled the Toledo Company in its preparation for that trial. The conclusion is unavoidable that the only cause of the failure of the Toledo Company to produce this Phinney evidence was the mistake of the counsel for the Toledo Company in assuming that an inadequate model in the Patent Office filed by Phinney showed no relevant prior use by him, and the failure of the Toledo Company's

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agents *to take the ordinary and obvious course to make adequate inquiry at Pawtucket as to the prior use which it had averred in the bill. Certainly the Computing Scale Company was not responsible for the inadequacy of Phinney's model or for the failure of the Toledo Company to make the inquiry before June 1912. The averments as to conspiracy to monopolize, and to drive the Toledo Company out of business, and the details of the purchase of Phinney scales, are all irrelevant because they are not shown to have had any causal connection with the failure of the Toledo Company to find out earlier what it did stumble on in 1913.

We do not understand it to be contended that there was any relation between the Computing Scale Company and the Toledo Company, which made it the duty of the former to furnish evidence to the latter to weaken its own case, or that silence in respect to the Phinney scales constituted that kind of fraud which would invalidate the decree, unless it was accompanied by acts which actually prevented the Toledo Company's finding and availing itself of such evidence. Clearly there is no such rule of law in a case like this.

[7] Another aspect of this record leads to the same conclusion. However nice the distinction between extrinsic and intrinsic fraud, we have been cited to no case where it has been held that fraud is extrinsic when the court rendering the decree attacked had before it the same issue of fraud on the same facts, only a little more elaborated as to the motive of the party charged with committing it. The necessary inference from the affidavits filed in May, 1913, by the Toledo Company, and its depositions in 1917, and its motion and briefs in 1921, in the Circuit Court of Appeals, was that the Computing Scale Company had been securing Phinney scales with a view of concealing them from the Toledo Company, and these were all before the Circuit Court of Appeals when it

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finally refused *to open the decree on its merits in 1921 to let in the evidence. It did not add to the weight of that evidence, for the purpose for which it could be used in either court, that this was the result of a conspiracy to monopolize trade, or that it grew out of malicious feeling toward the

Toledo Company. What the District Court for Northern Ohio was doing in hearing the injunction suit and issuing a temporary injunction was merely reviewing the discretion of the Circuit Court of Appeals of the Seventh Circuit in dealing with the same ultimate facts and reaching a different conclusion. This was beyond its province. *Embry v. Palmer*, 107 U. S. 3, 11, 2 Sup. Ct. 25, 27 L. Ed. 346; *Telford v. Brinkerhoff*, 163 Ill. 439, 443, 45 N. E. 156; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. Ed. 362.

It is pressed upon us that the amount of this decree, which by reason of growing interest will considerably exceed half a million dollars, is such that its enforcement may be ruinous to the Toledo Company, and yet that company has never had an opportunity to bring to a hearing this evidence of the *Phinney* prior commercial use which on the showing and argument is clearly a complete defense to a suit prosecuted by an unscrupulous competitor, conscious all the time of its falsity and injustice. This view of the case is not a fair one. The Toledo Company had a chance to make a defense of the *Phinney* prior use and failed to do so because of its own lack of diligence. As it did not secure a hearing of the *Phinney* defense, its opponent had no chance to meet it, as possibly it might have done by showing that the use relied on was a futile one because the *Phinney* scale as made was not practical, or did not weigh accurately, or accomplish the purpose of the *Smith* patent. The fact that but 20 machines were made, and that these ceased to be used years ago or were destroyed, suggests the probability of such an answer. We cannot know what the result of

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the hearing would have been on this issue if tried, because only one side is presented. We are prevented from knowing it by a most salutary rule of law which, after parties have had a full and fair opportunity to prepare their case, refuses to permit them to drag out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing. The apparent hardship of particular cases should not and cannot weigh against the application of this sound principle. As Mr. Justice Story remarked in *Ocean Insurance Co. v. Fields*, 2 Story, 59, 18 Fed. Cas. No. 10,406:

"It is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal."

[8] The surety companies object to the order of the Circuit Court of Appeals, directing the District Court to enter summary judgment against them for the amount due on the decree, because it causes them to pay a decree which the Toledo Company, their principal, deposited in Toledo banks enough money to their order to pay, but which a court of competent jurisdiction enjoins them

from paying, or from using this money to pay. They say they are to be ground between the upper and the nether millstones. They say they are indifferent between the parties, and only wish to be protected. The order which the Circuit Court of Appeals directed against them was within its jurisdiction. *Pease v. Rathbun-Jones Engineering Co.*, 243 U. S. 273, 278, 37 Sup. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918C, 1147. It was right, was final, and they must obey it. They can appeal from the order of the Ohio court. Indeed, we are advised that the cause is now pending on appeal in the Circuit Court of Appeals of the Sixth Circuit. If they satisfy the decree of the Seventh Circuit, they can be reasonably confident that they will not be required to suffer a double burden. The Circuit Court of Appeals of the Sixth Circuit is not likely to ignore the ruling of this court in the premises, and the cause pending in the Sixth Circuit can be brought within the jurisdiction of this court at any time by certiorari.

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[9, 10] *It is objected that the Circuit Court of Appeals had no power to direct the District Court to enjoin the Toledo Company from further maintaining its Ohio bill or from filing elsewhere any similar bill. It is also objected that it cannot direct the District Court to assess the Computing Company's expenses including a reasonable attorney's fee in the matter of the Ohio bill and to enter a summary decree therefor. We think these orders were within the power of the Circuit Court of Appeals. This Ohio proceeding was instituted to halt and defeat the decree of the Circuit Court of Appeals, while that decree was still in that court to be enforced by mandate to the lower court. Under section 262 of the Judicial Code (Comp. St. § 1239), that court had the right to issue all writs not specifically provided for by statute which might be necessary for the exercise of its appellate jurisdiction. It could therefore itself have enjoined the Toledo Company from interfering with the execution of its own decree, *Merrimack River Savings Bank v. Clay Center*, 219 U. S. 527, 535, 31 Sup. Ct. 295, 55 L. Ed. 320, Ann. Cas. 1912A, 513; or it could direct the District Court to do so, as it did, *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, 41 Sup. Ct. 338, 65 L. Ed. 673; *Steel Co. v. R. R. Supply Co.*, 244 U. S. 294, 299, 37 Sup. Ct. 506, 61 L. Ed. 1148; *Kessler v. Eldred*, 206 U. S. 285, 27 Sup. Ct. 611, 51 Ed. 1065. Moreover, when the character of the proceeding initiated by the Toledo Company, a party before it, to stop the execution of its decree, was disclosed on a full hearing on the petition for a rule against the Toledo Company, it had jurisdiction to determine whether the filing and maintenance of the bill was in contempt of its jurisdiction, *New Orleans v. New York S. S. Co.*, 20 Wall. 387, 392, 22

L. Ed. 354; *Swift v. Black Panther Oil & Gas Co.*, 244 Fed. 20, 29, 156 C. C. A. 448; and finding it to be so, to punish it by a compensatory imposition, *Merrimack River Savings Bank v. Clay Center*, 219 U. S. 527, 535, 31 Sup. Ct. 295, 55 L. Ed. 320, Ann. Cas. 1912A, 513; or to remand it to the District Court to do so.

[11-13] What we are considering here is the rightful course of a court which having entered a final decree is proceeding

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*upon the application of the successful party in the decree to put it into lawful execution. It is advised by this party that the quasi parties, the sureties who have made themselves directly liable upon summary process for prompt payment of the decree, have been enjoined from complying with their obligation to the court by a court of another jurisdiction, that the successful party has also been enjoined from seeking enforcement of the decree, and all this at the suit of the party condemned in the decree to pay and on the ground of fraud exercised upon the court itself in obtaining the decree. If the successful party, though thus enjoined, is willing to risk punishment for contempt by the enjoining court, and applies for enforcement of the decree, the court, whose decree it is, is clearly not ousted of jurisdiction to proceed to execute it. The proceeding in the enjoining court is solely in personam, and does not affect the power or functions of the court whose decree is in question. If advised that there is real ground for impeachment of its decree, it may in its discretion stay its hand until the issue is determined in another court of competent jurisdiction; but if, upon examination, it finds no such ground advanced, it may properly proceed to secure to the successful party the fruits of his litigation. If the defeated party in his suit in another jurisdiction only seeks to restrain the successful party from prosecuting his decree to payment, there should be unusual circumstances of disrespect to the court entering the decree to justify punishment for contempt. But when he unites in his new suit for an injunction the sureties who, as quasi parties, are obliged to respond to the decree in the course of execution, he puts himself in contempt of the court whose decree it is, and may be punished for it. In the former case he is merely restraining a party who, without disobedience or disrespect to any obligation to the court making the decree, has full discretion and liberty to

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withhold his hand in pressing it to *execution. In the latter case, he is obstructing the process of the court in a proceeding in which its action has been properly and lawfully invoked. The degree of punishment for contempt in such case is in the discretion of the court whose dignity has been offended and

whose process has been obstructed. *New Orleans v. New York Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354. Certainly it was not an abuse of discretion in this case to impose as a penalty, compensation for the expenses incurred by the successful party to the decree in defending its rights in the Ohio court.

Decree affirmed.

(262 U. S. 43)

PRENDERGAST et al. v. NEW YORK TELEPHONE CO.

(Argued Feb. 21, 1923. Decided April 16, 1923.)

No. 542.

1. Appeal and error ⇨1108—Subsequent order of commission held not to show injunction against previous order was proper.

The fact that a state Public Service Commission, more than seven months after the granting of a temporary injunction against the enforcement of telephone rates temporarily fixed by it, made orders allowing higher rates whose correctness may yet be questioned in appropriate proceedings for review, does not establish that the injunction was rightly granted under the condition which then existed, so that a motion to dismiss the appeal from the temporary injunction order or to affirm the order will be denied.

2. Courts ⇨101—District Court of three judges has jurisdiction to restrain enforcement of commission's order which violates Fourteenth Amendment.

A specially constituted District Court of three judges has jurisdiction, under Judicial Code, § 266 (Comp. St. § 1243), to hear and determine an application for temporary injunction to restrain the enforcement of orders of a state Public Service Commission, on the ground that the orders violate the Fourteenth Amendment.

3. Telegraphs and telephones ⇨33(1)—Bill held sufficiently to allege facts showing rate was confiscatory.

A bill specifically alleging the cost of a telephone company's property devoted to the rendition of intrastate telephone service, the cost of its reproduction, and its fair and reasonable value, respectively, and alleging that the rates prescribed by the state commission would prevent it from earning more than 2.56 per cent. on the cost of the property, and 1.96 per cent. on its fair and reasonable value, and would not afford it a fair return on such value, aptly states the ultimate facts on which the company asks relief, omitting mere statement of evidence as required by equity rule 25, par. 3 (198 Fed. xxv, 115 C. C. A. xxv).

4. Public service commissions ⇨21—Order of commission can be restrained without seeking review by certiorari.

The New York Public Service Commission is vested with the final legislative authority of the state in the rate-making process, the authority exercised by the state courts upon a review by certiorari being purely judicial under

Civil Practice Act N. Y. §§ 1304, 1305, and therefore a temporary injunction against enforcement of a confiscatory order may be sought without first seeking review by certification.

5. Telegraphs and telephones ☞33(1)—Company need not apply to state commission for rehearing or modification of orders before suit for injunction.

Since Public Service Commissions Law N. Y. § 22, makes the grant of a rehearing by the commission discretionary, a telephone company may bring suit to enjoin the enforcement of confiscatory order of the commission without first applying to the commission for a rehearing, where there was no indication that such rehearing would have been granted, and without making the application for modification of the commission's order under the privilege granted thereby.

6. Public service commissions ☞21—Temporary order reducing rates pending final hearing may be restrained.

An order of the state Public Service Commission, prescribing temporary rates, to be effective until its final determination, may be enjoined, if confiscatory, especially where the commission had not fixed any date for the final hearing; but, if the commission had fixed an early date for final hearing, that fact would be considered in determining whether the court would exercise its discretion to grant the injunction.

7. Public service commissions ☞22—All evidence before commission need not be introduced in suit to enjoin confiscatory order.

Where a bill against the state Public Service Commission did not challenge the orders of the commission on the ground that it acted arbitrarily without any evidence, but raised the sole issue that the rates fixed by the orders were confiscatory, it was not necessary for the company to introduce in court all the evidence heard by the commission, and the defendants in that suit cannot, on appeal from a temporary injunction, complain that the company did not introduce evidence heard before the commission which they themselves apparently did not regard as material, since they did not exercise their right to introduce it.

8. Appeal and error ☞954(1)—Temporary injunction not reversed, unless discretion was abused.

The granting of a temporary injunction pending final hearing is within the sound discretion of the trial court, and an order granting such injunction will not be disturbed on appeal, unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion.

9. Appeal and error ☞954(1)—Temporary injunction upheld, if balance of injury favors it.

Especially will the granting of a temporary injunction be upheld on appeal, where the balance of injury as between the parties favors its issue.

10. Public service commissions ☞24—Temporary injunction against enforcement of commission's order affirmed.

Where the court found that rates fixed by a state Public Service Commission were con-

fiscatory, and the rates were to continue in effect pending the final determination of the commission, no date for which had been fixed, and in the meantime the company could be protected from loss only by injunction, while the subscribers were protected by a bond required for return of excess charges, if the injunction were thereafter dissolved, the issuance of the injunction was not an improvident exercise of the trial court's judicial discretion.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the New York Telephone Company against William A. Prendergast and others, constituting the Public Service Commission of the State of New York, and others. From an order temporarily enjoining the enforcement of rates fixed by the commission, the defendants appeal. Affirmed.

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*Wilbur W. Chambers, of Albany, N. Y., and Simon Fleischmann, of Buffalo, N. Y., for appellants.

John W. Davis and Chas. T. Russell, both of New York City, for appellee.

Mr. Justice SANFORD delivered the opinion of the Court.

This is an appeal, under Section 266 of the Judicial Code (Comp. St. § 1243) from an order of the District Court enjoining pendente lite the enforcement of orders of the Public Service Commission of New York prescribing maximum rates for the exchange service of the Telephone Company.

The Commission, having entered upon an investigation as to the rates charged by the Company for telephone service within the State, on March 3, 1922, after a large amount of evidence had been taken, but before the hearings had been completed, made the two orders in question. One of these reduced temporarily, pending final determination, the maximum rates to be charged by the Company after April 1, for exchange telephone service in the City of New York. The other

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made a like reduction in the maximum rates for such service in other municipalities within the State, which were divided into groups, with basic area rates in each; with a further provision that either the Company or any municipality affected might apply for modification of the classifications on or before April 15. The Company on March 29 filed its bill in the District Court against the Commission, its counsel and the Attorney General of the State, for the purpose of enjoining the enforcement of these orders, upon the ground that they were confiscatory and in violation of the Fourteenth Amendment. An application for an interlocutory injunction was heard by three judges; and the court as thus constituted on June 12 granted an interlocutory order enjoining the defendants from enforcing the orders of

the Commission pending the final hearing and until the further order of the court; the Company being required to give bond for \$6,000,000 to secure the repayment to its subscribers of all excess charges paid pending the suit in the event the injunction should thereafter be dissolved. From this interlocutory order the defendants have appealed directly to this court.

[1] Since the argument on the appeal the Company has submitted a motion to dismiss the appeal or affirm the order of the court, upon the ground that on January 25, 1923, the Commission made final orders in the pending investigation establishing a schedule of telephone rates for the State which will yield the Company a much higher annual return than the temporary rates whose enforcement was enjoined. This, it is insisted, shows that the injunction was properly

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granted.¹ The fact that the *Commission has, more than seven months after the injunction was granted, made orders allowing higher rates—whose correctness may yet be questioned in appropriate proceedings for review—upon evidence not before us, does not establish that the injunction was rightly granted under the conditions which then existed. See *Cumberland Telephone Co. v. Louisiana Commission* (D. C.) 283 Fed. 215, 218. Hence the motion is denied.

The appellants urge, in substance, as grounds of error: That the special court of three judges had no jurisdiction to grant the injunction; that the bill contained insufficient averments of fact, as distinguished from mere conclusions; that it was prematurely filed; and that the injunction was granted upon insufficient evidence.

We conclude:

[2] 1. The specially constituted court of three judges had jurisdiction under Section 266 of the Judicial Code to hear and determine the application for the injunction upon the ground of the unconstitutionality of the orders of the Commission. *Oklahoma Natural Gas Co. v. Russell* (March 5, 1923) 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. —.

[3] 2. The defendants answered the bill on the merits without questioning in any way the sufficiency or form of its averments. See *Campbell v. United States*, 244 U. S. 99, 106, 32 Sup. Ct. 398, 56 L. Ed. 684. The bill specifically alleged that the cost of the Company's property in the State devoted to the rendition of intrastate telephone service, the cost of its reproduction, and its fair and reasonable value exceeded the sums of \$247,000,000, \$373,000,000 and \$323,000,000, re-

spectively; and that the rates prescribed by the Commission would prevent it from earning more than 2.56% per annum upon the cost of such property and 1.96% upon its fair and reasonable value and would not afford it a fair return upon such value. In short, it aptly stated the ultimate facts up-

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on which the Company asked relief, *omitting any mere statements of evidence. Equity Rule 25, par. 3 (198 Fed. xxv, 115 C. C. A. xxv).

[4] 3. Upon the making by the Commission of the orders in question the proceedings had reached the judicial stage entitling the Company to resort to the court for relief. *Bacon v. Rutland Railroad*, 232 U. S. 134, 137, 34 Sup. Ct. 283, 58 L. Ed. 538, distinguishing *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 229, 29 Sup. Ct. 67, 53 L. Ed. 150, in which an appeal had not been taken to the highest tribunal vested with the final legislative authority of the State. Here the Commission is vested with the final legislative authority of the State in the rate-making process; the authority exercised by the state courts upon a review by certiorari (*People v. Wilecox*, 194 N. Y. 383, 87 N. E. 517), being purely judicial and having no legislative character. Civil Practice Act (Laws New York 1920, c. 925) §§ 1304, 1305.

[5] It was not necessary that the Company should apply to the Commission for a rehearing before resorting to the court. While under the Public Service Commissions Law any person interested in an order of the Commission has the right to apply for a rehearing, the Commission is not required to grant such rehearing unless in its judgment sufficient reason therefor appear; the application for the rehearing does not excuse compliance with the order or its enforcement except as the Commission may direct; and any change made in the original order upon the rehearing does not affect the enforcement of any right arising from the original order (Sec. 22). As the law does not require an application for a rehearing to be made and its granting is entirely within the discretion of the Commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order. See, by analogy, *Hollis v. Kutz*, 255 U. S. 452, 454, 41 Sup. Ct. 371, 65 L. Ed. 727; *In re Arkansas Rate Cases* (C. C.) 187 Fed. 290, 306; *Atlantic Coast Line v. Interstate Commission* (Com. Ct.) 194 Fed. 449, 452; *Baltimore Railroad v. Railroad Commission* (C. C.) 196 Fed. 690,

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693, *699; and *Chicago Railways v. Illinois Commission* (D. C.) 277 Fed. 970, 974. In *Palermo Land & Water Co. v. Railroad Commission* (D. C.) 227 Fed. 708, the statute specifically provided that no cause of action should accrue in any court out of any order of the Commission unless an application for a rehearing had been made. Here the Commission did not suggest in its answer that

¹ The motion, which is supported by affidavits, alleges that the annual return which will be afforded by the rates established by the final orders of the Commission will exceed by not less than \$2,000,000 the revenue afforded by the rates which were in effect before the Commission prescribed the temporary rates in question, and by about \$5,000,000 the revenue which would have been afforded by such temporary rates.

it perceived any ground upon which it would have granted a rehearing, if an application had been made, but, on the contrary, maintained the correctness of its orders in all respects. Manifestly under such circumstances the injunction should not have been denied merely because application had not been made to the Commission for a rehearing.

And for like reasons, it was not necessary that the Company should have exercised the privilege granted by one of the orders of applying to the Commission for modification of the classification.

[6] Nor did the fact that the orders of the Commission merely prescribed temporary rates to be effective until its final determination, deprive the Company of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process. *Cumberland Telephone Co. v. Louisiana Commission*, supra. And see, by analogy, *Oklahoma Natural Gas. Co. v. Russell*, supra; and *Love v. Atchison Railway* (C. C. A.) 185 Fed. 321,

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*326, 107 C. C. A. 403 (affirming [C. C.] 174 Fed. 59 and 177 Fed. 493). If the Commission, however, had fixed an early date for the final hearing this might have been taken into consideration by the court as an element affecting the exercise of its discretion in the matter of granting an interlocutory injunction. *Cumberland Telephone Co. v. Louisiana Commission*, supra, 283 Fed. 217. But in the present case the Commission was still continuing indefinitely its general investigation and had not fixed any date for the final hearing.

[7] 4. The application for the injunction was heard by the District Court upon the pleadings and affidavits relating to the cost and value of the Company's property, its revenue and expenses. It was not necessary that the Company offer in evidence the voluminous testimony that had been taken by the Commission on the legislative question prior to making the orders in question. The bill did not challenge the orders of the Com-

mission on the ground that it had acted arbitrarily, without any evidence. See *Louisville Railroad v. Garrett*, 231 U. S. 299, 308, 34 Sup. Ct. 48, 58 L. Ed. 229. The sole issue presented was whether or not the orders were confiscatory; which was to be determined by the court upon the evidence submitted to it. Either party might, of course, show, by competent testimony, any fact brought out before the Commission which might throw light upon this issue; and the defendants cannot now rightly complain that the Company did not introduce evidence which they themselves do not appear to have regarded as material.

[8-10] The District Court, after consideration and analysis of the evidence, concluded that the value of the Company's property upon which it was entitled to a return could not be reduced much below \$300,000,000, and that the rates prescribed could not possibly yield a fair return upon such valuation. It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the

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trial court; and that, upon appeal, *an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Meccano, Ltd., v. Wanamaker*, 253 U. S. 136, 141, 40 Sup. Ct. 463, 64 L. Ed. 822; *Love v. Atchison Railway*, supra, 185 Fed. 331, and cases there cited. Especially will the granting of the temporary writ be upheld, when the balance of injury as between the parties favors its issue. *City of Amarillo v. Southwestern Telephone Co.* (C. C. A.) 253 Fed. 638, 640, 165 C. C. A. 264. Here the Commission had prescribed temporary rates which were found to be confiscatory, which were to continue in effect pending the final determination of the Commission after its investigation had been completed; and no date had been fixed for the completion of this investigation or the final hearing. The Company meanwhile could only be protected from loss by injunction; while, on the other hand, its subscribers were protected by the bond which was required for the return of the excess charges collected if the injunction should be thereafter dissolved. There was no necessity in the particular situation presented for any test period of the new rates.

And finding nothing in the record which justifies us in concluding that the District Court improvidently exercised its judicial discretion in granting the interlocutory injunction, its order is

Affirmed.

(262 U. S. 1)

**BOARD OF TRADE OF CITY OF CHICAGO
et al. v. OLSEN, U. S. Atty., et al.**(Argued Feb. 26, 1923. Decided April 16,
1923.)

No. 701.

1. Commerce ⚡37—Removal of grain for storing, inspecting, etc., held not to take it out of "interstate commerce."

Bills of lading for shipment of grain from Western states through Chicago, with right of removal at Chicago for storing, inspecting, weighing, grading, or mixing, and changing the ownership, consignee, or destination, and then continuing the shipment under the same contract and at a through rate, do not take the grain out of "interstate commerce," so as to deprive Congress of the power to regulate it, even though the grain be stored in warehouses and mixed with other grain, so that the owner in continuing the shipment does not receive the same grain.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. Commerce ⚡3—Grain Futures Act is constitutional as applied to grain actually handled.

Grain Futures Act Sept. 21, 1922, regulating transactions on grain exchanges, is within the power of Congress over interstate commerce so far as it concerns cash grain, sales of grain to arrive, and grain actually delivered in fulfillment of future contracts made on the Chicago Board of Trade.

3. Constitutional law ⚡70(3)—Conclusion of Congress as to obstruction by dealings in futures conclusive on courts.

In view of evidence before congressional committees and the Federal Trade Commission as to manipulations of futures markets and their effect, the conclusion of Congress, expressed in Grain Futures Act Sept. 21, 1922, that dealings in futures are susceptible to speculation, manipulation, and control, working to the detriment of producers, consumers, shippers, and legitimate dealers in interstate commerce, and that such burden and obstruction on interstate commerce is direct, recurring, and a constantly possible danger, is not unreasonable, and cannot be questioned by the court.

4. Commerce ⚡3—Grain Futures Act held within power of Congress.

In view of the authorized conclusion by Congress that manipulation of the market for futures on the Chicago Board of Trade might, and from time to time did, directly burden and obstruct interstate commerce in grain, and was a constantly possible danger, it had power to restrain and avoid such abuse by regulating transactions on such exchanges, as it did by Grain Futures Act Sept. 21, 1922.

5. Exchanges ⚡1—Board of Trade held subject to regulation; "public interest."

The Chicago Board of Trade is engaged in a business affected with a national public interest, and is subject to national regulation as such, and Congress may reasonably limit the

rules governing its conduct, with a view to preventing abuses and securing freedom from undue discrimination in its operation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Interest.]

6. Constitutional law ⚡296(1)—Incidental lowering of value of membership from regulation of Board of Trade not a taking of property without due process.

The incidental effect which reasonable regulation of a Board of Trade engaged in a business affected with a national public interest may have in lowering the value of memberships does not constitute a taking of property of the members without due process of law, but only a reasonable regulation, in the exercise of the police power of the national government.

7. Constitutional law ⚡296(1)—Requiring Boards of Trade to admit co-operative associations does not take property without due process.

Grain Futures Act Sept. 21, 1922, so far as it requires Boards of Trade, as a condition of being designated as contract markets, to admit to membership authorized representatives of lawfully formed co-operative associations of producers, and prohibits any rule preventing such associations from returning to their members on a pro rata basis the money collected by them, less expenses, does not take the property of members of Boards of Trade without due process of law.

8. Statutes ⚡64(2)—Unconstitutionality of provisions of Grain Futures Act held not to affect rest of statute.

If the provisions of Grain Futures Act Sept. 21, 1922, forbidding the use of the mails and interstate facilities of communication in making sales for future delivery or sending quotations of prices, except through members of a Board of Trade, are unconstitutional, they do not invalidate the rest of the act, in view of section 10.

9. Exchanges ⚡1—Within power of Congress to require record of dealings on Board of Trade.

Grain Futures Act Sept. 21, 1922, § 9, making it a misdemeanor for member of Board of Trade designated thereunder to fail to evidence any contract for future delivery by a record in writing, is a legitimate means of enforcing the statutory regulation of Boards of Trade, which is within the power of Congress.

10. Constitutional law ⚡46(1)—Constitutionality not determined until statute invoked.

The constitutionality of Grain Futures Act Sept. 21, 1922, § 9, providing for the punishment of any one knowingly or carelessly delivering through the mails or any other interstate means of communications false or misleading market reports, will not be determined until some one is charged with an offense thereunder and brought to trial therefor.

11. Constitutional law ⚡42—Constitutionality not determined, when plaintiffs do not show themselves in danger of prejudice.

The constitutionality of Grain Futures Act Sept. 21, 1922, § 6, par. (b), giving the com-

mission thereby created power to exclude from all contract markets persons violating the provisions of the act or attempting to manipulate market prices, will not be determined in suit for injunction, when plaintiffs do not aver that they are committing acts subjecting them to such exclusion, or that charges have been made and proceedings begun against them, or that proceedings are about to be begun.

Mr. Justice McReynolds and Mr. Justice Sutherland dissenting.

Appeal from the District Court of the United States for the Northern District of Illinois.

Suit by the Board of Trade of the City of Chicago and others against Edwin A. Olsen, United States Attorney for the Northern District of Illinois, and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

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*This is an appeal from a decree of the District Court for Northern Illinois, dismissing a bill in equity. The appeal is under section 238 of the Judicial Code (as amended Act January 28, 1915, c. 22, § 2, 38 Stat. 803, 804 [Comp. St. § 1215]), the case being one in which the constitutionality of the Grain Futures Act (enacted by Congress September 21, 1922 (42 Stat. 998, c. 369), is drawn in question.

The bill was brought by the Board of Trade of the city of Chicago, and a number of its members representing each class of traders on the exchange of the Board, to enjoin the United States district attorney at Chicago, the Secretary of Agriculture, and the United States postmaster at Chicago from taking steps to enforce the provisions of the act against them, on the ground that it violates their rights under the federal Constitution.

The purpose of the act is expressed in its title to be for the prevention of obstructions and burdens upon interstate commerce in grain by regulating transactions on grain future exchanges and for other purposes. Its second section, par. (a), is one of definitions. Its definition of interstate commerce, in the sense of the act, is as follows:

"The words 'interstate commerce' shall be construed to mean commerce between any state,

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territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same state, territory, or possession, or the District of Columbia, but through any place outside thereof, or within any territory or possession, or the District of Columbia."

Paragraph (b) contains the following addition to the foregoing definition:

"(b) For the purposes of this act (but not in any wise limiting the foregoing definition of interstate commerce) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-pro-

ducts thereof are sent from one state with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another state, or for manufacture within the state and the shipment outside the state of the products resulting from such manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this act. For the purpose of this paragraph the word 'state' includes territory, the District of Columbia, possession of the United States, and foreign nation."

Section 3 is in the nature of a recital and finding as follows:

"Sec. 3. Transactions in grain involving the sale thereof for future delivery as commonly conducted on Boards of Trade and known as 'futures' are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the move-

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ments thereof in inter*state commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

The act in section 4 forbids all persons to use mails or interstate telephone, telegraphic, wireless, or other communication, in offering or accepting sales of grain for future delivery or to disseminate prices or quotations thereof, excepting the man who holds the grain he is offering for sale, and the owner or renter of land on which the grain offered for sale is to be grown, and excepting also members of Boards of Trade located at a terminal market on which cash sales occur in sufficient volume and under such conditions as to reflect the general value of grain and its different grades, and which have been designated by the Secretary of Agriculture as "contract markets."

The act puts these boards of trade under supervision of the Secretary of Agriculture and imposes conditions *precedent and subsequent on his power to designate or continue them as "contract markets."

The conditions are:

(a) The keeping of a record with prescribed details of every transaction of cash and future sales of grain of the Board or its member in permanent form for three years, open to inspection of representatives of the Departments of Agriculture and of Justice.

(b) The prevention of the dissemination by the Board or any member of misleading prices.

(c) The prevention of manipulation of prices or the cornering of grain by the dealers or operators on the Board.

(d) The adoption of a rule permitting the admission as members of authorized representatives of lawfully formed co-operative associations of producers having adequate responsibility engaged in the cash grain business, complying with and agreeing to comply with, the rules of the Board applicable to other members, provided that no rule shall prevent the return to its members on a pro rata patronage basis the money collected by such association in the business, less expenses.

The Secretary of Agriculture, the Secretary of Commerce, and the Attorney General are made a commission to hear and determine, after due notice, whether any board of trade has failed or is failing by rule to do the things required above, and, if found in default, to suspend its functions as a contract market for a period not to exceed six months, or to revoke its designation as such, with an appeal on the record to the Circuit Court of Appeals within the circuit where the board is situate. Such commission, too, is to hear appeals from the Secretary's action in refusing to designate any Board of Trade as a contract market.

There is a further provision for excluding from all contract markets and trading priv-

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ileges any person violating *the provisions of the act or the regulations in pursuance thereof.

Section 9 declares any one trading in futures in violation of section 4, or sending intentionally or carelessly false or misleading quotations or information as to the prices of grain, guilty of a misdemeanor.

The bill of the plaintiffs describes the organization of the Chicago Board of Trade as a corporation under a special act of the Legislature of Illinois, passed in 1859 (Priv. Laws 1859, p. 13), with a membership of 1,600 and a board of 18 directors, of whom one is president. It avers that the Board does no business in selling or buying grain, but only furnishes an exchange and offices where such business can be done by its members; that it does not deliver any market quotation through interstate means, but it does cause to be collected the first price and each change of price on its exchange in cash and future sales during the regular

hours in the exchange hall, and delivers them to certain telegraph companies, who pay the Board for this information.

The bill further avers that it is sustained only by the initiation fees and dues of its members, the former being \$25,000 for each member, and the latter being in the form of annual assessments; that it has from these sources accumulated funds with which to provide a large building and offices for the exchange, from some of which it receives rental and so has property worth \$2,000,000 or more; that its existence depends on keeping its memberships valuable; that it does this by requiring character and financial responsibility as qualifications for its membership and by a requirement that a member shall charge for every sale a fixed minimum commission to a nonmember principal, and a less minimum to a member who shall be his principal; that corporations are not permitted to be members, but that, when two of the stockholders and officers

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are members, the corporation *is permitted as a member to make contracts on the exchange. The bill further avers that, if the Board were required to admit representatives of co-operative associations of producers, with the privilege of dividing with their members the proceeds of commissions, less expenses, it would greatly impair the value of its memberships to other members.

The bill further avers that the members of its exchange engage only in three kinds of trading:

(1) Many act as commission merchants, and receive from producers and country grain dealers grain in cars and boats consigned to them, which as agents they sell for immediate delivery and account to their principals for the proceeds of such sales, less their commissions and other expenses, and many members, as principals or agents, purchase and sell grain in Chicago which is in cars or elevators for immediate delivery, and all of these transactions are known as "cash sales."

(2) Many members send out in the afternoons, whenever market conditions are favorable, telegrams or letters to country grain dealers offering to buy grain, or to millers and other nonresidents of Chicago, probable buyers, offering to sell grain at released prices and to be shipped within a certain time, on condition that these offers be accepted before regular market hours the next morning. These are known as "cash sales for deferred shipment," or as "sales to arrive."

(3) Many of the members engage either as principals or agents in making on the exchange contracts with other members for the purchase and sale of grain for future delivery by which the seller agrees to deliver in Chicago the grain covered by the contract upon any day of the named month that he shall select. More than 75 per cent. of the volume of all trading in the exchange is for

future delivery, and under the rules it must be done in the exchange hall and between

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regular fixed hours; that both buyers *and sellers in all such contracts are personally present when the contracts are made.

The bill further avers that all contracts for future delivery are under the rules of the Board fulfilled only by delivery of warehouse receipts for the grain issued by twelve warehouses in Chicago, selected by the Board and having a capacity of 13,000,000 bushels and licensed by the state of Illinois to do a public warehouse business; that the grain is mixed with other grain, so that the receipt holder never gets the grain deposited when the receipt was issued; that, while a rule of the exchange makes grain in railroad cars deliverable in future cars the last three days of the month, the transaction is not fully completed till the grain in those cars is deposited in a regular warehouse and receipt issued; that in the trading for future delivery more than three-quarters of the many millions of bushels contracted to be delivered are settled for without delivery by offsetting purchases; that a large part of the future trading is done by grain merchants, millers, and others only for the purpose of insuring themselves against price fluctuations in respect of like grain owned by them and held for sale, shipment, or manufacture, and is settled by offsetting.

The bill further avers that another large part of future trading is done by speculators, so called, who make a study of market conditions affecting prices, and try to profit by their judgment as to future prices; that few of such speculators have capital enough to make large single purchases in any way affecting the market; that six-sevenths of all the trading in futures in the country take place in Chicago; that no corners have been run on the exchange for 15 years, due to the enforcement of rules against them by the Board and "perhaps to the Sherman Anti-Trust Act"; that manipulation has never been successfully resorted to, to depress prices; that the selling of futures has no

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such effect; that the law of supply and demand regulates prices and prevents violent fluctuations; and that before hedging was made possible by this future trading the cost of the middleman between producer and consumer was much greater.

The defendants filed an answer admitting much of the bill, but specifically denying the averments included in the last foregoing paragraph.

The plaintiffs submitted a large number of affidavits in support of a motion for a temporary injunction. These contained opinions of many professors of political economy in the colleges of the country to the effect that trading in futures in the long run did not depress prices, but stabilized them.

The court denied the motion for a tempo-

rary injunction and of its own motion dismissed the bill for want of equity.

The conclusions of Congress expressed in the recital of section 3 as to the detriment to interstate commerce from constantly recurring manipulation of sales for future delivery were reached after many years of investigation and examination of witnesses, including the advocates of regulation and those opposed, and men intimately advised in respect to the grain markets of the country.

The Senate Committee on Agriculture and Forestry reported to the Senate as follows:

"Every member of a grain exchange who testified before this committee acknowledged that there is at times excessive speculation and undesirable speculation in the futures market. Furthermore, it was brought out that a few big traders at times influence prices—manipulate the market—by the great volume of their operations. Also it was shown that a continually fluctuating, and not a stable, market is the desire of speculators. Such a market is against the interests of the producer; he must have stable prices in order to market his crop to best advantage. A market without wide and

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frequent price fluctuations *would greatly benefit the producer. The reason for this is that rapidly fluctuating prices can not be fully reflected in the prices paid at country stations, so an additional margin must be allowed for buying in the country." Sen. Report No. 212, 67th Congress, 1st Sess.

Witnesses testified before the committee that a calculation based on commissions showed the total bushels of grain sold for future delivery on the Chicago Board of Trade in a year reach nearly 20,000,000,000 and that the amount of grain actually delivered under such contracts is not 1 per cent. of this. Objectors to future trading insisted at first that future trading put in the hands of desperate speculators an easy opportunity to corner the market and to promote great and rapid fluctuations in value, and was wholly vicious and should be forbidden. Further investigation and consideration have satisfied many that the law of supply and demand operated on futures as on cash sales and that futures are very useful in certain respects, notably in offering a means by which, through "hedging," owners of grain can, to some extent, protect themselves against the danger of losses by fluctuation.

The government did not, in this hearing and argument, maintain that by manipulation the operators can permanently depress the prices of grain, but insisted and cited the actual quotations from time to time, some as late as the summer of 1922, showing violent fluctuations through "deals" of large operators engaged in manipulating the futures market at intervals since 1900, before which corners were ever recurring but since which they have been infrequent. Much evidence was adduced before congressional committees that the sales of futures on the Chicago

Board dominated the prices of wheat in this country and the world. The injurious effect of these recurring fluctuations in such futures upon the consignment of grain by owners and producers was asserted by witnesses.

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Mr. *Herebtr Hoover, whose experience as Food Administrator gave his opinion weight, said to the House Committee on Agriculture (Future Trading Hearings—66th Congress, 3d Session, pp. 909, 910):

"The second form of manipulation, and the one that I feel does at times take place, is the making of a drive on the price by either the sale or the purchase of such quantities as will affect the price by the volume of material coming to the market at that particular time. I would regard those transactions as an attempt to dislocate the normal flow of the law of supply and demand, and any attempt of any individual to dislocate a free market must be against public interest. I feel it is also against the interest of the individual producer, because a drive on the market that depresses the price must find a considerable number of farmers who, through the fall in price and their outside obligations, are compelled to liquidate, and they have been done an injury. Incidentally the commodity has been brought into the market, and an acceleration to depression has been created."

Mr. Julius H. Barnes, the head of the United States Grain Corporation during the war, and of widest experience in the grain markets of the world, at the same hearing, after explaining that future dealing stabilizes prices and helps legitimate hedging, and that a drive on prices worked its own cure in the long run, as did the distinguished economists whose affidavits were exhibited in this case, said (pages 839, 840):

"But it is also true that, even though such a price depression must be temporary in character it may, during its period of effectiveness, do substantial injustice by forcing the liquidation of grain held on margins, or by the price tendency thus displayed, frightening owners otherwise confident of the ultimate value of their goods."

The Federal Trade Commission in its report on wheat prices to the President, December 13, 1920, said (page 8):

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"Prices of wheat futures, the decline of which has been especially the subject of criticism, are susceptible of manipulation. Wide fluctuations in prices and large discounts of the future price below the cost price have prevailed. This has made it unsatisfactory for 'hedging,' and hedging sales may also appear to be manipulative, because, if they are large, they may cause sharp depressions. Wheat futures are not functioning well, even according to the standards of their advocates."

Mr. Julius H. Barnes, in his evidence before the Federal Trade Commission, in October, 1922, describes the effect upon inter-

state commerce of a "deal" in May, 1922, wheat on the Chicago Board of Trade, when the price of futures rose rapidly. Large operators collected cash wheat all over the country and headed it for Chicago for delivery at the attractive prices. This took wheat away from all the other wheat centers of the country, where it normally would have remained for consumption, and accumulated it in almost unsalable quantity in Chicago, greatly disturbing the normal and useful flow of wheat in its ordinary and proper distribution and precipitating a crash in prices.¹

¹ In response to Senate Resolution 133 the Federal Trade Commission prepared to make a report by conducting in October, 1922, an inquiry into the market manipulation of grain. Mr. Julius H. Barnes was a witness, and in the course of his examination said (pages 74-76):

"Now, in May, 1922, we had the same spectacular gyrations in prices, starting earlier in the month and falling into a complete collapse in price. Why?"

"Commissioner Murdock: In the middle of the month this time?"

"Mr. Barnes: Yes, starting early in the month, rising to a peak and then falling to an early collapse. Without knowing the facts, because these things are detected by commission merchants, it seems quite clear that there were two or three large lines of wheat bought in Chicago for delivery in May, 1922; that at least one of those, on popular report, was a man who could easily pay for 5,000,000 bushels of wheat; that he intended to take the wheat as a merchant; that he was going to pay cash for it and not squeeze somebody to make a settlement. He expected to get delivery of that, did not buy it in anticipation that it could not be delivered, and therefore he could force a settlement, and he was going to act as a merchant on the belief that wheat was worth more in the world's markets than the prices then ruling in Chicago; but on top of that there developed that two or three other men, who were evidently clear speculators, not acting with that conception, had also lines of wheat, and the aggregate of those made a shortage in Chicago exceeding the stock of wheat in Chicago or naturally tributary thereto."

"The result of that was that as this situation developed, the buyer, miller or exporter began to get afraid about the Chicago market, that he might have to buy his hedges in higher, and began to buy in those hedges and the market advanced under that kind of apprehensive buying, the buying of legitimate merchants who were frightened to leave their hedges in that month any longer. That helped make the peak, plus perhaps some buying by interested people who wanted to see the price marked up, and those large cash interests in Chicago began to collect all over the country wheat and head it to Chicago for delivery at these attractive prices, which by this time had reached a relation in respect to all of the markets which attracted wheat from every direction to Chicago."

"The result of that was that by the end of the month there was accumulated in Chicago a stock of 10,000,000 or 12,000,000 bushels of wheat, which was beyond the normal absorbing capacity of the consumption trade that rests on Chicago, and that wheat had been lifted by the incentive of these apprehensively made prices from centers where it should have remained for the consumption which normally overtakes it from those centers—Omaha, Kansas City, Minneapolis, all these other points. So that the country stocks which should normally supply mills west of Chicago or south of Chicago were lifted out of their natural place and directed to Chicago by these apprehensively made prices, and there was collected in Chicago an almost un-

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*It was charged before the congressional committees that the limitation of deliveries under contracts for futures to warehouse receipts of 12 regular warehouses aggregating but 13,000,000 bushels capacity, with the privilege of a tender of grain in cars on the last three days of the delivery month and a power in the board of directors to enlarge the privilege in case of an emergency, casts another element of speculative doubt into the prices of futures and puts too much control in the board of directors. In view of the fact that the total capacity of Chicago for storing grain in public and private warehouses is 45,000,000, it is urged that this rule of the futures market is sinister and dangerous in affecting the prices of a market that are worldwide in their influence by such a narrow limitation of deliveries subject to

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*arbitrary and uncertain change at the discretion of the Board, and that it is a factor in frightening shippers and lawful hedgers in making opportunity for speculative manipulation and burdening the flow of grain in normal interstate channels.²

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*Mr. Henry S. Robbins, of Chicago, Ill., for appellant.

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*Mr. Solicitor General Beck, of Washington, D. C., for appellees.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

Appellants contend that the decision of this court in *Hill v. Wallace*, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. Ed. 822, is conclusive against the constitutionality of the Grain

salable quantity of wheat which could only press in one direction, could not go back.

"Commissioner Murdock: So that we had a price collapse by that?"

See, also, letter of J. H. Barnes to Chicago Board of Trade, p. 69, Grain Future Hearings before Committee on Agriculture and Forestry, U. S. Senate, 67th Congress, 2d Session, on H. R. 11843, containing the following:

"Present conditions lay an economic burden on distribution cost by drawing wheat to Chicago out of its accustomed channels and from points of supply needed shortly for actual consumption elsewhere. These evil effects are solely from apprehension of a forced settlement at artificial prices on hedges properly used as insurance against price level fluctuations."

²Evidence of Julius H. Barnes before Federal Trade Commission in October, 1922 (page 77), on inquiry in response to Senate Res. No. 133:

"Mr. Barnes: In the demonstration for several years that the chief abuses of the trade were deliberate manipulation and congestion, the deliberate forcing of settlement by artificial prices, the trade step by step tried to make it more difficult for any one to obtain that control of the market. They made No. 1, 2, 3 wheat, and on all varieties deliverable. That was not sufficient, as demonstrated in Chicago two years ago to the market committee of 1917. I suggested to them that the trade ought to seriously consider a widening of the contract basis once more, so as to make wheat at Omaha and Kansas City and Minneapolis, at points of accumulation on the normal flow. So that there was not any substantial injustice done a buyer; deliv-

Futures Act. Indeed in their bill they pleaded the judgment in that case as res adjudicata in this, as to its invalidity. The act whose constitutionality was in question in *Hill v. Wallace* was the Future Trading Act (chapter 86, 42 Stat. 187). It was an effort by Congress, through taxing at a prohibitive rate sales of grain for future delivery, to regulate such sales on boards of trade by exempting them from the tax if they would comply with the congressional regulations.

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It was *held that sales for future delivery where the parties were present in Chicago, to be settled by offsetting purchases or by delivery, to take place there, were not interstate commerce and that Congress could not use its taxing power in this indirect way to regulate business not within federal control. We said (259 U. S. 68, 42 Sup. Ct. 458, 66 L. Ed. 822):

"Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause."

Again, on page 69 of 259 U. S., on page 458 of 42 Sup. Ct. (66 L. Ed. 822), we said:

erable at a freight cost difference and a small penalty, so that it would not be abused, and I stand to-day for that as being the one real constructive thing left for the Chicago market to-day, if Chicago is to be the liquid grain future trading market of America, as it should be, if there is a natural advantage in concentrating all the trading of the country in one market, so that you can send an order through and get 100,000 or 500,000 bushels in a minute, to answer a cable from abroad or a milling order, because the volume of trade there is liquid all the time, and I believe that is in the public interest.

"If it is to do that, then Chicago ought to widen this wedge against these shippers, and it can be done by taking into contract delivery the wheats in these other markets. The effect last May would have been that that wheat would have been delivered, but the wheat itself would have physically been in Omaha and Kansas City and available for milling in June and July, when it was needed, and it would not have been in Chicago to press direct on East and the world's market and cause a further decline in price.

"Mr. Watkins: Mr. Barnes, what you would include for delivery at Chicago markets you would include for delivery at seaboard markets, would you not?"

"Mr. Barnes: No. I would not, because as I say, on the natural flow, a buyer in Chicago for actual delivery of wheat must in the normal process of trade move that wheat east. His consumption both for export and milling is east of Chicago. Therefore, for him to take delivery west of Chicago at a freight difference and a small penalty is no substantial injustice; but to force him to take wheat at the seaboard at the transportation cost when maybe he is buying in Chicago to supply a mill in Omaha, might be a very substantial injustice."

"It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."

The Grain Futures Act which is now before us differs from the Future Trading Act in having the very features the absence of which we held in the somewhat carefully framed language of the foregoing prevented our sustaining the Future Trading Act. As we have seen in the statement of the case, the act only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that by manipulation they have become a constantly recurring burden and obstruction

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to that commerce. Instead, *therefore, of being an authority against the validity of the Grain Futures Act, it is an authority in its favor.

[1] The Chicago Board of Trade is the greatest grain market in the world. Chicago Board of Trade v. United States, 246 U. S. 231, 235, 38 Sup. Ct. 242, 62 L. Ed. 683. Its report for 1922 shows that on that market in that year were made cash sales for some 350,000,000 bushels of grain, most of which was shipped from states west and north of Illinois into Chicago, and was either stored temporarily in Chicago or was retained in cars and after sale was shipped in large part to Eastern states and foreign countries. This great annual flow is made up of the cash grain sold on the exchange, the cash sales to arrive (Chicago Board of Trade v. United States, 246 U. S. 231, 38 Sup. Ct. 242, 62 L. Ed. 683), and the comparatively small percentage of grain contracted to be sold in the futures market not settled by offsetting. Chicago Board of Trade v. Christie Grain Co., 198 U. S. 236, 248, 25 Sup. Ct. 637, 49 L. Ed. 1031. The railroads of the country accommodate themselves to the interstate function of the Chicago market by giving shippers from Western states bills of lading through Chicago to points in Eastern states with the right to remove the grain at Chicago for temporary purposes of storing, inspecting, weighing, grading, or mixing, and changing the ownership, consignee or destination and then to continue the shipment under the same contract and at a through rate. Bacon v. Illinois, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615. Such a contract does not prevent the local taxing of the grain while in Chicago; but it does not take it out of interstate commerce in such a way as to deprive Congress of the power to regulate it, as is plainly intimated in the authority cited (227 U. S. 516, 33 Sup. Ct. 299, 57 L. Ed. 615) and expressly recognized in Stafford v. Wallace, 258 U. S. 495, 525, 526, 42 Sup. Ct. 397, 66 L. Ed. 735. The fact that

the grain shipped from the West and taken from cars may have been stored in warehouses and mixed with other grain, so that the owner receives other grain when pre-

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sending his receipt for continuing the shipment, does not take away from the interstate character of the through shipment any more than a mixture of the oil or gas in the pipe lines of the oil and gas companies in West Virginia, with the right in the owners to withdraw their shares before crossing state lines, prevented the great bulk of the oil and gas which did thereafter cross state lines from being a stream or current of interstate commerce. Eureka Pipe Line v. Hallanan, 257 U. S. 265, 272, 42 Sup. Ct. 101, 66 L. Ed. 227; United Fuel Gas Co. v. Hallanan, 257 U. S. 277, 281, 42 Sup. Ct. 105, 66 L. Ed. 234.

[2] It is impossible to distinguish the case at bar, so far as it concerns the cash grain, the sales to arrive, and the grain actually delivered in fulfillment of future contracts, from the current of stock shipments declared to be interstate commerce in Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735. That case presented the question whether sales and purchases of cattle made in Chicago at the stockyards by commission men and dealers and traders under the rules of the stockyards corporation could be brought by Congress under the supervision of the Secretary of Agriculture to prevent abuses of the commission men and dealers in exorbitant charges and other ways, and in their relations with packers prone to monopolize trade and depress and increase prices thereby. It was held that this could be done, even though the sales and purchases by commission men and by dealers were in and of themselves intrastate commerce, the parties to sales and purchases and the cattle all being at the time within the city of Chicago.

We said (258 U. S. 515, 42 Sup. Ct. 402, 66 L. Ed. 735):

"The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current

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flows *and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales of the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the

(43 Sup.Ct.)

subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West, its ultimate destination known to, and intended by, all engaged in the business is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce."

This case was but the necessary consequence of the conclusions reached in the case of *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such. The *Swift Case* merely fitted the commerce clause to the real and practical essence of modern business growth. It applies to the case before us just as it did in *Stafford v. Wallace*.

The distinction that the exchange of the Chicago Board of Trade building is not

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within the same inclosure as the *railroad yards and warehouses in which the grain is received and stored on its way from the West to the East as it is being sold on the exchange, while the stockyards exchange and the actual receipt and shipment of cattle are within the same fence, surely can make no difference in the application of the principle. The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe, as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East.

[3, 4] The question under this act is somewhat different in form and detail from that in the *Stafford Case*, but the result must be the same. It is not the sales and deliveries of the actual grain which are the chief subject of the supervision of federal agency by Congress in the Grain Futures Act, although a record of cash sales is required, and a corner in cash sales would be a violation of it, and there are other provisions equally regulatory of them. It is the contracts of sales of grain for future delivery, most of which do not result in actual delivery but are settled by offsetting them with other contracts of the same kind, or by what is called "ringing." Board of Trade v. *Christie Co.*, 198 U. S. 236, 246-247, 25 Sup. Ct. 637, 49 L. Ed. 1081. The question is whether the conduct of such sales is subject to constantly recur-

ring abuses which are a burden and obstruction to interstate commerce in grain? And further, are they such an incident of that commerce and so intermingled with it that the burden and obstruction caused therein by them can be said to be direct?

In *United States v. Ferger*, 250 U. S. 199, 39 Sup. Ct. 445, 63 L. Ed. 936, the question was of the validity of a statute of Congress punishing the forging of bills of lading used in interstate commerce, and altering them. The lower court had dismissed an indictment charging the offense denounced in the stat-

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ute, *on the ground that Congress could only deal with real bills of lading where there was an actual shipment in interstate commerce, and had no power to punish a fraud and fiction where there was no such commerce, and where the bills of lading whose fabrication was the subject of complaint were mere pieces of papers fraudulently inscribed, and did not relate to any actual interstate commerce. This court, speaking through Chief Justice White, rejected the view of the lower court, on the ground that interstate commerce would be directly impaired and weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently connected with such commerce. The court, in *Stafford v. Wallace*, supra, adopted and applied this principle and said (258 U. S. 521, 42 Sup. Ct. 403, 66 L. Ed. 735):

"Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and to meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent."

In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation, and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein.

It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the

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finding *of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain and that it is a real abuse.

But it is contended that it is too remote in its effect on interstate commerce, and that it is not like the direct additions to the cost to the producer of marketing cattle by exorbitant charges and discrimination of commission men and dealers, as in *Stafford v. Wallace*. It is said there is no relation between prices on the futures market and in the cash sales. This is hardly consistent with the affidavits the plaintiffs present from the leading economists, already referred to, who say that dealing in futures stabilizes cash prices. It is true that the curves of prices in the futures and in the cash sales are not parallel and that sometimes one is higher and sometimes the other. This is to be expected because futures prices are dependent normally on judgment of the parties as to the future, and the cash prices depend on present conditions, but it is very reasonable to suppose that the one influences the other as the time of actual delivery of the futures approaches, when the prospect of heavy actual transactions at a certain fixed price must have a direct effect upon the cash prices in unfettered sales. The effect of such a "deal" as that of May, 1922, as explained by Mr. J. H. Barnes, shows this clearly and illustrates in a striking way the direct effect of such manipulation in disturbing the actual normal flow of grain in interstate commerce most injuriously. Mr. Barnes also points out the effect of the operation of the rule limiting deliveries to warehouse receipts from warehouses selected by the directors of the Board, whose unregulated power to suspend or modify the rule pending settlement adds to the speculative character of the market and frightens consignors.

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*More than this, prices of grain futures are those upon which an owner and intending seller of cash grain is influenced to sell or not to sell as they offer a good opportunity to him to hedge comfortably against future fluctuations. Manipulations of grain futures for speculative profit, though not carried to the extent of a corner or complete monopoly, exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage, not only this justifiable hedging, but disturb the normal flow of actual consignments. A futures market lends itself to such manipulation much more readily than a cash market.

In the case of *United States v. Patten*, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, an indictment charged a conspiracy to run a corner by making purchases of quantities of cotton for future delivery, by means of which the conspirators were to secure control of the available supply of cotton in the country and enhance the price of cotton at will. It was contended

that, even if the necessary result of this was an obstruction of interstate trade, it was so indirect as not to constitute a restraint of it within the federal Anti-Trust Law under which the indictment was drawn. This court held otherwise and sustained the indictment.

Corners in grain through trading in futures have not been so frequent as they were before 1900, due, as the plaintiffs aver, to the stricter rules of the Board of Trade as to futures and to the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830), though they do seem to have since occurred infrequently. The fact that a corner in grain is brought about by trading in futures shows the direct relation between cash prices and actual commerce on the one hand, and dealing in futures on the other, because a corner is not a monopoly of contracts only, it is a monopoly of the actual supply of grain in commerce. It was this direct relation that led to the decision in the *Patten Case*.

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If a corner and the enhance*ment of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the states. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the states in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the appropriate means adopted in this act by which this abuse may be restrained and avoided.

[5-7] The next provision of the act which is attacked as invalid is that which forbids a board, designated as a contract market, from excluding from membership in, and all privileges on, its exchanges any duly authorized representative of a lawfully formed and conducted association of producers having adequate financial responsibility, engaged in the cash grain business, and complying or agreeing to comply with the terms and conditions lawfully imposed on the other members, and which bars any rule forbidding the return by such association of the commissions of its representative, less expenses, to the bona fide members of the co-operative association in proportion to their consignments of grain to the exchange. It is said that this will impair the value of memberships in the Board and will take the property of the members without due process of law.

The Board of Trade conducts a business

which is affected with a public interest and

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is, therefore, subject to *reasonable regulation in the public interest. The Supreme Court of Illinois has so decided in respect to its publication of market quotations. *New York & Chicago Grain Exchange v. Chicago Board of Trade*, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107. In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales of futures upon interstate commerce, we find no difficulty under *Munn v. Illinois*, 94 U. S. 113, 133, 24 L. Ed. 77, and *Stafford v. Wallace*, supra, in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest and is subject to national regulation as such. Congress may therefore reasonably limit the rules governing its conduct with a view to preventing abuses and securing freedom from undue discrimination in its operations. The incidental effect which such reasonable rules may have, if any, in lowering the value of memberships does not constitute a taking, but is only a reasonable regulation in the exercise of the police power of the national government. Congress evidently deems it helpful in the preservation of the vital function which such a board of trade exercises in interstate commerce in grain that producers and shippers should be given an opportunity to take part in the transactions in this world market through a chosen representative. Nor do we see why the requirement that the relation between them and this representative, looking to economy of participation on their part by a return of patronage dividends, should not be permissible because facilitating closer participation by the great body of producers in transactions of the Board which are of vital importance to them. It would seem to make for more careful supervision of those transactions in the national public interest in the free flow of interstate commerce. Under the present rules of the Board, corporations are permitted to enjoy the benefit of membership by reason of the membership of two of their executive officers who are bona fide stockholders, and

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all their stock*holders are thus given a chance to enjoy the commissions earned and the benefits to the corporation of other membership privileges to the extent of their stock ownership. The provisions of the act objected to are to be sustained on the principles laid down in *House v. Mayes*, 219 U. S. 270, 31 Sup. Ct. 234, 55 L. Ed. 213. *Broadnax v. Missouri*, 219 U. S. 285, 31 Sup. Ct. 238, 55 L. Ed. 219, and *Grisin v. South St. Paul Live Stock Exchange*, 152 Minn. 271, 188 N. W. 729. We think the objection to this feature of the act untenable.

[8] We do not find it necessary to our de-

gree in this case to consider the constitutional objections made in the bill to that part of the fourth section which forbids the use of the mails and interstate facilities of communication to offer or accept sales for future deliveries or to send quotations of prices thereof except through members of a board of trade, because the plaintiffs are not affected thereby. Section 10 of the act reads as follows:

"If any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby."

The unconstitutionality of these provisions, if they be unconstitutional, would, therefore, not invalidate the rest of the act.

[9] Section 9 declares it to be a misdemeanor for a member of a designated board of trade to fail to evidence any contract mentioned in section 4 by a record in writing as therein required. This is only a legitimate means of enforcing the statutory regulations of the Board of Trade which we have found to be within the power of Congress.

[10] As to the power of Congress to provide in section 9 for the punishment of any one who shall knowingly or carelessly deliver through the mail or interstate means of communication false or misleading crop or market reports, it will be time enough for us to consider its existence when some one is charged with the offense and is brought to trial therefor. The plaintiffs present no such case.

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[11] *Paragraph (b) of section 6 which gives to the Commission the power on complaint after investigation by the Secretary of Agriculture, and after a hearing, to exclude from all contract markets any person violating any of the provisions of the act or attempting to manipulate the market price of any grain in violation of the provisions of section 5 of the act or of any of the rules or regulations made in pursuance to its requirements, is attacked as invalid because a jury trial is not afforded. The plaintiffs do not aver that they are committing acts which will subject them to such exclusion, or that charges have been made and proceedings have been begun or are about to be begun against them by the Secretary of Agriculture. Until they are thus in danger of suffering prejudice from the operation of the paragraph, they cannot invoke our decision as to its validity.

For the reasons given the decree of the District Court is

Affirmed.

Mr. Justice McREYNOLDS and Mr. Justice SUTHERLAND dissent.

(262 U. S. 77)

**LION BONDING & SURETY CO. v.
KARATZ.*****DEPARTMENT OF TRADE AND COM-
MERCE OF STATE OF NEBRASKA et
al. v. HERTZ et al.**(Argued March 2, 1923. Decided April 23,
1923.)

Nos. 574, 467.

1. Receivers ⇨9—Simple unsecured contract creditor cannot maintain suit for appointment.

A bill for appointment of a receiver lacks equity, where it was brought by an unsecured simple contract creditor.

2. Courts ⇨328(2)—Amount of plaintiff's claim determines jurisdiction to appoint receivers, not value of property.

In a suit by a creditor for the appointment of a receiver, the amount of plaintiff's claim is the amount in controversy, and the amount of the defendant corporation's assets, either within or without the state, is of no legal significance.

3. Courts ⇨328(2)—Amount of insurance company's indebtedness to others than plaintiff does not determine jurisdiction to appoint receivers.

In a suit for the appointment of receivers for a foreign insurance company, brought by a simple contract creditor, the amount of the debts owed by the company to creditors other than plaintiff is immaterial in determining the amount in controversy.

4. Courts ⇨328(4)—Allegation creditor sued on behalf of others does not aid jurisdiction.

Where plaintiff who brought suit for the appointment of a receiver of a foreign corporation, had a claim against the corporation which was less than the jurisdictional amount, his allegation that he sued on behalf of others similarly situated does not aid him.

5. Courts ⇨329—General allegation of amount in controversy does not aid bill disclosing want of jurisdictional amount.

Where the bill discloses that the amount in controversy is less than the jurisdictional amount, the general allegation that it exceeds the jurisdictional amount is of no avail.

6. Receivers ⇨55—Bill by receivers to secure property dismissed, if appointment was without jurisdiction.

A bill by receivers appointed by a federal court to compel the delivery of property to them is dependent on the decree appointing the receivers, and if that decree was made by a court not having jurisdiction, the bill for possession of the property must be dismissed.

7. Corporations ⇨560(4)—Statute giving receivers possession of property in other districts does not apply to property of insurance company.

Judicial Code, § 56 (Comp. St. § 1038), giving a receiver control of land, or other property of a fixed character which lies within different states in the same judicial circuit, relates

to cases where the fixed property is a unit extending into several states, like interstate railroads, and does not apply where the receiver is appointed for a foreign insurance company in a state where its assets are money and credits, so as to give such jurisdiction possession of the assets of the corporation in its home state, which was in the same circuit.

8. Courts ⇨493(3)—Federal court receiver cannot take property from possession of state court acquired before receivership.

Where a state court had taken actual possession of the property of an insurance company under appropriate proceedings, and was in possession at the time a receiver for the company was appointed by the federal court, the latter court had no jurisdiction to take the property out of the possession of the state court.

9. Courts ⇨497—Possession by one court deprives all other courts of jurisdiction.

Where a court of competent jurisdiction has by appropriate proceedings taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts, and the first court has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere.

10. Courts ⇨493(3)—Limited relief previously granted by state court having possession of property does not entitle federal receivers to take possession.

The fact that the state court which had taken possession of property of an insurance company had granted only limited relief by directing the state department of trade and commerce to conduct the affairs of the company until the assets could be turned back to the company as permitted by the state statute, before receivers for the company were appointed by the federal court in another district, does not entitle the federal receivers to possession of the property, nor give the federal court jurisdiction to control the future proceedings of the state court, which thereafter entered a decree for winding up the business of the insurance company, since such procedure is contrary to the settled principles governing the relation of courts of concurrent jurisdiction, and inconsistent with Judicial Code, § 265 (Comp. St. § 1242), prohibiting courts of the United States from staying proceedings in state courts.

11. Judgment ⇨828(3)—Of state court having possession of res cannot be collaterally attacked in federal court.

The judgment of the state court, which first acquired possession of the res, cannot be collaterally attacked in the federal court, which subsequently appointed receivers to take possession of the same property, since lower federal courts are not superior to state courts.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Suits by A. H. Karatz against the Lion Bonding & Surety Company and by A. J. Hertz and another, as receivers of the Lion Bonding & Surety Company, against the De-

*Motions to modify decrees denied 262 U. S. 640, 43 Sup. Ct. 641, 67 L. Ed. —, and 262 U. S. 733, 43 Sup. Ct. 701, 67 L. Ed. —.

partment of Trade and Commerce of the State of Nebraska and others. Decree for complainant in the first case was affirmed by the Circuit Court of Appeals (281 Fed. 1021), and decree dismissing the bill in the second case reversed (280 Fed. 540), and defendants in each case bring certiorari. Reversed.

See, also, 280 Fed. 532.

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*Messrs. Halleck F. Rose and Arthur R. Wells, both of Omaha, Neb., for petitioner.

Mr. Bruce W. Sanborn, of St. Paul, Minn., for respondents.

Mr. Justice BRANDEIS delivered the opinion of the Court.

These two cases arise out of the insolvency of the Lion Bonding & Surety Company, a Nebraska insurance corporation. They are here on writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. In the Karatz Case, it affirmed a decree of the federal court for Minnesota which appointed receivers in a suit brought by an unsecured simple contract creditor. See 280 Fed. 532. In the Hertz Case, it reversed a decree of the federal court for Nebraska, which dismissed a suit brought by those receivers for possession of the company's property. 280 Fed. 540. At the date of each decree the property of the company in Nebraska was held by the department of trade and commerce of that state, with the usual powers of a receiver, under a decree of a state court. The Circuit Court of Appeals directed, in the Hertz Case, that the lower court enjoin the department from doing any act in relation to the property, except to hold custody thereof subject to the further order of the federal court for Minnesota. Petitioners ask that the judgments of the appellate court be reversed and that the bills in the

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*federal District Courts be dismissed. The grounds on which jurisdiction was asserted by the federal courts make necessary a fuller statement of the facts.

The Lion Bonding & Surety Company had for some years prior to 1921 been licensed to conduct the business of insurance in Nebraska, and was doing business and had property also in 18 other states. A statute of Nebraska commits to its department of trade and commerce the supervision of insurance companies and control thereof in case of insolvency and otherwise. Compiled Statutes Nebraska 1922, §§ 7745-7748; Laws Nebraska 1919, c. 190, tit. 5, art. 3, pp. 576-579. Paragraph 1 of section 4 of that act provides:

"Whenever any domestic company is insolvent, * * * or is found, after an examination, to be in such condition that its further transaction of business would be hazardous to its policy holders, or to its creditors, or to its stockholders, or to the public; * * * the department * * * may apply to the district court, * * * in the county * * * in which the principal office of such company is

located, for an order directing such company to show cause why the department * * * should not take possession of its property, records and effects and conduct or close its business, and for such other relief as the nature of the case and the interest of its policy holders, creditors, stockholders or the public may require."

On April 12, 1921, the department applied to the district court of Douglas county, Nebraska, for an order directing it to take possession of the property and to conduct the business of the company, under paragraph 2 of section 4, which provides:

"On such application, or at any time thereafter, such court or judge may, in his discretion, issue an order restraining such company from the transaction of its business, or disposition of its property, records, and effects until the further order of the court. On the return of such order to show cause, and after a full

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hearing, the *court shall either deny the application or direct the department * * * forthwith to take possession of the property, records and effects, and conduct the business of such company, and retain such possession * * * until on the application of the department * * * or of such company, it shall, after a like hearing, appear to the court that the cause of such order directing the department * * * to take possession has been removed, and that the company can properly resume possession of its property, records and effects, and the conduct of the business."

The petition prayed also for an order restraining the company from the transaction of its business or from disposing of any of its property, and for other and further relief. The company immediately filed an answer, by which it admitted the material allegations of the petition, and joined in the prayer thereof. On the same day the state court entered a decree in accordance with the prayer; the department entered upon the duties prescribed by the decree; it immediately took possession of all the property of the company in Nebraska, has since held possession thereof subject to the orders of the state court, and has also obtained like possession of property of the company in other states. On May 28, 1921, the department filed, in that court, a supplemental petition, in which it prayed for an order directing it to liquidate the business under paragraph 3 of section 4, which provides:

"If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of the department, * * * which may deal with the property, records, effects and business of such company in the name of the department * * *, or in the name of the company, as the court may direct and it shall be vested by operation of law with title to all the property effects, contracts and

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*rights of action of such company as of the date of the order so directing it to liquidate. * * *"

The supplemental petition prayed, among other things, that the orders theretofore made, so far as applicable, and necessary to further the liquidation, remain in full force. The company filed an answer by which it admitted the material allegations contained in the supplemental petition and joined in the prayer thereof. On the same day that court entered an order in accordance with the prayer of the supplemental petition, all action of the department being made subject to the direction of the court.

On May 2, 1921, while the decree of the Nebraska court entered April 12, 1921, was in full force and the department was in actual possession thereunder of the property in that state, Karatz, a citizen of Minnesota, purporting to sue also on behalf of others similarly situated, filed a bill in equity against the company in the federal court for the district of Minnesota, Fourth division. No disclosure was made of the proceedings taken against the company in the state court of Nebraska, nor that under its decree the department was in possession of all the company property in that state, and, at least, of some of its property elsewhere. The bill alleged that the company had been admitted to do business in Minnesota; that through its operation there plaintiff had become an unsecured simple contract creditor to the amount of \$2,100; that the company had ceased to do business and was insolvent; that it had assets within that district valued at \$20,000; and that there was danger that the property of the company would be wasted. The bill prayed that the amount due plaintiff be ascertained and declared a first lien upon all the assets of the company in Minnesota; that, for the purpose of protecting the general public, creditors, and stockholders, receivers be appointed to collect all its assets, wherever situated, and to realize upon and distribute the same; that the company be directed to deliver possession to them

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of all the *property wherever situated; that the company and its officers be restrained from interfering in any way with such receivers; and for general relief. On the filing of this bill the federal court, acting ex parte, appointed Hertz and Levin receivers of all the property of the company wheresoever situated, and authorized them to apply to any other District Court of the United States in aid of the order so entered. The company (which was served on May 5 by process upon the insurance commissioner of Minnesota) moved, on May 14, 1921, to dismiss the Karatz bill for want of federal jurisdiction and for want of equity. A motion was also made to discharge the receivers and to restore the property to the company or to the department of trade and commerce. Both motions were denied on May 30, 1921.

The Minnesota receivers secured the ap-

pointment of themselves as ancillary receivers by the federal courts for 12 other districts, but not for the Nebraska district. On May 11 and May 12, 1921, they filed, in purported compliance with section 56 of the Judicial Code (Comp. St. § 1038), certified copies of the bill and of the order of appointment with the clerks of the federal District Courts for Nebraska and other states in the Eighth circuit. On May 14, 1921, the company moved the Circuit Court of Appeals under that section for an order of disapproval of the appointment of receivers, so far as it may be operative outside the district of Minnesota. This motion was denied on May 31, 1921.¹

On September 6, 1921, the Minnesota receivers filed in the federal court for the dis-

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trict of Nebraska, Omaha *division, a bill in equity (called the Hertz suit) against the company, the department of trade and commerce and others. It charged that there was a conflict of authority between the federal court for Minnesota and the Nebraska state court concerning the administration of the company's property; that the department threatened to liquidate the company under the order of the state court entered May 28, 1921; that its rights were limited to the temporary possession and listing of the property authorized by the order of April 12, 1921; and that it had no longer any right to the possession or control of the property either for the administration of the affairs of the company under direction of the state court or otherwise. The bill prayed that defendants be restrained from interfering with the Minnesota receiver's possession and control; that they be directed to surrender possession to plaintiffs; and for other relief. A motion of defendants to dismiss the bill for want of jurisdiction and for want of equity was granted, and the receivers appealed to the Circuit Court of Appeals.

Meanwhile the Karatz Case had proceeded to final hearing. On August 11, 1921, a decree was entered adjudicating Karatz's claim for \$2,100, making permanent the appointment of the receivers and continuing their powers to administer the property of the company, and perpetually enjoining it from interfering with the receiver's control. The company appealed to the Circuit Court of Appeals. That court then heard together appeals in the two cases. On April 28, 1922, it rendered the opinions, 280 Fed. 532, 540, by which, in the Minnesota case, it affirmed

¹ There was this qualification: "That the right of said receivers to the possession of such of the property of said company as is situated in the district of Nebraska shall be subject to such right of possession thereof in the department of trade and commerce of Nebraska as had accrued to it, under proceedings in the district court of Douglas county in that state, when the right of the receivers arose under the laws of the United States."

^{*85} the order appointing receivers,² and, in the Nebraska case, reversed the decree dismissing the bill. The decree in the latter was later enlarged by directing the District Court to reinstate the bill, and to restrain the department, the company and their employees—

"from removing, secreting, or disposing of the moneys, books, papers, records, assets, property, accounts, or choses in action or derived from the Lion Bonding & Surety Company, and from doing any other act in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division."³

The decrees of the Circuit Court of Appeals in both cases must be reversed.

[1] First. In the Karatz Case the motion to dismiss the bill should have been granted. There was want of equity, for it was brought by an unsecured simple contract creditor. *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, 43 Sup. Ct. 454, 67 L. Ed. —, No. 431, decided April 9, 1923. But there was also the fundamental objection that the District Court was without jurisdiction as a federal court.

[2-5] The only ground of jurisdiction alleged is diversity of citizenship. The facts specifically stated show that the amount in controversy was less than \$3,000. Plaintiff's claim against the company was \$2,100. He prayed that this debt be declared a first lien on the assets within the state. His only interest was to have that debt paid. The amount of the corporation's assets, either within or without the state, is of no legal significance in this connection. Nor is the amount of its debts to others. The case is not of that class where the amount in con-

^{*86} troversy ^{*is} measured by the value of the property involved in the litigation. *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 335, 27 Sup. Ct. 529, 51 L. Ed. 821; *Western & Atlantic R. R. v. Railroad Commission of Georgia*, 261 U. S. 264, 43 Sup. Ct. 252, 67 L. Ed. —, No. 195, decided February 19, 1923. Nor is it like those cases in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount.

³ The decree in the Karatz Case directly under review here is that entered by the Circuit Court of Appeals on July 7, 1922, pursuant to its per curiam opinion of June 30, 1922 (281 Fed. 1021), in which it affirmed the final decree of the District Court entered August 11, 1921, for reasons stated in the opinion in that cause, of April 28, 1922, affirming the "interlocutory order appointing a receiver."

² In accordance with this decree of the Circuit Court of Appeals, the federal District Court for Nebraska entered a decree for an injunction. From the decree of the District Court the department appealed directly to this court, on the ground that the District Court was without jurisdiction as a federal court. The appeal was dismissed on October 16, 1922, for lack of jurisdiction in this court. 360 U. S. 713, 43 Sup. Ct. 90, 67 L. Ed. —.

Troy Bank v. G. A. Whitehead & Co., Inc., 222 U. S. 39, 41, 32 Sup. Ct. 9, 56 L. Ed. 81. In the case at bar, if several creditors of the company, each with a debt less than \$3,000, had joined as plaintiffs, the demands could not have been aggregated in order to confer jurisdiction. *Rogers v. Hennepin County*, 239 U. S. 621, 36 Sup. Ct. 217, 60 L. Ed. 469; *Scott v. Frazier*, 253 U. S. 243, 40 Sup. Ct. 503, 64 L. Ed. 883. Nor can Karatz's allegation that he sued on behalf of others similarly situated help him. Compare *Title Guaranty Co. v. Allen*, 240 U. S. 136, 36 Sup. Ct. 345, 60 L. Ed. 566; *Eberhard v. Northwestern Mutual Life Ins. Co.*, 241 Fed. 353, 356, 154 C. C. A. 233.⁴ Since the bill in this case discloses that the amount in controversy was less than the jurisdictional amount, the general allegation that it exceeds this amount is, therefore, of no avail. *Vance v. W. A. Vandercook Co. (No. 2)* 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111.

As the bill should have been dismissed on motion, there is no occasion to consider whether the provisions of the Nebraska statute and the proceedings taken thereunder in the courts of that state, which the defendant set up, constituted a bar to the Karatz suit.⁵

^{*87} [6] ^{*Second.} In the Hertz Case, also, the motion to dismiss the bill should have been granted. Being dependent upon the decree in the Karatz suit appointing the receivers, the Hertz suit must necessarily fall with the dismissal of that bill. But there are other insuperable obstacles to the maintenance of the Hertz suit.

[7] Hertz and Levin were not appointed ancillary receivers for Nebraska. They sue in the Nebraska district as Minnesota receivers, relying upon section 56 of the Judicial Code. That section, by its terms, applies only where, in a suit "in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different states in the same judicial circuit." It relates to those cases where the fixed property is a unit, extending into several states, like interstate railroads and pipe lines.⁶ See *Public Utilities Commission v. Landon*, 249 U. S. 236, 243, 39 Sup.

⁴ Where a creditors' bill has been entertained by this court, the amount of a single plaintiff's claim has been large enough to satisfy the jurisdictional requirement. Compare *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 855; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547; *Handley v. Stutz*, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706.

⁵ Compare *O'Neil v. Welch*, 245 Fed. 261, 267, 268, 157 C. C. A. 453; *Ward v. Foulkrod (C. C. A.)* 264 Fed. 627, 634. See, also, *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 331; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292.

⁶ The scope and effect of this section was stated by Mr. Moon (who introduced it) to be this: "It applies to a case where a receiver is to be appointed by a District Judge covering property that runs across an entire circuit."—*Cong. Rec.* 61st Cong. 3d Sess. pp. 566, 3998.

Ct. 268, 63 L. Ed. 577. It cannot be assumed that the assets of an insurance company are of that character. Those of this company, within the Minnesota district, specifically described in the Karatz bill, were alleged to consist of money and credits. The description of the property in Nebraska, given in the Hertz bill, is "cash, mortgages and other securities, bills receivable, real estate, stocks, and bonds." The provisions of section 56 extending the operation of a receivership to other districts of the same judicial circuit were therefore inapplicable to this case. The motion made, under that section, for disapproval of the order, so far as it may be operative outside the district of Minnesota, should have been granted. As Minnesota receivers merely, Hertz and Levin had no rights whatever in Nebraska. The

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general rule that a receiver cannot *sue in a foreign jurisdiction applied. *Great Western Mining Co. v. Harris*, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163. The express authorization (contained in the order of appointment) to apply for aid to other courts could not aid them in this respect. *Sterrett v. Second National Bank*, 248 U. S. 73, 39 Sup. Ct. 27, 63 L. Ed. 135.

[8] Moreover, even if the federal court for Minnesota would have had jurisdiction to appoint the receivers, and these receivers had secured ancillary appointment in the Nebraska district, the Hertz bill should still have been dismissed, because the property was then in the possession of the state court. What the federal court undertook to do was not to adjudicate rights in personam (as the state court did in *Kline v. Burke Construction Co.*, 260 U. S. 226, 43 Sup. Ct. 79, 67 L. Ed. —, No. 81, decided November 20, 1922), but to take the res out of the possession and control of the state court, and to enjoin all action on its part, except as directed by the federal court for Minnesota. It sought to do this, although the state court alone had jurisdiction of the parties and of the subject-matter, at the time when the proceeding before it was begun, at the time its decree directing the department to take possession was entered, and at the time possession was taken thereunder. Moreover, the proceeding in the state court was confessedly an appropriate one, the possession taken was actual, and it has been continuous. All this occurred before any suit was begun in any federal court. The federal court did not seek to gain possession and control of the Nebraska property until three months after entry of the decree of the state court directing the department (which had possession of the res) to proceed with the liquidation. The case is thus free of those features which sometimes create difficulty in determining conflicts between courts of concurrent jurisdiction.

[9] Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its of-

ficers, the property is thereby withdrawn

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*from the jurisdiction of all other courts. *Wabash Railroad v. Adelbert College*, 203 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379. Compare *Oklahoma v. Texas*, 258 U. S. 574, 581, 42 Sup. Ct. 406, 66 L. Ed. 771. Possession of the res disables other courts of coordinate jurisdiction from exercising any power over it. *Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667. The court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction. *Palmer v. Texas*, 212 U. S. 118, 126, 129, 29 Sup. St. 230, 53 L. Ed. 435.

[10] The assertion of control by the federal courts over property in the possession of the state court, is sought to be justified on the following ground: The possession taken by the department under the state court's decree of April 12, 1921, was only for a temporary purpose, namely, to conduct the business until the company could properly resume the conduct thereof. True, the supplemental decree entered by the state court on May 28, 1921, directed the department to liquidate the business as provided in the statute. But meanwhile, on May 2, 1921, suit had been brought by Karatz in the federal court for Minnesota, and it had obtained jurisdiction over the company's assets by its appointment ex parte of receivers. So, the court says (280 Fed. 542):

"Its right to the possession by its receivers is superior to that of the state court. It follows that the receivers appointed by it are entitled to the possession of the company's records and assets as against the department of trade and commerce."

[11] This contention is opposed to the settled principles which govern the relations of courts of concurrent jurisdiction. It is inconsistent, also, with section 265 of the Judicial Code (Comp. St. § 1242) which prohibits

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courts of the United States from *staying proceedings in courts of a state. *Essanay Film Manufacturing Co. v. Kane*, 258 U. S. 358, 42 Sup. Ct. 318, 66 L. Ed. 658. The Nebraska court was confessedly a court of competent jurisdiction. While it was in possession of the res, it entered a supplemental decree directing the department to liquidate the company. The statute of the state expressly provides for such liquidation. The original petition of April 12, 1921, clearly contemplated it and contained a prayer for general relief. The claim is that the application for liquidation is a new and independent proceeding, and that jurisdiction over the res had terminated before entry of the supplemental de-

cree, although the court's possession of the res continued. The claim is groundless. But, if the legality of the state court's action was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in that court. *Covell v. Heyman*, 111 U. S. 176, 179, 4 Sup. Ct. 355, 28 L. Ed. 390; *Byers v. McAuley*, 149 U. S. 608, 614, 13 Sup. Ct. 906, 37 L. Ed. 867; *Compare Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525; *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128; *Murphy v. John Hofman Co.*, 211 U. S. 562, 569, 29 Sup. Ct. 154, 53 L. Ed. 327. If such action had been taken and relief had been denied there, resort could then have been had to appellate proceedings. *Wisswall v. Sampson*, 14 How. 52, 14 L. Ed. 322. But the judgment of the state court, which had possession of the res, could not be set aside by a collateral attack in the federal courts. *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, 159, 160, 23 Sup. Ct. 707, 47 L. Ed. 987. Nor could it be ignored. *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660. Lower federal courts are not superior to state courts.

Reversed.

(262 U. S. 66)

A. G. SPALDING & BROS. v. EDWARDS,
Collector of Internal Revenue.

(Argued April 10 and 11, 1923. Decided
April 23, 1923.)

No. 710.

1. Commerce — Exports cannot be taxed by general sales tax law.

The fact that the law under which a tax was imposed on exports was a general law, touching all sales of the class and not aimed specially at exports, does not prevent its violating Const. art. 1, § 9, prohibiting a tax on articles exported from any state.

2. Commerce — Exports in course of transportation cannot be taxed.

Articles in course of transportation for export cannot be taxed.

3. Commerce — Goods being manufactured for export are taxable.

While goods are in process of manufacture, they are subject to taxation, even though they are intended for export and made with specific reference to foreign wants.

4. Commerce — Sale for export held not taxable.

Where goods were sold by a manufacturer to a commission merchant for export, and the order specified the manner of packing and marking the goods for export, and title passed upon delivery by the manufacturer to the carrier, the transportation was initiated by the act which completed the sale, and therefore the sale could

not be taxed under Const. art. 1, § 9, prohibiting a tax on exports, though the bill of lading was not issued at that time, and the commission merchant still might have changed the destination of the goods.

In Error to the District Court of the United States for the Southern District of New York.

Action by A. G. Spalding & Bros. against William H. Edwards, Collector of Internal Revenue for the Second District of New York. Complaint dismissed by the District Court on the merits (285 Fed. 784), and plaintiff brings error. Reversed.

Messrs. Frank Davis, Jr., of Washington, D. C., and Franklin Grady, of New York City, for plaintiff in error.

Mr. Solicitor General Beck, of Washington, D. C., for defendant in error.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit to recover the amount of taxes collected by duress under color of the War Revenue Act of October 3, 1917, c. 63, § 600 (f), 40 Stat. 300, 316 (Comp. St. 1918, § 6309¾a). The plaintiff, a corporation, manufacturer of the goods in question, says that the tax was laid on articles exported from a State, (New York,) in violation of Article 1, § 9, of the Constitution of the United States. Upon demurrer the complaint was dismissed by the District Court on the merits.

The tax is "upon all baseball bats, * * * balls of all kinds * * * sold by the manufacturer, producer, or importer" and was levied on three occasions admitted to be similar, so that the statement of one transaction will be enough. *Delgado & Cia.*, a firm in the city of La Guaira, Venezuela,

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ordered Scholtz & Co., commission *merchants in New York, to buy for their account and risk a certain number of baseballs and baseball bats, etc., at an agreed price and to

mark the packages ^{D & C}_S ^{La Guaira} to indicate the ^{# 36} purchasers and their place. Scholtz & Co. thereupon sent to the plaintiff in writing, dated December 10, 1918, this:

"Export order from Scholtz & Co., Shipping and Commission Merchants. * * * Please ship on or before the — per steamer —. Rush. * * * Errors in weight often entail heavy fines in Foreign Customs Houses, therefore be careful when weighing and marking Goods, as we shall hold you responsible for any fines caused through your errors. Cases or crates must be made to fit Goods as duty is paid by Gross weight. Shipping mark and number to be put on packages. [As above, with statement of the goods wanted.] Please send Memo. Invoice at once so we can apply for license and clear at Custom House."

Scholtz & Co. instructed the plaintiff to deliver the packages so marked to the Atlantic & Carribean Steam Navigation Co., an exporting carrier in New York. The plaintiff marked and delivered the goods as directed and was given a receipt by the carrier which it sent to Scholtz & Co. and which was exchanged by them for an export bill of lading in their name, dated February 10, 1919. The goods were transported and delivered in due time to Delgado & Cia. Scholtz & Co. paid the plaintiff on February 1 and were paid their commission by Delgado & Cia. in ninety days from date of shipment. The transaction from start to finish was understood and intended by the plaintiff and Scholtz & Co. to be for the purpose of exporting the goods to Delgado & Cia. in Venezuela. The question is whether the sale was a step in exportation, assuming as ap-

pears to be the fact, that the title *passed at the moment when the goods were delivered into the carrier's hands.

[1-3] The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was "laid on Articles exported from any State," because that is forbidden in terms by the Constitution. Article 1, § 9. *United States v. Hvoslef*, 237 U. S. 1, 18, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. 295. Articles in course of transportation cannot be taxed. *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 173, 38 Sup. Ct. 432, 62 L. Ed. 1049. So we return to the question that we have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. *Cornell v. Coyne*, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. Ed. 504; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 43 Sup. Ct. 83, 67 L. Ed. —, November 27, 1922. On the other hand no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun.

[4] The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and

with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does

not matter *so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk. Theoretical possibilities may be left out of account. In *Railroad Commission of Louisiana v. Texas & Pacific Ry. Co.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215, the consignees might have retained the goods at New Orleans instead of shipping them abroad. The fact that they came to New Orleans by rail from another place in the State made no difference. The same principle was applied in *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 123, 33 Sup. Ct. 229, 57 L. Ed. 442. The overt act of delivering the goods to the carrier marks the point of distinction between this case and *Cornell v. Coyne*, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. Ed. 504. To put it at any later point would fail to give to exports the liberal protection that hitherto they have received; of which an example may be seen in *Thames & Mersey Marine Ins. Co., Ltd., v. United States*, 237 U. S. 19, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087.

Judgment reversed.

(262 U. S. 51)

COMMERCIAL TRUST CO. OF NEW JERSEY v. MILLER, Alien Property Custodian.

(Argued April 10, 1923. Decided April 23, 1923.)

No. 575.

I. War — 12 — Suit for possession by Alien Property Custodian is equivalent to physical seizure.

Under Trading With the Enemy Act Oct. 6, 1917 and section 7 of the amendment of November 4, 1918 (Comp. St. Ann. Supp. 1919, § 3115½a et seq.), authorizing the President to require property held for the benefit of an enemy to be transferred to the Alien Property Custodian, a suit by the Custodian against a trust company for possession of property held in trust for an alien enemy is equivalent to physical seizure, gives preliminary custody such as seizure gives, and the trust company cannot interpose the defense that under the terms of the trust a neutral might also demand the trust property.

2. War §12—Custodian succeeds to enemy's right to withdraw funds from trust for benefit of heirs and neutral.

Where a trust agreement for the benefit of an alien enemy and a neutral authorized the trust company to pay the funds over to either of them, the Alien Property Custodian succeeded to the rights of the alien enemy to demand the payment of the trust funds to her.

3. War §12—Custodian's suit for possession cannot be defeated or delayed by defenses.

The provision of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½a et seq.), authorizing the Alien Property Custodian to require property of an alien enemy to be transferred to him was a provision for the emergency of war, not to be defeated or delayed by any defenses on the part of the trustee having possession of such property, whose only remedy is by claim under section 9 of the act (section 3115½e), which may be enforced by suit, if not yielded to.

4. War §12—Trading with Enemy Act did not cease with termination of war.

The Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½a et seq.) did not cease with the cessation of war, since the power which declared the necessity for the act was the power to declare its cessation, that is, the legislative power, and Congress has reserved from its legislation since the termination of the war the Trading with the Enemy Act and the amendments thereof, and provided that all property subject to the act shall be retained by the United States until Germany had made suitable provision for the satisfaction of all claims.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Suit by Francis P. Garvan, as Alien Property Custodian, against the Commercial Trust Company of New Jersey, in which Thomas W. Miller was substituted as petitioner, after he succeeded the original petitioner as Alien Property Custodian. Decree for plaintiff (Garvan v. Commercial Trust Co. of New Jersey, 275 Fed. 841) was affirmed by the Circuit Court of Appeals (Commercial Trust Co. of New Jersey v. Miller, 281 Fed. 804), and defendant appeals. Affirmed.

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*Mr. Selden Bacon, of New York City, for appellant.

Mr. James A. Fowler, of Knoxville, Tenn., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

This is a suit under the Trading with the Enemy Act of October 6, 1917, and the amendment of November 4, 1918, 40 Stat. 411, 1020 (Comp. St. Ann. Supp. 1919, § 3115½a et seq.). It was commenced by Francis P. Garvan as Alien Property Custodian. He ceasing to be such, Thomas W. Miller was appointed his successor, and substituted as petitioner.

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Section 7 of the act provides that, "if the President shall so require, any money or other property * * * held for the benefit of an enemy," without license "which the President after investigation shall determine * * * is so held, shall be conveyed, transported, assigned, delivered, or paid over to the alien property custodian."

The act has received exposition in *Central Trust Co. v. Garvan*, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. 403, and *Stoehr v. Wallace*, 255 U. S. 239, 41 Sup. Ct. 293, 65 L. Ed. 604, and what it authorizes, and the conditions of the exercise of its authorization determined.

Whatever problems the act presents those cases resolve. They decide that the President's power may, under section 5¹ of the act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½c), be delegated to and be exercised by the Custodian, and that the determination of the Custodian is conclusive whether right or wrong. And it may be exercised by forcible seizure of the property or by suit and, if by suit, the suit is purely possessory and must be yielded to; the right of any claimant being postponed to subsequent assertion. And it was decided that the Custodian acquires by suit "nothing but the preliminary custody, such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more." In other words, and in comprehensive description, the act may be denominated an exercise of governmental power in the emergency of war and its procedure is accommodated to and made adequate to its purpose, but securing as well, the assertion of opposing or countervailing rights "by a suit in equity unembarrassed by the President's executive determination," and if the claimant "prevails" the property "is to be forthwith returned to him."

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*These are the determining generalities, and the Circuit Court of Appeals applying them, affirmed the decree of the District Court, adjudging, ordering and decreeing that the Commercial Trust Company of New Jersey "do forthwith convey, transfer, assign, deliver and pay to Thomas W. Miller, as Alien Property Custodian, all of the money and other property held by it under a certain trust agreement entered into on January 30, 1913," between the company and Frederick Wesche and Helene J. von Schierholz. A list of the moneys and other property was attached to the decree.

It was recited in the trust agreement that the property which consisted of bonds, was held "for the joint account of said Frederick Wesche and Helene J. von Schierholz, and to

¹ By section 5 the President is in terms authorized to exercise "any" of his powers "through such officer or officers as he shall direct." By section 6 (section 3115½cc) he is authorized to appoint and "prescribe the duties of" the officer to be known as the Alien Property Custodian.

collect the interest to become due and payable on said bonds" for their joint account, and to deliver the bonds from time to time as requested, to either "or to the survivor of them, it being understood that the said bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. von Schierholz, or to the survivor of them."

In addition to the above, the following may be quoted from the opinion of the Circuit Court of Appeals:

"The Trust Company, in compliance with the provisions of the act, made a report in December, 1917, that it held stocks, bonds, mortgages, securities and money, of the value of about \$600,000, in trust, as to both principal and interest, for the joint account of Frederick Wesche, of Paris, France, and Helene J. von Schierholz, of Plauen, Germany, to be delivered and paid to either upon his or her sole demand, or to the survivor.

"Upon investigation the Alien Property Custodian determined that Wesche was a neutral and von Schierholz an alien enemy not holding a license from the President, and demanded

surrender of the securities. Because the *neutral had power upon his sole order to withdraw the whole property, the Trust Company thought the Alien Property Custodian had no right to it and accordingly declined to yield possession. Because the alien enemy had like power upon her sole order to withdraw the whole property and acquire its possession, the Alien Property Custodian thought he had a right to it and accordingly demanded it. The question is, Which was right?"

The court answered the Custodian by virtue of his power under the act and the efficacy of its exercise. This appeal disputes the answer, and the contention is that the power was not exercised as required because the Custodian had not made an investigation which justified in any way "any determination that the property was *all* (italics counsel's) enemy property, or seizure of *all* (italics counsel's) the property as such." In support of the contention, it is urged, that no investigation was made of any interest in the property other than that of Mrs. Schierholz—none of Wesche, or none determined beyond what was shown by the report of and letter of the Commercial Trust Company. And there is also a contention that Wesche was not an enemy, and that he was given no opportunity of review, and the act, as to him, was "unconstitutional and without due process of law" and that, consequently, surrender of the property by appellant (Trust Company) under such circumstances to the Custodian, would have afforded it no defense to the claim of Wesche for such part of the property as belonged to him. The appellant accordingly did not transfer or deliver the property as so demanded, and still retains it under superseas bond.

[1] The contentions are precluded by the

cases which we have cited. As there decided, the act was of peremptory quality and effect. The suit was tantamount to physical seizure—gave preliminary custody such as seizure gives, and was intended to be not "less immediately effective than a taking with a strong hand."

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[2] *It is manifest, therefore, that the defenses upon which the contentions are based were not available to either claimant of the property. And besides, under the act, it is to be remembered, the Custodian succeeds to all the rights in the property to which the enemy is entitled as completely as if by conveyance, transfer or assignment, and the Trust Company in the present case held the bonds for the joint account of Wesche and Mrs. Schierholz to be paid over to either of them. She had the power, therefore, to demand the bonds and receive them and to this power the Custodian determined he succeeded, and, therefore, exercised. What interest Wesche had or has does not require decision, nor can the Trust Company urge it, the act requiring submission to the determination of the Custodian.

[3] The case, therefore, has no complexity and we do not think it is necessary to trace through the elaborate argument of counsel by which he attempts to sustain the contention of the Trust Company. Its foundation is, as said by the Circuit Court of Appeals, that the Trust Company "claims the right to have property interests judicially determined by a court of equity before a right to the possession of the property can be asserted by the Alien Property Custodian." The claim is precluded, we have seen, by *Central Union Trust Co. v. Garvan*, and *Stoehr v. Wallace*, *supra*. Those cases decide, as we have also seen, that the suit is as of peremptory character as "seizure in pais" and is the dictate and provision for the emergency of war, not to be defeated or delayed by defenses; its only condition, therefore, being the determination by the Alien Property Custodian that it was enemy property. It was recognized that there is implication in the act that mistakes may be made, but it, the act, assumes "that the transfer will take place whether right or wrong." In other words, it is the view of the opinions that the act provides for an exercise of government, but also provides, as

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*we have said, redress for mistakes in its exercise by the claimant of the property filing a claim under section 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), which, if not yielded to, may be enforced by suit.

[4] The next contention of the Trust Company is that, the act being a provision for the emergency of war, it ceased with the cessation of war, ceased with the joint resolution of Congress declaring the state of war between Germany and the United States at an end, and its approval by the President, July 2, 1921 (42 Stat. 105), and the

proclamation of peace by the President August 25, 1921. The contention, however, encounters in opposition the view that the power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field. Many problems would yet remain for consideration and solution, and such was the judgment of Congress, for it reserved from its legislation the Trading with the Enemy Act and amendments thereto, and provided that all property subject to that act shall be retained by the United States "until such time as the Imperial German government * * * shall have * * * made suitable provision for the satisfaction of all claims." Section 5. See *Kahn v. Anderson*, 255 U. S. 1, 41 Sup. Ct. 224, 65 L. Ed. 469, and *Vincenti v. United States (C. C. A.)* 272 Fed. 114, and 256 U. S. 700, 41 Sup. Ct. 538, 65 L. Ed. 1178.

Affirmed.

(262 U. S. 58)

UNITED STATES TRUST CO. OF NEW YORK v. MILLER, Alien Property Custodian.

(Argued April 10, 1923. Decided April 23, 1923.)

No. 292.

War 6-12—Neutral owner of part of property cannot intervene in suit of Alien Property Custodian for possession.

Where a trust was by its terms payable to the order of either an alien enemy or a neutral, and the Alien Property Custodian had brought suit to compel the trust property to be delivered to him, the neutral could not intervene and claim his share of the property in that suit, even though he was a nonresident of any district, and at the time the act providing for suits by claimants to funds in the hands of the Alien Property Custodian authorized such suits only in the district where the claimant resided.

Appeal from the District Court of the United States for the District of New Jersey.

Petition by the United States Trust Company of New York as ancillary administrator of Frederick Wesche, deceased, against Thomas W. Miller, as Alien Property Custodian, for leave to intervene in a suit by the Custodian to take possession of certain property. From an order denying the petition for intervention, intervener appeals. Affirmed.

Mr. Selden Bacon, of New York City, for appellant.

Mr. James A. Fowler, of Knoxville, Tenn., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

This case was argued and submitted with No. 575, *Commercial Trust Co. of New Jersey v. Thomas W. Miller*, as Alien Property Custodian, 262 U. S. 51, 43 Sup. Ct. 486, 67 L. Ed. —, just decided. It is a petition for leave to intervene in the latter suit instituted (as we have seen) by Francis P. Garvan, then Alien Property Custodian, Miller subsequently succeeding him. That suit is here on appeal from the United States Circuit Court of Appeals for the Third Circuit, this suit is here on appeal from the District Court of the United States for the District of New Jersey, a constitutional question being, it is contended, involved. "The District Court," the assertion is, "months after peace had been declared, denied Wesche's

^{*59} petition to intervene, and awarded conveyance and delivery of what was admittedly his separate property, to the Custodian."

In support of these contentions and their pertinency and control, counsel's comment is that the Custodian made two demands for the property, but—

"that these demands were both made while the act forbade recourse by any claimant to any Court to review any seizure thereunder by the Custodian, save the United States District Court for the district in which the claimant resided. The amendment permitting suit in the Supreme Court for the District of Columbia was added only by the Act of July 11, 1919 (41 Stat. 35). And Wesche, a neutral, separate owner of part of the property, and custodian of it all, resided in Switzerland, and Ahrenfeldt, an American citizen, separate owner of part of the property, was residing throughout the war in England, France or Switzerland."

And the further argument is that "seizure under such circumstances was unconstitutional" and that "mere demands" by the Custodian "did not constitute constructive capture, and even constructive capture was not completed before peace came."

This statement is enough preliminarily to the understanding and appreciation of Wesche's fundamental contentions which are that the conditions of the act were not complied with before suit and suit, therefore, was not justified. And the unconstitutionality of the act as applied to his case is also urged, and that the defenses were available to him in the suit. The court therefore, is the contention, in denying his petition to intervene, committed error.

The case, it will be observed, is identical in legal aspects with *Commercial Trust Co. of New Jersey v. Miller*, Alien Property Custodian, 262 U. S. 51, 43 Sup. Ct. 486, 67 L. Ed. —. Here as there, Wesche's interest is

asserted in the property, here by himself, there by the Trust Company. Here, as there, the conditions of suit were asserted not to have been performed; here, perhaps with

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more emphasis, as there, the *unconstitutionality of the act is argued; here, as there, it is urged that these contentions constituted defenses that could be made in the suit, and that relief was not only through the "filing of a claim and instituting proceedings as provided by section 9 of the Trading with the Enemy Act" (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115^{1/2}e).

We repeat, therefore, the cases are identical, and upon the authority of that case, the order of the District Court denying Wesche's petition for intervention is

Affirmed.

(262 U. S. 60)

AHRENFELDT v. MILLER, Alien Property Custodian.

(Argued April 10, 1923. Decided April 23, 1923.)

No. 576.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Petition by Charles J. Ahrenfeldt against Thomas W. Miller, as Alien Property Custodian, for leave to intervene in a suit by the Alien Property Custodian to recover possession of trust funds. An order denying the petition was affirmed by the Circuit Court of Appeals (282 Fed. 944), and petitioner appeals. Affirmed.

Mr. Selden Bacon, of New York City, for appellant.

Mr. James A. Fowler, of Knoxville, Tenn., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

Ahrenfeldt, the appellant, filed a petition in the District Court in the case of Garvan v. Commercial Trust Co., 282 Fed. 943 (in this Court, Commercial Trust Co. v. Miller, etc. [No. 575] 262 U. S. 51, 43 Sup. Ct. 486, 67 L. Ed. —), for leave to intervene, alleging that

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"he was an American citizen residing abroad since January 1, 1914, in France, England and Switzerland, having no residence in any judicial district of the United States during that time."

He further alleged that "he was the admitted separate owner of an identified portion of the securities and cash deposited with the Commercial Trust Company as mentioned in cases Nos. 575 (262 U. S. 51, 43 Sup. Ct. 486, 67 L. Ed. —) and 292 (U. S. Trust Co. v. Miller, 262 U. S. 58, 43 Sup. Ct. 489, 67 L. Ed. —)," and that his "petition for leave to intervene related solely to his own separate property."

The District Court denied his petition and its order was affirmed by the Circuit Court of Appeals. 282 Fed. 944. The grounds of affirmance, the Court, through Circuit Judge Woolley, expressed as follows:

"At the hearing in Garvan, as Alien Prop-

erty Custodian, v. Commercial Trust Co. of New Jersey, 275 Fed. 841, the appellant, Charles J. Ahrenfeldt, presented a petition for leave to intervene and have determined by the District Court his claim to ownership of a part of the property in process of seizure. The District Court denied the petition, holding that the question sought to be litigated by Ahrenfeldt can be raised only after the demand of the Alien Property Custodian has been complied with, and then only by proceedings authorized by Section 9 of the Act, as amended June 5, 1920 (41 Stat. 977). 282 Fed. 943. That the District Court was right is established by the decisions of the Supreme Court in Central Union Trust Co. v. Garvan, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. 403, and Stoehr v. Wallace, 255 U. S. 239, 41 Sup. Ct. 293, 65 L. Ed. 604.

"The order is affirmed."

It is manifest that the case is identical in legal principle, and to a certain and material extent in contentions, with cases Nos. 575 and 292, and is necessarily involved in their ruling.

The decree of the Circuit Court of Appeals affirming the decree of the District Court is

Affirmed.

(262 U. S. 70)

ST. LOUIS SOUTHWESTERN RY. CO. v. UNITED STATES.

(Argued March 6-7, 1923. Decided April 23, 1923.)

No. 184.

1. Post office  21(4)—Postmaster General's determination of amount of extra compensation for transporting parcels post is conclusive.

Under Act March 4, 1913 (Comp. St. § 7494), authorizing the Postmaster General to add to the compensation for transportation of mails on railroad routes, not exceeding 5 per cent. thereof, on account of the increased weight resulting from the enactment of the parcels post provision, the power of the Postmaster General to grant or withhold additional compensation within the limit set was conclusive, except on Congress, so that a railroad cannot maintain a claim for additional compensation in excess of that allowed.

2. Post office  21(4)—Claim cannot be sustained for extra compensation for carrying parcels post during the first six months.

A railroad company cannot claim an implied contract for payment of extra compensation for transporting parcels post during the first six months, where it made no protest against transporting such matter and was promised no additional compensation, nor is it entitled by statute to such compensation, since Congress, in enacting the provision for additional compensation, intentionally determined it should not be applicable during the first six months of operation of the parcels post.

Appeal from the Court of Claims.

Suit by the St. Louis Southwestern Railway Company against the United States.

From a judgment dismissing the petition on demurrer (56 Ct. Cl. 64), claimant appeals. Affirmed.

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*Mr. Benjamin Carter, of Washington, D. C., for appellant.

Mr. Blackburn Esterline, of Washington, D. C., for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Prior to July 1, 1910, claimant entered into a contract with the Post Office Department to carry the mails over a part of its line for the period of four years from that date. Prior to July 1, 1911, it entered into a like contract to carry the mails over another part of its lines. These contracts were in form and substance similar to that involved in *New York, New Haven & Hartford R. R. Co. v. United States*, 258 U. S. 32, 42 Sup. Ct. 209, 66 L. Ed. 448, and other recent cases.¹ By them the amount of compensation was fixed by a weighing prior to the date of the contract.

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While the mails *were being carried by claimant under these contracts, the parcel post system was established pursuant to Act Aug. 24, 1912, c. 389, § 8, 37 Stat. 539, 557-559 (Comp. St. § 7319 et seq.). From the inauguration of the service, on January 1, 1913, to the end of the contract periods, claimant carried the parcel post together with the other mail. For rendering this service, during the first six months, no additional compensation has been paid claimant. For rendering it during the remainder of the contract periods, claimant received, under later legislation, sums in addition to the compensation provided by the contracts. These sums it deems inadequate. On February 1, 1919, this suit was brought to recover, as reasonable compensation for the service rendered, the several amounts which it insists should have been paid. The government demurred to the petition. The Court of Claims dismissed it on the ground that there was neither a contract express or implied in fact, nor a law of Congress to support the claims for additional compensation. The case is here on appeal.

The Act of August 24, 1912, provided that the establishment of parcel post zones and postage rates should go into effect January 1, 1913. It increased the weight of fourth class mail matter from four to eleven pounds and the size to seventy-two inches in length and girth. It also authorized further increases of the weight limit, by order of the Postmaster General with the consent of the Interstate Commerce Commission. But that act (Comp. St. § 7446), while it authorized the Postmaster General to "readjust the com-

ensation of star route and screen wagon contractors if it should appear that as a result of the parcel post system the weight of the mails handled by them has been materially increased," made no provision whatsoever for increasing the pay of railroads because of carrying parcel post matter. Act March 4, 1913, c. 143, 37 Stat. 791, 797 (Comp. St. § 7494), authorized the Postmaster General "to add to the compensation paid for trans-

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portation on railroad routes *on and after July first, one thousand nine hundred and thirteen, for the remainder of the contract terms" not exceeding 5 per cent. thereof per annum "on account of the increased weight of mails resulting from the enactment of" the parcel post provision of the preceding year. The Postmaster General allowed claimant, under this act on some routes the full 5 per cent.; on some less; on some nothing additional. But the latter act, also, contained no provision authorizing additional pay to the railroads for carrying parcel post matter from January 1, 1913, to June 30, 1913.

[1] First. That no recovery can be had for the period after June 30, 1913, is clear. Before that date Congress had made express provision for the additional compensation and in so doing had limited the amount payable. The power to grant or to withhold was, within the limit set, vested in the Postmaster General; and his decision as to additional compensation was conclusive except upon Congress.² The protest alleged to have been made in August, 1913, against the amounts proposed to be paid for this period, cannot avail claimant. *New York, New Haven & Hartford R. R. Co. v. United States*, 251 U. S. 123, 40 Sup. Ct. 67, 64 L. Ed. 182.

[2] Second. The first six months' period presents a different situation; but the legal result is the same. There is no claim of an express contract to pay additional compensation; nor is there any basis for a claim on a contract implied in fact. The petition alleges that the parcel post matter was radical-

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ly different in character *from the ordinary mails as constituted before January 1, 1913. It may be, that claimant might legally have refused, for this reason, to carry the parcel post mail under then existing contracts; even if additional compensation had been offered. Compare *United States v. Utah, Nevada & California Stage Co.*, 199 U. S. 414, 26 Sup. Ct. 69, 50 L. Ed. 251; *Hunt v. United*

² Some further compensation was in fact made after the expiration of the contracts, under later legislation. By Act of July 28, 1916, c. 261, 39 Stat. 412, 425 (Comp. St. § 7494b), passed after both contracts with claimant had expired, the Postmaster General was authorized to make an additional payment not exceeding one-half of 1 per centum per annum on account of the increased weight of mails resulting from his order effective August 15, 1913, raising the weight limit to 20 pounds and additional payment not exceeding 1 per cent. on account of the increased weight resulting from his order effective January 1, 1914, raising the weight limit to 50 pounds.

¹ *United States v. Atchison, Topeka & Santa Fé Ry. Co.*, 249 U. S. 451, 39 Sup. Ct. 325, 63 L. Ed. 703; *New York, New Haven & Hartford R. R. Co. v. United States*, 251 U. S. 123, 40 Sup. Ct. 67, 64 L. Ed. 182; *Mail Divisor Cases*, 251 U. S. 326, 40 Sup. Ct. 162, 64 L. Ed. 290.

States, 257 U. S. 125, 42 Sup. Ct. 5, 66 L. Ed. 163. But the petition contains no allegation that it refused to perform this extra service, unless the government would agree to pay additional compensation. The petition contains allegations apparently designed to show that objection to carrying the parcel post matter would have been largely futile;³ but the allegations fall far short of showing a demand that the parcel post matter be eliminated, or a protest against carrying it under the conditions then existing. If the parcel post act, or other legislation, gives a right to compensation, the refusal or failure of the Postmaster General to allow the claim could not, of course, defeat recovery. Compare *Campbell v. United States*, 107 U. S. 407, 411,

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2 Sup. Ct. 795, 27 L. Ed. 592; **United States v. Knox*, 128 U. S. 230, 9 Sup. Ct. 63, 32 L. Ed. 465. But, unless there is such legislation, claimant cannot recover without showing a contract, express or implied, in fact to pay the extra compensation. Compare *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 335, 40 Sup. Ct. 518, 64 L. Ed. 935; *Sutton v. United States*, 256 U. S. 575, 581, 41 Sup. Ct. 563, 65 L. Ed. 1099, 19 A. L. R. 403. No basis for such a contract is afforded by the further allegation that when the act of 1912 was passed, and when the parcel post system was established, railroads, high officials of the Post Office Department, and members of both houses of Congress, in charge of postal legislation, understood that Congress would provide additional compensation to the railroads.

The legislation makes no provision for additional compensation to the railroads for the period prior to July 1, 1913, and its history makes clear that Congress concluded not to allow any. For some time prior to the passage of the Act of August 24, 1912, there had been much discussion in Congress concerning the pay of railroads for carrying the mail. The carriers urged generally that the pay

was inadequate; and there were proposals for increase of compensation. On the part of the public, there was a widespread belief that the railroads were overpaid; and there were proposals to reduce the compensation. When Congress passed the 1912 act, it was not prepared to decide this controverted question. It, therefore, appointed a special committee to inquire into the subject, and also others, relating to parcel post, and directed the committee to report at the earliest date possible. Meanwhile, the discussion continued in Congress. That the parcel post would result in largely increased weight of mail was repeatedly asserted; but it was insisted that the pay under existing contracts would give the railroads even more compensation than they deserved. The fact was recognized that the appropriation bill enacted March 4, 1913, provided increased pay only

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for parcel post service rendered after June 30, 1913.⁴ The failure of Congress to make any provision for the preceding six months was not inadvertent. It was the deliberate purpose of Congress not to give the railroads additional pay for carrying the parcel post mail during that period.⁵

The case at bar is wholly unlike *Freund v. United States* (Nos. 29 and 37) 260 U. S. 60, 43 Sup. Ct. 70, 67 L. Ed. —, decided November 13, 1922; *United States v. Utah, Nevada & California Stage Co.*, 199 U. S. 414, 26 Sup. Ct. 69, 50 L. Ed. 251, and *Hunt v. United States*, 257 U. S. 125, 42 Sup. Ct. 5, 66 L. Ed. 163, on which claimant relies. In each of those cases there was ample power in the Postmaster General to pay the additional compensation claimed. In each the main question presented was whether under the proper construction of the contract claimant was entitled to additional pay. Moreover, in each, the contractor had by proper protest preserved his rights, and there was perhaps an element of duress. Here, as in *Sutton v. United States*, 256 U. S. 575, 41 Sup. Ct. 563, 65 L. Ed. 1099, 19 A. L. R. 403, the Department had been denied power to

³ The petition alleges: "Much the larger part of the mails on petitioner's routes and on the routes of the other important railroad companies were carried in post office cars, for which cars arrangements were made between the Post Office Department and the railroad companies independent of the contracts for mail transportation, and, under such arrangements, such cars were in operation on petitioner's said routes at the time when the parcel post was established and at the times when the increases in weight of the parcel post matter became effective. The greater part of the mails carried in such cars were loaded into and out of the same by contractors or other persons employed by the Post Office Department, over whom petitioner and the other railroad companies had no control, and the Postal Laws and Regulations (sec. 1583) forbade that railroad employes should enter the post office cars when in motion for any other purpose than the operation of the trains. Moreover, the parcel post matter was so confused with the other mails that the employes of petitioner and the other railroad companies could not possibly have distinguished them, and removed them from the post office cars, if otherwise they had had opportunity."

⁴ See volume 49, Cong. Rec. part 5, 62d Cong. 3d Sess. pp. 4459, 4461, 4684, 4686-4689, 4690, 4692, 4767, 4769, and particularly page 4768:

"Mr. Moon, of Tennessee (manager on part of the House, submitting Conference Report): No; we do not add anything until after July, 1913.

"Mr. Murdock: That is my question—do we add 5 per cent. after July, 1913?

"Mr. Moon: Yes; weighed before January 1."

⁵ See Senate Report, Committee on Post Offices and Post Roads, July 23, 1912, No. 955, p. 25, 62d Cong. 2d Session; Conference Report, August 23, 1912, H. R. No. 1242, 62d Cong. 2d Sess.; Message of President, December 19, 1912, Sen. Doc. 989, p. 6, 62d Cong. 3d Session; Senate Report, February 11 (17), 1913, No. 1212, pp. 2, 4, 62d Cong. 3d Sess.; also volume 49, Cong. Rec. part 2, 62d Cong. 3d Sess. pp. 1409, 1411, 1412, 1466, 1476, 1506, 1509, 1511; volume 49, Cong. Rec. part 4, 62d Cong. 3d Sess. pp. 4012, 4013, 4014; volume 48, Cong. Rec. 62d Cong. 2d Sess. part 5, pp. 4675, 4989, 5063, 5075, 5227; volume 48, Cong. Rec. 62d Cong. 2d Sess. part 6, pp. 5439, 5473, 5504, 5649.

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pay an additional sum; there *was no protest by the contractor against assuming the additional service; and there was no duress. The service was undertaken voluntarily; no doubt, in the expectation that Congress would provide additional compensation. It made some provision, but concluded not to make any for the first six months. We may not inquire into the reasons for this refusal, or undertake to revise its judgment. The obstacle to recovery is not strictly lack of jurisdiction in the Court of Claims. There was an express contract between the parties; there was also legislation, and on these the claim is founded. The obstacle to recovery is lack of legal merits. The government did not in fact promise to pay for the extra service; nor did the legislation give to claimant a right to compensation. In other words, the petition fails to set out a cause of action.

Affirmed.

(262 U. S. 62)

UNITED STATES v. LUSKEY.

(Argued April 10, 1923. Decided April 23, 1923.)

No. 371.

Army and navy — 23—Extra compensation for detail to flight duty does not depend on actual flights; "duty involving actual flying."

Under Act March 3, 1915 (Comp. St. § 2823), giving enlisted men in the Navy and Marine Corps, while detailed for duty involving actual flying in aircraft 50 per cent. increase of pay, the right to increased pay does not depend on the making of actual flights, so that a machinist's mate of the Navy, who was detailed for duty involving actual flying for a period of 16 months, was entitled to additional compensation during the entire period, though he made only three actual flights during that period.

Appeal from the Court of Claims.

Petition by Harry W. Luskey against the United States. Judgment for petitioner (56 Ct. Cl. 411), and the United States appeals. Affirmed.

The Attorney General and Mr. James A. Fowler, of Knoxville, Tenn., for the United States.

Mr. George A. King, of Washington, D. C., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

The findings of fact of the Court of Claims are in substance, these: (1) Luskey was a machinist's mate in the Navy. He was by proper authority detailed for duty involving actual flying in aircraft, September 15, 1915, and continued in that duty until after Feb-

ruary 1, 1917. He made actual flights, one of which was in September, 1916, and two others in December, 1916, and was at all times capable of flying, if so ordered. (2) He received the sum of \$329, being 50 per cent. additional pay allowed him by the Act of March 3, 1915, for duty involving actual flying for the entire period from July 1, 1916, to January 31, 1917, a period of 7 months. At a later period the amount was deducted from his pay. He was paid a certain amount for the month of December, 1916.

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*If entitled to additional pay for aviation duty for the entire period, July 1, 1916, to January 31, 1917, less pay received for December, 1916, he would receive \$279.95.

Upon the facts found, the court concluded "as a matter of law" that he was entitled to recover, and "adjudged and ordered that" he "recover of and from the United States the sum of two hundred and seventy-nine dollars and ninety-five cents (\$279.95)."

The United States, by this appeal, disputes the conclusion and judgment. Its contention is that, "to entitle an officer designated to such service to the extra compensation," he must "be actually engaged in flying, and that, when an unreasonable time elapses during which he makes no actual flight, he is not entitled to extra pay for such period." Expressing its contention in other words, it, in effect, is that it is not the detail, but the flying, not the possibility of a risk, but the actual risk, that vests the right to the additional pay.

To sustain the contention, emphasis is put upon, and insistence made of, the words of the act (38 Stat. 939 [Comp. St. § 2823]) that compensation is awarded to the officer "while lawfully detailed for duty involving actual flying in aircraft."

To the contention, and rejecting it, the court replied, after quoting the statute: ¹

"The word 'involving,' used in the statute, may be inept, but its meaning in the connection in which it is used is plain and not to be mistaken, and that is, that the pay is not made dependent upon the number of flights while on such duty, but is made dependent on the detail to such duty. When, therefore, the plaintiff was lawfully detailed to duty involving flying in

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*aircraft, he must be regarded and treated as entitled to the consequences of such detail and to the pay provided for such duty."

We concur in the conclusion and judgment. The meaning of the statute "is plain." If Congress had intended to provide a de-

¹ "Hereafter enlisted men in the Navy and Marine Corps, while detailed for duty involving actual flying in aircraft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and services or rank and service, as the case may be, plus fifty per centum increase thereof."

tail to intermittent duty with intermittent pay, Congress would have specifically so provided, not left repulsion to it the advantage of ambiguity. If it intended to regard "the possibility of a risk or the actual risk" in flying as determination of compensation or as a factor in compensation, as the United States urges, care would have been taken, not, we will say, against its abuse, but against its use, putting the officer's life in peril many times a day. If that were reasonable in expectation, the other contention is condemned; that is, that the officer is entitled to compensation only when he engages in flights and for reasonable intervals between them. The contention gives no animation to prepare for the duty and its hazards.

Congress naturally supposed that there would be no detail to aircraft duty, unless there was requirement or use for it, and, when either ceased, the detail would be revoked; but, if made, and not revoked, its duration constituted a service for which the officer must keep prepared, and to which, therefore, the compensation was by the statute assigned.

Judgment affirmed.

(262 U. S. 65)

UNITED STATES v. MOSSEL.

SAME v. MILFORD.

(Argued April 10, 1923. Decided April 23, 1923.)

Nos. 372, 373.

Appeals from the Court of Claims.

Petitions by John B. Mossel and Charles F. Milford against the United States. Judgments for petitioners (56 Ct. Cl. 502), and the United States appeals. Affirmed.

The Attorney General and Mr. James A. Fowler, of Knoxville, Tenn., for the United States.

Mr. George A. King, of Washington, D. C. for appellees.

Mr. Justice McKENNA delivered the opinion of the Court.

Under stipulation of counsel, filed in the clerk's office, the above cases are submitted on the record as printed in *United States v. Harry W. Luskey* (No. 371) 262 U. S. 62, 43 Sup. Ct. 493, 67 L. Ed. —, just decided, "it being agreed by counsel that they shall be controlled by the decision in that case."

Therefore, upon its authority, the judgments in these cases are

Affirmed.

(262 U. S. 134)

CULLINAN v. WALKER, Collector of Internal Revenue.

(Argued March 9, 1923. Decided April 30, 1923.)

No. 301.

1. Internal revenue ⚡7—Difference between value of securities received on reorganization and stockholder's investment held taxable as "income."

For purpose of reorganization, a Texas petroleum corporation dissolved and its liquidating trustees transferred its assets to two new corporations in exchange for their stocks and bonds, and transferred the stock to a Delaware holding corporation in exchange for its stock. The last-mentioned stock and the bonds were then distributed to the stockholders in the old corporation. *Held*, that the difference between the value of the securities so received by a stockholder and the amount of his investment was taxable as "income" under Act Sept. 8, 1916, tit. 1, §§ 1, 2 (Comp. St. §§ 6336a, 6336b).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

2. Internal revenue ⚡7—Taxable gain may be segregated by dividend in liquidation.

The gain, which, when segregated, becomes legally income subject to tax, under Act Sept. 8, 1916, tit. 1, §§ 1, 2 (Comp. St. §§ 6336a, 6336b), may be segregated by a dividend in liquidation, as well as by an ordinary corporate dividend.

On Writ of Error to the District Court of the United States for the Southern District of Texas.

Action by J. S. Cullinan against A. S. Walker, as Collector of Internal Revenue. Judgment for defendant, and plaintiff brings error. Affirmed.

Mr. John Walsh, of Washington, D. C., for plaintiff in error.

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*Mr. Solicitor General Beck, of Washington, D. C., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

[1] A tax of \$156,212.66 was laid upon Cullinan, under the Act of September 8, 1916, c. 463, tit. 1, §§ 1 and 2, 39 Stat. 756, 757 (Comp. St. §§ 6336a, 6336b), for additional gain or income of that year, assessed at \$1,571,760. He paid the tax, under protest, and brought, in the federal court for Southern Texas, this action against the local collector of internal revenue to recover the amount. The question was whether certain securities received by Cullinan in that year should be deemed gain or income. The case was tried by the court without a jury, upon agreed

facts, and judgment was entered for defendant. Cullinan contends that securities issued to him, which the collector treated as gain or income, were, in legal effect, like a stock dividend, and that, under *Eisner v. Macomber*, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570, he was not taxable thereon. The government insists that the securities so distributed were gains or income within the rule laid down in *United States v. Phellis*, 257 U. S. 156, 42 Sup. Ct. 63, 66 L. Ed. 180, and *Rockefeller v. United States*, 257 U. S. 176, 42 Sup. Ct. 68, 66 L. Ed. 186. This issue, presented on the facts hereinafter stated, is the only matter for decision. The case is here on writ of error under section 238 of the Judicial Code, because of the constitutional question involved. *Towne v. Eisner*, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254.

Farmers' Petroleum Company was, in 1915, a Texas corporation, with a capital stock of

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\$100,000. Cullinan *owned 26.64 per cent. of its stock, for which he had paid (in that and the preceding year) \$26,640 in cash. Later in 1915, the company was dissolved under the Texas law, and Cullinan became one of the trustees in liquidation. In 1916 the trustees organized two Texas corporations, Republic Production Company, a producing concern, and American Petroleum Company, a pipe line concern. To these corporations the trustees transferred the assets held by them, one-half in value to each. From each they received \$1,500,000 par value of its stock and \$1,500,000 par value of its bonds, being the total issues. The trustees also organized under the laws of Delaware a third company, American Republics Corporation, a holding company. To this company the trustees transferred all the \$1,500,000 stock of each of the new Texas corporations; from it they received \$3,000,000 of its stock. They thus held in 1916 the \$3,000,000 stock of the Delaware corporation and the \$1,500,000 bonds of each of the new Texas corporations. All these securities the trustees then distributed pro rata among the persons who had been stockholders in Farmers' Petroleum Company.

Farmers' Petroleum Company had been dissolved solely for the purpose of effecting a reorganization. The reorganization was undertaken, partly, in order to separate the pipe lines from the producing properties, which counsel advised was necessary, and, partly, in order to procure credit required for the developing business. The two new Texas corporations had, at the time of the distribution of the stock of the Delaware corporation, no assets other than those received from the trustees in liquidation. These assets were, at the time of distribution, of the

same value as they were when held by the trustees in liquidation. Cullinan received 26.64 per cent. of each class of security. The stock and bonds distributed were then all worth par. The aggregate value of the securities received by him was \$1,598,400. The

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amount which he *had invested in Farmers' Petroleum Company was \$26,640. On the difference, \$1,571,760, the internal revenue collector assessed the tax here in question.

[2] Cullinan insists that his gain so ascertained was merely an incident of a reorganization. This was equally true in the Phellis and the Rockefeller Cases. It is sought to differentiate those cases on the ground that there the distributed stock of the new corporation was technically a dividend paid out of surplus, and that here the segregation is not of that character. But the gain, which when segregated becomes legally income subject to the tax, may be segregated by a dividend in liquidation, as well as by the ordinary dividend. If the trustees in liquidation had sold all the assets for \$6,000,000 in cash, and had distributed all of that, no one would question that the late stockholders of Farmers' Petroleum Company would, in the aggregate, have received a gain of \$5,900,000 taxable as income. The result would obviously have been the same, if the trustees had taken in payment, and distributed, bonds of the value of \$6,000,000, in some new corporations. And the result must also be the same where that taken in payment is \$3,000,000 of such bonds and \$3,000,000 in stock of a third corporation. All the material elements which differentiate the Phellis and Rockefeller Cases from Eisner v. Macomber are present also here. The corporation, whose stock the trustees distributed, was a holding company. In this respect, it differed from Farmers' Petroleum Company, which was a producing and pipe line company. It differed from the latter, also, because it was organized under the laws of another state. It is true that, at the time this Delaware corporation's stock was distributed, it held the stock of the new oil-producing company and likewise the stock of the new pipe line company. But the Delaware corporation was a holding company. It was free, at any time, to sell the whole, or

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any *part, of the stock in either of the new Texas companies and to invest the proceeds otherwise. By such a sale, and change of investments, all interest of the holding company in the original enterprise might be parted with, without in any way affecting the rights of its own stockholders. When the trustees in liquidation distributed the securities in the three new corporations, Cullinan, in a legal sense, realized his gain, and became taxable on it as income for the year 1916.

Affirmed.

In re FULLER et al.

(Submitted on Motion for Stay April 27, 1923.
Decided April 30, 1923.)

1. Bankruptcy ⚡242(2)—Bankrupt cannot delay surrender of possession of property because carrying incriminating evidence.

One becoming bankrupt or brought into a bankruptcy court has no right, under Const. Amend. 4 and 5, to delay surrender of the possession and title of any of his property to the officers appointed by law for its custody or disposition, on the ground that the transfer of such property will carry with it incriminating evidence against him, though such transfer may bring it into the ownership or control of one properly subject to subpoena duces tecum.

2. Bankruptcy ⚡242(2)—Receiver, bankrupt, and his attorney bound to surrender books and papers to trustee, notwithstanding stipulation between them as to use thereof.

On appointment of trustee in bankruptcy, title and right to possession of bankrupt's books and papers passes to the trustee, and the receiver, the bankrupts, and their attorney must yield possession and title to the trustee, notwithstanding agreement between the receiver and the bankrupts, approved by the court, that such books and papers will be used only in connection with the administration of the estate, and not turned over to any district attorney, or used before any grand or petit jury.

3. Bankruptcy ⚡242(2)—Bankrupts or receiver cannot make surrender of books, papers, or property to trustee conditional on their not being used against bankrupts.

Neither bankrupts, their attorney, nor a receiver in bankruptcy can accompany delivery to the trustee of the bankrupt's books, papers, or property with any effective condition restricting their use as evidence against the bankrupts.

Application for a Stay of Order of District Court Pending Appeal.

In the matter of Edward M. Fuller and another individually and as copartners doing business as E. M. Fuller & Co., bankrupt. On application by Edward M. Fuller for a stay pending appeal from an order. Application denied.

Messrs. William J. Fallon, of White Plains, N. Y., and Eugene F. McGee and Arthur Garfield Hays, both of New York City, for appellant.

Messrs. Francis L. Kohlman, Wm. M. Chadbourne, and Cyrus F. Smythe, all of New York City, for appellee.

Mr. John Caldwell Myers, of New York City, for Joab H. Banton, as amicus curiæ.

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*Mr. Chief Justice TAFT delivered the opinion of the Court.

On June 26, 1922, a petition in involuntary bankruptcy was filed against Fuller and McGee, individually and as partners, in the name of E. M. Fuller & Co., in the District Court for the Southern District of New York. Thereafter Strasbourger was appointed receiver and at once demanded of the bankrupts the books of accounts, records, and documents, both of themselves individually and of the firm. The bankrupts claim that the books would tend to incriminate them and refused to turn them over, unless the receiver agreed that they were to be used in connection with the civil administration of bankrupts' estate only. A stipulation of this kind was made between the receiver and the attorneys for the bankrupts, with the further specific agreement that the books and records would not be turned over to any district attorney or used before any grand or petit jury. The district attorney, county of New York, then attempted to bring the books and records into the state court by serving a subpoena upon the receiver. Judge Augustus Hand, at the petition of the bankrupts, enjoined the receiver from turning the books over.

On April 6, 1923, the attorneys for the bankrupts demanded of the receiver that he return the books and papers to them because his receivership had terminated by the appointment of a trustee in bankruptcy. The referee in bankruptcy directed the receiver to turn the books and papers over to the trustee without condition or restriction. On review, this order was affirmed by Circuit Judge Mack sitting in bankruptcy. April 21st last, all the books and papers were then delivered over to the trustee, except certain books and papers which had been redelivered by the receiver to the attorneys for the bankrupts on their receipts, which were turned

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over to *the trustee. The bankrupts objected to turning over the books and papers thus receipted for by their attorneys to the trustee. Thereupon on April 24, 1923, Judge Mack made a second order directing the attorneys for the bankrupts and the bankrupts to turn over these records and papers so withheld by them to the trustee. On April 21st the district attorney of New York county had subpoenaed the trustee to produce the books and papers of the bankrupts he them had in his custody and on the 24th of April offered them in evidence in the Court of General Sessions of New York as evidence against E. M. Fuller under an indictment arising out of the business of the bankrupts. On the 25th of April Judge Mack granted an application for a stay pending proceedings for appeal to this

court and an application for a stay here, and Judge Nott, presiding in the state court, adjourned the trial there until April 30th.

Proceedings for appeal to this court have now been begun under the authority of *Perlman v. United States*, 247 U. S. 7, 38 Sup. Ct. 417, 62 L. Ed. 950, and the application for a stay of Judge Mack's two orders has now been made.

[1] A man who becomes a bankrupt, or who is brought into a bankruptcy court, has no right to delay the legal transfer of the possession and title of any of his property to the officers appointed by law for its custody or for its disposition, on the ground that the transfer of such property will carry with it incriminating evidence against him. His property and its possession pass from him by operation and due proceedings of law, and, when control and possession have passed from him, he has no constitutional right to prevent its use for any legitimate purpose. His privilege secured to him by the Fourth and Fifth Amendments to the Constitution is that of refusing himself to produce, as incriminating evidence against him, anything which he owns or has in his possession and control; but his privilege in respect to what

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was his and in his custody *ceases on a transfer of the control and possession which takes place by legal proceedings and in pursuance of the rights of others, even though such transfer may bring the property into the ownership or control of one properly subject to subpoena duces tecum. These conclusions follow from the principles announced by this court in the *Matter of Harris*, 221 U. S. 274, 279, 31 Sup. Ct. 557, 55 L. Ed. 732, and *Johnson v. United States*, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263.

[2, 3] In considering the correctness of Judge Mack's orders, it is wholly immaterial what stipulation had been entered into between the receiver and the bankrupts in regard to the use to be made pending the receivership of the books and papers or what sanction Judge Hand's action had given the stipulations. With the appointment of the trustee both the title and the right to possession of such books and papers passed to him and Judge Mack's orders properly confirmed this result. The receiver, the bankrupts, and their attorney must yield possession and title to the trustee. Neither can accompany the delivery he is bound by law to make with any effective conditions restricting use of the books, papers, or other property of the bankrupts' estate as evidence against them.

The application is denied.

(262 U. S. 138)

YUMA COUNTY WATER USERS' ASS'N et al. v. SCHLECHT et al.

(Argued Feb. 28, 1923. Decided April 30, 1923.)

No. 268.

1. Waters and water courses ⚡222—Correspondence and reports held not statutory "estimate" of cost of reclamation project.

An engineer's report concerning a proposed reclamation project, and correspondence among government officials and with an association representing settlers, though expressing opinion as to cost of the project, *held* not to constitute "estimate" required by Reclamation Act, § 4 (Comp. St. § 4703), and not to bind or estop the government.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estimate.]

2. Waters and water courses ⚡222—Statutory notice concerning reclamation project should be precise and formal.

Reclamation Act, § 4 (Comp. St. § 4703), providing that the Secretary of the Interior shall give public notice of the lands irrigable under an irrigation project, the limit of area per entry, and the charges per acre on such entries, and on privately owned lands, contemplates a precise and formal public notice stating such matters.

3. Waters and water courses ⚡222—Statute only requires that notice of reclamation charges shall be preceded by determination of practicability and making of contracts; "thereupon."

Reclamation Act, § 4 (Comp. St. § 4703), providing that, on determination by the Secretary of the Interior that an irrigation project is practicable, he may cause contracts to be let, and thereupon shall give public notice of the lands irrigable and the charges to be made per acre for water, etc., does not use "thereupon" as meaning immediately thereafter, but as expressing the relation of cause or of condition precedent, and merely makes the determination as to the practicability and the making of contracts, conditions precedent to the estimate of cost and public notice, and the time when such notice shall be given thereafter is in the Secretary's discretion if not unreasonably exercised.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Thereupon.]

4. Waters and water courses ⚡222—Delay in fixing charges for water under irrigation project held not unreasonable exercise of discretion.

Where a contract for the construction of a reclamation project was abandoned, and the government itself completed the work and encountered physical conditions not originally foreseen, presenting difficulties and requiring increased expenditures of great magnitude, notice given by the Secretary of the Interior, in 1917, of the charge per acre imposed on water users, *held* not an unreasonable exercise of

his discretion, though the construction contract was made in 1905, and an agreement with an association representing the water users in 1906.

5. Waters and water courses ⚡222—Elimination of tracts from reclamation project held within discretion of Secretary of Interior.

Though original plans for reclamation project disclosed an intention to reclaim three tracts of land, where the Secretary of the Interior reserved the right to make changes as further investigations and circumstances might dictate to be requisite, the elimination of two of the tracts was within his discretion, especially where other lands of greater area were added, more than counterbalancing any injury to water users.

6. Appeal and error ⚡1094(2)—Concurrent finding of lower courts accepted, in absence of clear error.

The concurrent findings of the District Court and Circuit Court of Appeals, that a reclamation project had been completed when public notice was given of the charge per acre imposed on water users, will be accepted by the Supreme Court, in the absence of clear error.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the Yuma County Water Users' Association and others against W. W. Schlecht and another. From a decree of the Circuit Court of Appeals (275 Fed. 885), affirming a decree dismissing the bill, plaintiffs appeal. Affirmed.

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*Mr. T. D. Molloy, of Yuma, Ariz., for appellants.

Mr. Assistant Attorney General Riter, for appellees.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The Yuma County Water Users' Association is a corporation organized primarily to represent the settlers on the Yuma irrigation project in Arizona in their dealings with the government. The other appellants are shareholders and owners of tracts of land under the project.

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*On April 8, 1904, the Secretary of the Interior received the report of a board of consulting engineers, made at his request, giving alternate estimates of the cost of the project, and recommending that \$3,000,000 be set aside for construction. This report was followed by a letter from the Director of the Geological Survey, joining in the recommendation and, among other things, saying:

"In general the reports indicate that, by means of construction of a dam across Colorado river and other works, it will be possible to reclaim upwards of 85,000 acres of land at a cost of less than \$40 per acre. * * *

"The land is extremely fertile in character, the climate is somewhat tropical, and the products have such value per acre that it is be-

lieved that the cost of \$40 per acre is not prohibitive.

"There are a large number of alternatives to be considered and difficult problems to be solved, but the matter has developed from the engineering side to a point where it is possible to consider the larger features, and to set aside provisionally a sufficient sum of money to carry out the work, contingent upon satisfactory arrangements being made with the owners of lands and vested rights and the complete solution of other matters now pending."

The Secretary, on May 10, 1904, replied approving the recommendation. Correspondence ensued between the Water Users' Association and the officials of the Reclamation Service, and on May 28, 1904, a meeting between them was had. It does not seem necessary to give the details of this correspondence or of the meeting. It suffices to say that, throughout, the officials declared that in their opinion the project would cost at the rate of about \$35 per acre, and the water users joined in the enterprise under that belief. True, it was stated that this sum might be increased or lessened as the work progressed, and the opinion was otherwise qualified; but it was evidently thought that the

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cost would not depart *from the figures given to any great extent, one way or the other. Thereupon the landowners subscribed for shares in the association, binding themselves to pay the cost of the project in proportion to their interests and pledging their lands as security to that end.

On May 31, 1906, the association, acting for its shareholders, entered into an agreement with the government by which it was stipulated: That the Secretary should determine the number of acres capable of irrigation under the project; that payments should be divided into not less than ten equal annual installments, the first payable at the time of the completion of the works or within a reasonable time thereafter and after due notice from the Secretary; and that the cost per acre should be equal throughout the district. And the association agrees "that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments for that part of the cost of the irrigation works, which shall be apportioned by the Secretary of the Interior to its shareholders. * * *" The contract is silent as to the amount of the cost and nowhere suggests that it had already been fixed.

It does not appear that a definite plan of construction was determined upon until after the meeting in 1904; the report of the engineers contains no estimate in respect of the works as they were finally constructed; and no construction contract was made until June, 1905. In the process of construction, great and unexpected difficulties were encountered. The contractors finding themselves unable to proceed, abandoned their

contract, and the government was forced to take upon itself the burden of completing the work. The ultimate cost was more than double what had been anticipated. The project was finally completed, as found by both lower courts, on April 6, 1917, and on that

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date public notice was given *by the Secretary, imposing upon the water users a construction charge of \$75 per acre. This notice complies with the provisions of section 4 of the Reclamation Act, 32 Stat. 388, 389, c. 1093 (Comp. St. § 4703), printed in the margin.¹

Appellants (plaintiffs) brought suit in the United States District Court for the District of Arizona to enjoin the defendants, who were officials of the Reclamation Service, from putting into operation the determination of the Secretary so as to exact a greater sum than \$35.28 per acre. The court, after a trial, found in favor of the government and dismissed the bill, and its action was affirmed by the Circuit Court of Appeals (275 Fed. 885), from whose decree the case comes here by appeal.

The pleadings are voluminous, much testimony was taken at the trial, and a large number of errors have been assigned. After eliminating from consideration those matters which are clearly immaterial or without merit, two questions remain. They are:

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*(1) Whether the report, correspondence and statements made in 1904 constituted an estimate of the cost of the project and a public notice, under the terms of section 4; and, if not, whether the notice of 1917 may be so regarded?

(2) Whether the project was completed on April 6, 1917, within the meaning of the contract of 1906?

[1, 2] First. It is contended by appellants that the report of the engineers, the correspondence among the officials and with the Water Users' Association and the statements

¹ "Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: Provided, that in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon."

made at the meeting in 1904, taken together, constitute an estimate of cost binding on the government, and, though informal, a compliance with section 4 as to public notice. That it was the firm belief of the government officials that the cost of the project would not greatly, if at all, exceed \$35 an acre, and that their opinion to that effect was given to the Water Users' Association, by the documents and statements referred to, does not admit of doubt. It seems clear that the water users relied upon these expressions of opinion, and it may be assumed that, if they had known in the beginning that the cost was to be as much as \$75 per acre, they would not have gone forward with the enterprise. But however confidently these opinions were expressed, and however much they may have influenced the water users, the attendant circumstances, the language employed, and the statutory requirements all preclude the idea that they constitute an estimate of the cost as contemplated by the statute. No element of fraud or bad faith is shown or suggested. The Reclamation Act sets aside all money received from the sale and disposal of public lands in certain states and territories named for the reclamation of the arid lands therein; and this fund is to be kept intact as nearly as possible, by collecting from the water users under each project the estimated cost of the construction thereof. See *Swigart v. Baker*, 229 U. S. 187, 197, 33 Sup. Ct. 645, 57 L. Ed. 1143. The extent to which the fund will be

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preserved, obviously, will depend *upon the accuracy of the estimate, and this, in turn, will depend upon the care exercised in securing information upon which to base it. Investigation as to the feasibility of any project, opinions of experts, and collection of data relating to the question of cost must precede such an estimate, and section 4, moreover, requires that the charges against water users shall not be assessed until after construction contracts shall have been made, the evident purpose being to put the Secretary in possession of the data furnished by the contracts themselves before he acts in that respect. Prior to the making of the construction contracts, opinions expressed by engineers or officials may be estimates in one sense; but they are tentative and preliminary, and cannot be regarded as constituting the required statutory estimate, though contributing to the basic facts upon which it is made. See *Payette-Boise Water Users' Ass'n v. Cole* (D. C.) 263 Fed. 734, 738, 739. The statute contemplates a precise and formal public notice which must state the lands irrigable under the project, the limit of area for each entry, the charges to be made per acre, the number of annual installments and the time when the payments shall commence. The opinions, correspondence, and statements relied upon do not fulfill the statutory requirements, and we must hold that the government is neither bound

nor estopped by them. *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408, 409, 37 Sup. Ct. 387, 61 L. Ed. 791; *Pine River Logging Co. v. United States*, 186 U. S. 279, 291, 22 Sup. Ct. 920, 46 L. Ed. 1164; *Whiteside et al. v. United States*, 93 U. S. 247, 256, 257, 23 L. Ed. 882; *The Floyd Acceptances*, 7 Wall. 666, 676, 19 L. Ed. 169; *Filor v. United States*, 9 Wall. 45, 49, 19 L. Ed. 549; *Hart v. United States*, 95 U. S. 316, 24 L. Ed. 479; *Lee v. Munro*, 7 Cranch, 366, 3 L. Ed. 373. Moreover, the contract of 1906, made subsequently, expressly provides for payment on the part of the water users "for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders." Plainly this

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looked forward to *future action on his part, and did not rest upon any action already taken.

[3,4] Following the provisions requiring the Secretary to determine the practicability of the project and to make construction contracts the words are "and thereupon he shall give public notice," etc. The word "thereupon" is construed by appellants as an adverb of time, meaning immediately thereafter. But this is only one of its uses. It is employed more frequently to express the relation of cause or of condition precedent. It is in the latter sense that it is used here, and its meaning is that the determination as to the practicability of the project and the making of contracts are precedent conditions to the estimate of cost and public notice. See *Porphyry Paving Co. v. Ancker*, 104 Cal. 340, 342, 37 Pac. 1050. The notice must follow the coming into existence of the conditions. The time thereafter within which it shall be given is left, and from the nature of the matter must be left, to the discretion of the Secretary, and whether that discretion has been unreasonably exercised will depend upon the circumstances of each case. Here it is made plain that performance of the construction contract became impossible and the same was abandoned. Acting upon its judgment, which so far as the record shows was not unreasonable, the government then itself undertook the completion of the work. Physical conditions not originally foreseen were encountered, presenting difficulties and requiring increased expenditures of great magnitude. It does not appear that these expenditures were made unnecessarily or improvidently; nor is there anything in the record to indicate that the work was not done with reasonable expedition. The uncertainties arising from the newly discovered conditions, the abandonment of the construction work by the contractors, the changes which were necessitated in the original plans, and the unexpected turn of events in other respects, left the question of cost in such

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doubt as to justify withholding *the public notice until it could rest on more definite in-

formation. The delay, it is true, was long continued but, under all the circumstances, we cannot say as a matter of law, that it was undue or that the Secretary's discretion in respect of the time was unreasonably exercised.

Second. The contract of May 31, 1906, provides that the first installment shall be payable at the time of the completion of the proposed works, and appellants contend that in two respects they were not completed on April 6, 1917, when the public notice was given: (1) That complete drainage for one of the tracts was not provided; and (2) that only one of three tracts which the government promised to reclaim was reclaimed.

As to the first point, it is sufficient to say that the testimony shows that the contemplated drainage was substantially completed, and fails to show that the small portion left undone detracted in any way from the effectiveness of the system.

[5, 6] As to the second point, the original plans disclose that it was the intention to reclaim the three tracts mentioned, but the Secretary reserved the right to make such changes "as further investigations and circumstances may dictate to be requisite for the public welfare." The elimination, therefore, of the two tracts was within his discretion. Moreover, while these tracts were not reclaimed, other lands of greater area were added to the project which much more than counterbalanced any injury to the water users here concerned that might otherwise have resulted from the omission. The Secretary determined that the project had been completed when the public notice was given and both lower courts concurred in the same finding. These findings will be accepted here in the absence of clear error, which the record before us does not show. *Bodkin v. Edwards*, 255 U. S. 221, 41 Sup. Ct. 268, 65 L. Ed. 595; *Brewer-Elliott, etc., Co. v. United States*, 280 U. S. 77, 43 Sup. Ct. 60, 67 L. Ed. —, decided November 13, 1922.

The decree of the Court of Appeals is Affirmed.

(262 U. S. 94)

PEOPLE ex rel. CLYDE v. GILCHRIST et al.,
New York State Tax Commission.

(Argued and Submitted April 17, 1923. Decided April 30, 1923.)

No. 318.

I. Courts ⇨394(9)—United States Supreme Court, on question whether statute impairs obligation of contract, must decide whether there was contract and what it was.

On a writ of error attacking the exaction of a tax by a state as impairing the obligation of a statutory contract giving exemption from the tax, the questions of whether there was a

contract for the exemption, and, if so, what it was, are questions for the United States Supreme Court, and not for the state court.

2. Courts ⇨394(9) — Supreme Court is slow to depart from state construction of tax exemption statute as creating a contract.

While the Supreme Court is not bound by the construction placed on New York statutes by the New York courts in determining whether they created a contract for an exemption which was subsequently impaired, it will be slow to depart from their judgment in dealing with the matter of local policy, where there was no real oppression or manifest wrong in the result.

3. Constitutional law ⇨100—Taxation ⇨31 —New York mortgage recording tax law does not contract away power to tax income.

Recording Tax Law N. Y. § 251, providing that all mortgages of real property taxed by that article, and the debts and obligations they secure, shall be exempt from other taxation by the state and local subdivisions, did not establish a contract exempting from the tax, which was impaired by the subsequent taxation of income from the mortgage, in view of the fact that at the time the law was enacted the only state taxes on mortgage debts were taxes on the principal, and no one thought of an income tax.

4. Constitutional law ⇨100—Taxation ⇨31 —New York statute exempting secured debts does not contract away right to tax incomes therefrom.

Laws N. Y. 1911, c. 802, § 331, permitting secured debts to be taxed at the rate therein specified, and thereupon to be indorsed as exempt from other taxation, which is an alternative to a tax on the fair market value of the security, under section 336, did not create a contract exemption, which was impaired by the taxation of the income from such secured debts.

In Error to the Supreme Court of the State of New York.

Statutory proceeding by the People of the State of New York, on the relation of Emeline F. Clyde, against Gilchrist, President and others, as members of the State Tax Commission of the State of New York, to recover the amount of taxes paid under duress and protest. An order confirming the comptroller's holding that no payment was unlawfully exacted (197 App. Div. 913, 187 N. Y. Supp. 949) was affirmed by the New York Court of Appeals (232 N. Y. 550, 134 N. E. 567), and relator brings error. Affirmed.

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*Mr. Arthur E. Goddard, of Brooklyn, N. Y., for plaintiff in error.

Messrs. Francis W. Cullen, James S. Y. Ivins, and Claude T. Dawes, all of Albany N. Y., for defendants in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a statutory proceeding to recover the amount of taxes for 1919 paid under duress and protest. As the first step the relator, the plaintiff in error, filed an application for a revision of the tax with the Comptroller of the State. His determination presented the issue in a few words. The relator held bonds secured by mortgages upon which latter the mortgage recording tax under Article 11 of the Tax Law (Consol. Laws N. Y. c. 60) had been paid. She also held secured debts upon which a tax had been paid under Article 14 of the Tax Law as amended by

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Chapter 802 of the *Laws of 1911. An additional assessment was made under the Income Tax Law of 1919, c. 627, on account of the relator's income from these bonds and debts. The relator seems to have contended that if the Income Tax Law imposed the additional assessment it was unconstitutional as impairing the obligation of contracts made by the statutes laying the taxes first mentioned. The Comptroller held that the additional assessment was correct and that no payment was unlawfully exacted. His determination was confirmed by the Appellate Division of the Supreme Court, and the order of the Appellate Division was affirmed by the Court of Appeals. No opinion was delivered by either Court. The case was brought here by writ of error and the defendant in error moved to dismiss on the ground that it does not appear that the judgment below necessarily decided a question that can be brought here in this way. *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 304, 37 Sup. Ct. 643, 61 L. Ed. 1153.

[1] The position of the relator is that where the ground of judgment does not appear this Court will not assume that the Court below proceeded upon ground clearly untenable, and that therefore if the only one that seems plausible opens a constitutional question raised upon the record, this Court will proceed to deal with it. *Adams v. Russell*, 229 U. S. 353, 358, 33 Sup. Ct. 846, 57 L. Ed. 1224. The only ground suggested by the defendant in error as local is that the decision of the Appellate Division at least is shown to have gone upon the construction of the exempting statutes by an opinion rendered at the same time as the present judgment, to the effect that the exemption of mortgages by the Mortgage Recording Tax Law, if a contract, did not extend to the interest upon the debt. *People ex rel. Central Union Trust Co. v. Wendell*, 197 App. Div. 131, 188 N. Y. Supp. 344. To this the relator rightly replies that when a statute is alleged to impair the obligation of a contract this Court must decide for itself

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whether there was a contract *and what it was. *Detroit United Ry. v. Michigan*, 242 U. S. 238, 249, 37 Sup. Ct. 87, 61 L. Ed. 268; *Columbia Water Power Co. v. Columbia Electric Street Railway, Light & Power Co.*,

172 U. S. 475, 487, 19 Sup. Ct. 247, 43 L. Ed. 521. The relator in her petition to the Supreme Court failed to call attention in terms to the provision of the Constitution relied upon. *Harding v. Illinois*, 196 U. S. 78, 88, 25 Sup. Ct. 176, 49 L. Ed. 394. But she set forth that the exemptions claimed were granted by the statutes under which the earlier taxes were fixed, that they were secured for a valuable consideration, the payment of those taxes, and that the subsequent tax upon the income of the bonds and securities violated the provisions of the Constitution of the United States. We shall assume in her favor that Article 1, Section 10, was sufficiently indicated as the clause upon which she relied.

[2] Nevertheless we are not satisfied that the relator is entitled to prevail. It is apparent that the New York Courts held that there was no contract of the kind that it alleged. It would be extravagant to suppose that they upheld a law admitted to impair the obligation of an admitted contract. The opinion of the Supreme Court shows clearly enough the general nature of the defense sustained. The relator contends and must contend that this is so. While it is true that we are not bound by the construction of the New York statutes by the New York Courts in deciding the constitutional question, yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result. *Troy Union R. Co. v. Mealy*, 254 U. S. 47, 50, 41 Sup. Ct. 17, 65 L. Ed. 123.

[3] The Mortgage Recording Tax Law, Article 11, § 251, provides that all mortgages of real property situated within the State that are taxed by that article and the debts and obligations that they secure shall be

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exempt *from other taxation by the State and local subdivisions. The caution that should be used before interpreting such declarations of legislative policy as promises, even when they manifestly tend and are expected to induce voluntary action, is illustrated in *Wisconsin & Michigan R. Co. v. Powers*, 191 U. S. 379, 386, 24 Sup. Ct. 107, 48 L. Ed. 229; *Troy Union R. Co. v. Mealy*, 254 U. S. 47, 50, 41 Sup. Ct. 17, 65 L. Ed. 123. But the Appellate Division, in the case that we have cited, while having this caution in mind, preferred to assume without deciding that there was a contract of exemption, but held that it did not extend to this income tax. The Court recognized that for many purposes a tax upon the interest received from a mortgage debt is a tax upon the mortgage; but for the purpose of construing the words of a statute it rightly recognized that a distinction might be taken. That a distinction was intended, or rather that the Legislature had in mind only a tax upon the principal debt or obligation it deduced from a nice consid-

eration of the words of the statute, which led it to the conclusion that "the dominant idea in the mind of the Legislature was to render mortgagees independent of the action, capricious or otherwise, of local tax officials." Considering that only the principal of mortgages was taxed when the law was passed and that in those days no one thought of an income tax; that any contract of exemption must be shown to have been indisputably within the intention of the Legislature; that it is difficult to believe that the Legislature meant to barter away all its powers to meet future exigencies for the mere payment of a mortgage recording tax; and that a tax upon the individual measured by net income might be regarded as one step removed from a tax on the capital from which the income was derived, *Peck & Co. v. Lowe*, 247 U. S. 165, 175, 38 Sup. Ct. 432, 62 L. Ed. 1049; it held that there was no promise that the present tax should not be imposed. With regard to the mortgages the conclusion does not seem to us very difficult to reach. The

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State did not need to offer a bar*gain to induce mortgagees to record their deeds. *Federal Land Bank of New Orleans v. Crosland* (March 19, 1923) 261 U. S. 374, 43 Sup. Ct. 385, 67 L. Ed. —.

[4] The provision as to the tax on secured debts other than the foregoing is to the effect that any person may send them or a description of them to the Comptroller and may pay a tax of one-half of one per centum on the face value and that thereupon the Comptroller by indorsement or receipt shall certify that they are exempt from taxation and that thereafter they shall be exempt from all taxation in the State or local divisions of the State with certain specified exceptions. *Laws 1911, c. 802, § 331*. This is an alternative to a tax, at such rate as may be fixed, on the fair market value of the security. Section 336. There is an argument that it relates only to the year for which payment is made, and, although for reasons indicated in *Wisconsin & Michigan R. Co. v. Powers*, *supra*, consideration seems to be of little importance except as bearing on interpretation, that the payment of an alternative tax is consideration for exemption from nothing except its alternative. On the other hand the provision for an indorsement upon the security hardly is reconcilable with less than a permanent exemption; it is said that so the law generally has been understood; and the ground taken by the Appellate Division in the case that we have cited indicates that they were not prepared to deny that the exemption even of mortgag-

es looked beyond the year. In the absence of further opinion it seems fair to assume that the Appellate Division and the Court of Appeals decided against the exemption for the reasons stated in *People ex rel. Central Union Trust Co. v. Wendell*, 197 App. Div. 131, 188 N. Y. Supp. 344, of which we have given a summary. As we said at the outset we ought to be slow to depart from the judgment of the Courts of the State in a case like this and we accept their conclusion also with regard to secured debts. We are not prepared to say that the judgment was wrong and therefore it is affirmed.

Judgment affirmed.

(262 U. S. 747)

GALVESTON CAUSEWAY CONST. CO. et al.
v. GALVESTON, H. & S. A. RY.
CO. et al.

(Decided April 30, 1923.)

No. 995.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Suit by the Galveston Causeway Construction Company and another against the Galveston, Harrisburg & San Antonio Railway Company and others. A decree for defendants (284 Fed. 137) was affirmed by the Circuit Court of Appeals (287 Fed. 1021), and plaintiffs apply for certiorari. Petition denied.

Messrs. Hunt & Teagle and Presley K. Ewing, all of Houston, Tex. (Joseph A. McCullough, of Baltimore, Md., of counsel), for petitioners.

PER CURIAM. The petition for certiorari in this case is denied [not only because of the character of the case, but also because of the failure to comply with the provisions of paragraph 3 of rule 37 of this court (38 Sup. Ct. v) which requires that in the case of applications for certiorari the petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ, and provides that a failure to comply with that requirement will be deemed a sufficient reason for denying the petition. In the present case no such statement was filed, although there was a record of 1,000 pages. Instead of such a statement, we were invited to examine a brief of 263 pages.]¹

¹ The words in brackets were stricken out by order dated June 4, 1922. See 262 U. S. 747, 43 Sup. Ct. 702.

(262 U. S. 100)

**CUNARD S. S. CO., Limited, et al. v. MEL-
LON, Secretary of the Treasury, et al.**
No. 659.

**OCEANIC STEAM NAV. CO., Limited, v.
SAME.**
No. 660.

**INTERNATIONAL NAV. CO., Limited, v.
SAME.**
No. 661.

**COMPAGNIE GENERALE TRANSATLAN-
TIQUE v. SAME.**
No. 662.

**NETHERLANDS-AMERICAN STEAM NAV.
CO. v. SAME.**
No. 666.

**LIVERPOOL, BRAZIL & RIVER PLATE
STEAM NAV. CO., Limited, v. SAME.**
No. 667.

**ROYAL MAIL STEAM PACKET CO. v.
SAME.**
No. 668.

**UNITED S. S. CO. OF COPENHAGEN v.
SAME.**
No. 669.

PACIFIC STEAM NAV. CO. v. SAME.
No. 670.

**NAVIGAZIONE GENERALE ITALIANA v.
SAME.**
No. 678.

**INTERNATIONAL MERCANTILE MARINE
CO. v. STUART, Acting Collector of Cus-
toms for Port of New York, et al.**
No. 693.

**UNITED AMERICAN LINES, Inc., et al. v.
SAME.**
No. 694.

(Argued Jan. 4, 5, 1923. Decided, April 30,
1923.)

1. Intoxicating liquors ⚡138—"Transporta-
tion" and "importation" used in ordinary
sense in constitutional amendment.

Const. Amend. 18, prohibiting the transpor-
tation of intoxicating liquors within, or the im-
portation thereof into, the United States, uses
the words "transportation" and "importation"
in their ordinary sense, and not with any tech-
nical meaning.

[Ed. Note.—For other definitions, see Words
and Phrases, First and Second Series, Import-
Importation; Transport—Transportation.]

2. Intoxicating liquors ⚡138—Any carrying
about or from one place to another consti-
tutes "transportation."

"Transportation" of intoxicating liquors,
within Const. Amend. 18, comprehends any real
carrying about, or from one place to another,
and it is not essential that the carrying be for

hire, or by one for another, or that it be inci-
dental to a transfer of possession or title.

3. Intoxicating liquors ⚡138—"Importation"
consists of bringing liquor into the country
from outside.

"Importation" of intoxicating liquor within
Const. Amend. 18, consists in bringing it into
the country from outside, regardless of the
mode in which it is effected, and entry through
a custom house is not of the essence of the act.

4. Intoxicating liquors ⚡138—"Territory,"
within Prohibition Amendment, embraces re-
gional areas over which United States exer-
cises jurisdiction.

Const. Amend. 18, prohibiting the transpor-
tation of intoxicating liquor within or the im-
portation thereof into the United States and
territory subject to its jurisdiction, uses the
word "territory" as meaning the regional areas
of land and adjacent waters over which the
United States claims and exercises dominion
and control as a sovereign power.

[Ed. Note.—For other definitions, see Words
and Phrases, First and Second Series, Terri-
tory.]

5. Intoxicating liquors ⚡138—United States
⚡2—Prohibition Amendment operates in
land areas of United States, ports, and har-
bors, and for three miles from the coast.

The territory subject to the jurisdiction of
the United States includes the land areas un-
der its dominion and control, the ports, harbors,
bays, and other inclosed arms of the sea along
the coast, and a marginal belt of the sea ex-
tending from the coast line outward a marine
league or three geographical miles, and all of
this territory constitutes the field of operation
of the Eighteenth Amendment.

6. International law ⚡7—Intoxicating liquors
⚡138—Prohibition Amendment applies to
foreign ships in American waters, and not to
American ships outside such waters.

The Prohibition Amendment covers, and is
confined to, the physical territory of the United
States, and does not apply to domestic mer-
chant ships outside the waters of the United
States, whether on the high seas or in foreign
waters, but does apply to foreign merchant
ships when within the territorial waters of the
United States.

7. International law ⚡7—Jurisdiction over
domestic ship is in nature of personal sov-
ereignty, and has little application in foreign
waters.

The jurisdiction of a country over a ship
flying its flag partakes more of the characteris-
tics of personal than of territorial sovereignty,
and has little application in foreign territorial
waters beyond what is affirmatively or tacitly
permitted by the local sovereign.

8. International law ⚡7—Ship of one coun-
try, while within territorial limits of another,
is subject to its jurisdiction and laws.

A merchant ship of one country, voluntarily
entering the territorial limits of another, sub-
jects herself to the latter's jurisdiction, and,
during her stay, is entitled to the protection of,

and bound to yield obedience to, the laws of the place, and while the local sovereign may, out of consideration of public policy, forego the exertion of its jurisdiction wholly or in part, this rests solely in its discretion.

9. International law ⚡7—**Intoxicating liquors** ⚡138—**National Prohibition Act applies to all vessels in American waters, but not to domestic vessels outside such waters.**

In view of Act Nov. 23, 1921, c. 134, § 3, supplemental to the National Prohibition Act, the act is operative throughout the territorial limits of the United States, subject only to the exception with respect to the Panama Canal and Panama Railroad contained in title 3, § 20, of the original act, and applies to all merchant vessels, whether foreign or domestic, when within the territorial waters of the United States, but does not apply to domestic vessels, when outside such waters.

10. International law ⚡7—**Congress can regulate domestic vessels on the high seas or in foreign waters, so far as permitted by territorial sovereign.**

Congress has power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign.

11. Intoxicating liquors ⚡138—**Statutory recognition of practice of carrying liquors as sea stores does not limit application of Prohibition Amendment and statute.**

Rev. St. § 2775 (Comp. St. § 5471), recognizing the practice of carrying intoxicating liquor for beverage purposes as part of a ship's sea stores, was not in the nature of a promise for the future, and does not limit the application or construction of the Prohibition Amendment and National Prohibition Act, especially as such recognition has been withdrawn by Act Sept. 21, 1922.

12. Intoxicating liquors ⚡138—**That liquors carried by vessels only as sea stores immaterial; "transportation," "importation."**

Where intoxicating liquors are carried by vessels through the territorial waters of the United States and brought into its ports and harbors, such carrying constitutes "transportation" and "importation" prohibited by the Prohibition Amendment and the National Prohibition Act, though such liquors are carried only as sea stores.

Mr. Justice Sutherland and Mr. Justice McReynolds, dissenting.

Appeals from the District Court of the United States for the Southern District of New York.

Suits by the Cunard Steamship Company, Limited, and others, by the Oceanic Steam Navigation Company, Limited, by the International Navigation Company, Limited, by the Compagnie Generale Transatlantique, by the Netherlands-American Steam Navigation Company (Holland American Line), by the Liverpool, Brazil & River Plate Steam Navigation Company, Limited, by the Royal Mail Steam Packet Company, by the United

Steamship Company of Copenhagen (Scandinavian American Line), by the Pacific Steam Navigation Company, and by the Navigazione Generale Italiana against Andrew W. Mellon, Secretary of the Treasury, and others, and by the International Mercantile Marine Company and by the United American Lines, Inc., and others against H. C. Stuart, Acting Collector of Customs for the Port of New York, and others. From decrees dismissing each suit on the merits (284 Fed. 890; 285 Fed. 79), plaintiffs appeal. Decrees in the first ten suits affirmed, and decrees in the other two suits reversed.

Messrs. Geo. W. Wickersham, Lucius H. Beers, and F. B. Lord, all of New York City, for appellants Cunard S. S. Co., Limited, and others.

Messrs. Geo. W. Wickersham, Van Vechten Veeder, and R. H. Hupper, all of New York City, for appellant Oceanic Steam Nav. Co., Limited.

Messrs. Geo. W. Wickersham, J. M. Woolsey, and Cletus Keating, all of New York City, for appellant International Nav. Co., Limited.

Messrs. Geo. W. Wickersham and J. P. Nolan, both of New York City, and R. J. Garritty, for appellant Compagnie Generale Transatlantique.

Messrs. Geo. W. Wickersham and Van Vechten Veeder, both of New York City, for appellants Netherlands-American Steam Nav. Co. (Holland America Line) and Liverpool, Brazil & River Plate Steam Nav. Co., Limited.

Messrs. Geo. W. Wickersham, Van Vechten Veeder, and Roscoe H. Hupper, all of New York City, for appellants Royal Mail Steam Packet Co., United S. S. Co. of Copenhagen (Scandinavian-American Line) and Pacific Steam Nav. Co.

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*Messrs. Geo. W. Wickersham and A. S. Gilbert, both of New York City, for appellant Navigazione Generale Italiana.

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*Messrs. Cletus Keating and John M. Woolsey, both of New York City, for appellant International Mercantile Marine Co.

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*Mr. Reid L. Carr, of New York City, for appellant United American Lines, Inc., and others.

Mr. James M. Beck, Sol. Gen., and Mrs. Mabel Walker Willebrandt, Asst. Atty. Gen., for appellees.

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*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

These are suits by steamship companies operating passenger ships between United States ports and foreign ports to enjoin threatened application to them and their ships of certain provisions of the National Prohibition Act (41 Stat. 305). The defendants are officers of the United States

charged with the act's enforcement. In the first ten cases the plaintiffs are foreign corporations and their ships are of foreign registry, while in the remaining two the plaintiffs are domestic corporations, and their ships are of United States registry. All the ships have long carried and now carry, as part of their sea stores, intoxicating liquors intended to be sold or dispensed to their passengers and crews at meals and otherwise for beverage purposes. Many of the passengers and crews are accustomed to using such beverages and insist that the ships carry and supply liquors for such purposes. By the laws of all the foreign ports at which the ships touch this is permitted and by the laws of some it is required. The liquors are purchased for the ships and taken on board in the foreign ports and are sold or dispensed in the course of all voyages, whether from or to those ports.

The administrative instructions dealing with the subject have varied since the National Prohibition Act went into effect. December 11, 1919, the following instructions were issued (T. D. 38218):

"All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

"Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

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"Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same line or owner."

January 27, 1920, the first paragraph of those instructions was changed (T. D. 38248) so as to read:

"All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose. All such liquors on foreign vessels should be sealed on arrival of the vessels in port, and such portions thereof released from seal as may be required from time to time for use by the officers and crew."

October 6, 1922, the Attorney General, in answer to an inquiry by the Secretary of the Treasury, gave an opinion to the effect that the National Prohibition Act, construed in connection with the Eighteenth Amendment to the Constitution, makes it unlawful (a) for any ship, whether domestic or

foreign, to bring into territorial waters of the United States, or to carry while within such waters, intoxicating liquors intended for beverage purposes, whether as sea stores or cargo, and (b) for any domestic ship even when without those waters to carry such liquors for such purposes either as cargo or sea stores. The President thereupon directed the preparation, promulgation and application of new instructions conforming to that construction of the act. Being advised of this and that under the new instructions the defendants would seize all liquors carried in contravention of the act as so con-

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strued and would proceed to subject the plaintiffs and their ships to penalties provided in the act, the plaintiffs brought these suits.

The hearings in the District Court were on the bills or amended bills, motions to dismiss and answers, and there was a decree of dismissal on the merits in each suit. 284 Fed. 890; *International Mercantile Marine v. Stuart*, 285 Fed. 79. Direct appeals under Judicial Code, § 238 (Comp. St. § 1215), bring the cases here.

While the construction and application of the National Prohibition Act is the ultimate matter in controversy, the act is so closely related to the Eighteenth Amendment, to enforce which it was enacted, that a right understanding of it involves an examination and interpretation of the amendment. The first section of the latter declares (40 Stat. 1050, 1941):

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

These words, if taken in their ordinary sense, are very plain. The articles proscribed are intoxicating liquors for beverage purposes. The acts prohibited in respect of them are manufacture, sale and transportation within a designated field, importation into the same, and exportation therefrom; and the designated field is the United States and all territory subject to its jurisdiction. There is no controversy here as to what constitutes intoxicating liquors for beverage purposes; but opposing contentions are made respecting what is comprehended in the terms "transportation," "importation" and "territory."

[1-3] Some of the contentions ascribe a technical meaning to the words "transportation" and "importation." We think they are to be taken in their ordinary sense, for it better comports with the object to be attained.

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In that *sense transportation comprehends any real carrying about or from one place to another. It is not essential that the car-

rying be for hire, or by one for another; nor that it be incidental to a transfer of the possession or title. If one carries in his own conveyance for his own purposes it is transportation no less than when a public carrier at the instance of a consignor carries and delivers to a consignee for a stipulated charge. See *United States v. Simpson*, 252 U. S. 465, 40 Sup. Ct. 364, 64 L. Ed. 665, 10 A. L. R. 510. Importation, in a like sense, consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.

[4] Various meanings are sought to be attributed to the term "territory" in the phrase "the United States and all territory subject to the jurisdiction thereof." We are of opinion that it means the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power. The immediate context and the purport of the entire section show that the term is used in a physical and not a metaphorical sense—that it refers to areas or districts having fixity of location and recognized boundaries. See *United States v. Bevans*, 3 Wheat. 336, 390, 4 L. Ed. 404.

[5] It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. *Church v. Hubbard*, 2 Cranch, 187, 234, 2 L. Ed. 249; *The Ann*, 1 Fed. Cas. No. 397, p. 926; *United States v. Smiley*, 27 Fed. Cas. No. 16317, p. 1132; *Manchester v. Massachusetts*, 139 U. S. 240, 257, 258, 11 Sup. Ct. 559, 35 L. Ed. 159; *Louisiana v. Mississippi*, 202 U. S. 1, 52, 26 Sup. Ct. 408, 50 L. Ed. 913; 1 Kent's Com. (12th Ed.)

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*29; 1 Moore, *International Law Digest, § 145; 1 Hyde, International Law, §§ 141, 142, 154; Wilson, International Law (8th Ed.) § 54; Westlake, International Law (2d Ed.) p. 187, et seq; Wheaton, International Law (5th Eng. Ed. [Phillipson]) p. 282; 1 Oppenheim International Law (3d Ed.) §§ 185–189, 252. This, we hold, is the territory which the amendment designates as its field of operation; and the designation is not of a part of this territory but of "all" of it.

[6, 7] The defendants contend that the amendment also covers domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters. But it does not say so, and what it does say shows, as we have indicated, that it is confined to the physical territory of the United States. In support of their

contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. *Scharrenberg v. Dollar S. S. Co.*, 245 U. S. 122, 127, 38 Sup. Ct. 28, 62 L. Ed. 189; *In re Ross*, 140 U. S. 453, 464, 11 Sup. Ct. 897, 35 L. Ed. 581; 1 Moore International Law Digest, § 174; Westlake, International Law (2d Ed.) p. 264; Hall, International Law (7th Ed. [Higgins]) § 76; Manning, Law of Nations (Amos), p. 276; Piggott Nationality, pt. II, p. 13. The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty. See *The Hamilton*, 207 U. S. 398, 403, 28 Sup. Ct. 133, 52 L. Ed. 264; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 355, 29 Sup. Ct. 511, 53 L. Ed. 326, 16 Ann. Cas. 1047; 1 Oppenheim International Law (3d Ed.) §§ 123–125, 128. It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign. 2

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Moore International *Law Digest, §§ 204, 205; Twiss, Law of Nations (2d Ed.) § 166; Woolsey, International Law (6th Ed.) § 58; 1 Oppenheim International Law (3d Ed.) §§ 128, 146, 260.

The defendants further contend that the amendment covers foreign merchant ships when within the territorial waters of the United States. Of course, if it were true that a ship is a part of the territory of the country whose flag she carries, the contention would fail. But, as that is a fiction, we think the contention is right.

[8] The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion. The rule, now generally recognized, is nowhere better stated than in *The Exchange*, 7 Cranch, 116, 136, 144 (3 L. Ed. 287), where Chief Justice Marshall, speaking for this court, said:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a

diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. * * *

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"When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption."

That view has been reaffirmed and applied by this court on several occasions. *United States v. Diekelman*, 92 U. S. 520, 525, 526, 23 L. Ed. 742; *Wildenhus' Case*, 120 U. S. 1, 11, 7 Sup. Ct. 385, 30 L. Ed. 565; *Nishimura Ekiu v. United States*, 142 U. S. 651, 659, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Knott v. Botany Mills*, 179 U. S. 69, 74, 21 Sup. Ct. 30, 45 L. Ed. 90; *Patterson v. Bark Eudora*, 190 U. S. 169, 176, 23 Sup. Ct. 821, 47 L. Ed. 1002; *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348, 355, 356, 40 Sup. Ct. 350, 64 L. Ed. 607. And see *Buttfield v. Stranahan*, 192 U. S. 470, 492, 493, 24 Sup. Ct. 349, 48 L. Ed. 525; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 324, 29 Sup. Ct. 671, 53 L. Ed. 1013; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544. In the *Patterson Case* the court added:

"Indeed, the implied consent to permit them [foreign merchant ships] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose."

In principle, therefore, it is settled that the amendment could be made to cover both do-

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mestic and foreign *merchant ships when within the territorial waters of the United States. And we think it has been made to cover both when within those limits. It contains no exception of ships of either class and the terms in which it is couched indicate that none is intended. Such an exception would tend to embarrass its enforcement and to de-

feat the attainment of its obvious purpose, and therefore cannot reasonably be regarded as implied.

In itself the amendment does not prescribe any penalties, forfeitures, or mode of enforcement but by its second section¹ leaves these to legislative action.

[9] With this understanding of the amendment, we turn to the National Prohibition Act, c. 85, 41 Stat. 305, which was enacted to enforce it. The act is a long one and most of its provisions have no real bearing here. Its scope and pervading purpose are fairly reflected by the following excerpts from title 2:

"Sec. 3. No person² shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. * * *

"Sec. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating

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liquor and property kept and used *in maintaining the same, is hereby declared to be a common nuisance. * * *

"Sec. 23. That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, * * * any liquor * * * in violation of this title is guilty of a nuisance. * * *

"Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. * * *

Other provisions show that various penalties and forfeitures are prescribed for violations of the act, and that the only instance in which the possession of intoxicating liquor for beverage purposes is recognized as lawful is where the liquor was obtained before the act went into effect and is kept in the owner's dwelling for use therein by him, his family, and his bona fide guests.

As originally enacted the act did not in terms define its territorial field, but a supple-

¹ The second section says: "The congress and the several states shall have concurrent power to enforce this article by appropriate legislation." For its construction, see *United States v. Lanza* December 11, 1922).

² The act contains a provision (§ 1 of title 2) showing that it uses the word "persons" as including "associations, copartnerships and corporations" when the context does not indicate otherwise.

mental provision³ afterwards enacted declares that it "shall apply not only to the United States but to all territory subject to its jurisdiction," which means that its field coincides with that of the Eighteenth Amendment. There is in the act no provision making it applicable to domestic merchant ships when outside the waters of the United States, nor any provision making it inapplicable to merchant ships, either domestic or foreign, when within those waters, save in the Panama Canal. There is a special provi-

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sion dealing *with the Canal Zone⁴ which excepts "liquor in transit through the Panama Canal or on the Panama Railroad." The exception does not discriminate between domestic and foreign ships, but applies to all liquor in transit through the canal, whether on domestic or foreign ships. Apart from this exception, the provision relating to the Canal Zone is broad and drastic like the others.

Much has been said at the bar and in the briefs about the Canal Zone exception, and various deductions are sought to be drawn from it respecting the applicability of the act elsewhere. Of course the exception shows that Congress, for reasons appealing to its judgment, has refrained from attaching any penalty or forfeiture to the transportation of liquor while "in transit through the Panama Canal or on the Panama Railroad." Beyond this it has no bearing here, save as it serves to show that where in other provisions no exception is made in respect of merchant ships, either domestic or foreign, within the waters of the United States, none is intended.

Examining the act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the territorial limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside the territorial

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waters of the United States; *and, thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise.

[10] In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over

³ Section 3, Act November 23, 1921, c. 134, 42 Stat. 222.

⁴ The pertinent portion of section 20 of Title 3, relating to the Canal Zone, is as follows:

"Sec. 20. That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: Provided, that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them. *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224; *The Abby Dodge*, 223 U. S. 166, 176, 32 Sup. Ct. 310, 56 L. Ed. 390. But we do mean that the National Prohibition Act discloses that it is intended only to enforce the Eighteenth Amendment and limits its field of operation, like that of the amendment, to the territorial limits of the United States.

[11] The plaintiffs invite attention to data showing the antiquity of the practice of carrying intoxicating liquors for beverage purposes as part of a ship's sea stores, the wide extent of the practice and its recognition in a congressional enactment, and argue therefrom that neither the amendment nor the act can have been intended to disturb that practice. But in this they fail to recognize that the avowed and obvious purpose of both the amendment and the act was to put an end to prior practices respecting such liquors, even though the practices had the sanction of antiquity, generality and statutory recognition. Like data could be produced and like arguments advanced by many whose business, recognized as lawful theretofore, was shut down or curtailed by the change in national policy. In principle the plaintiffs' situation is not different from that of the innkeeper whose accustomed privilege of selling liquor to his guests is taken away, or that of the dining-car proprietor who is prevented from serving liquor to those who use the cars which he operates to and fro across our northern and southern boundaries.

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*It should be added that after the adoption of the amendment and the enactment of the National Prohibition Act Congress distinctly withdrew the prior statutory recognition of liquors as legitimate sea stores. The recognition was embodied in section 2775 of the Revised Statutes (Comp. St. § 5471) which was among the provisions dealing with customs administration, and when, by the Act of September 21, 1922, those provisions were revised, that section was expressly repealed along with other provisions recognizing liquors as legitimate cargo. Ch. 356, Title 4 and § 642, 42 Stat. 858, 948, 989. Of course, as was observed by the District Court, the prior recognition, although representing the national policy at the time, was not in the nature of a promise for the future.

[12] It therefore is of no importance that the liquors in the plaintiffs' ships are carried only as sea stores. Being sea stores does not make them liquors any the less; nor does it change the incidents of their use as beverages. But it is of importance that they are carried through the territorial waters of the United States and brought into its ports and harbors. This is prohibited transportation and importation in the sense of the amend-

ment and the act. The recent cases of *Grogan v. Walker & Sons* and *Anchor Line v. Aldridge*, 259 U. S. 80, 42 Sup. Ct. 423, 66 L. Ed. 836, 22 A. L. R. 1116, are practically conclusive on the point. The question in one was whether carrying liquor intended as a beverage through the United States from Canada to Mexico was prohibited transportation under the amendment and the act, the liquor being carried in bond by rail, and that in the other was whether the transshipment of such liquor from one British ship to another in the harbor of New York was similarly prohibited, the liquor being in transit from Scotland to Bermuda. The cases were considered together and an affirmative answer was given in each, the court saying in the opinion, 259 U. S. 89, 42 Sup. Ct. 424, 66 L. Ed. 836, 22 A. L. R. 1116.

"The Eighteenth Amendment meant a great revolution in the policy of this country, and

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presumably and *obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 151, note 1. It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the amendment forbids, not only importation into and exportation from the United States, but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words Title III, § 20, 41 Stat. 322."

Our conclusion is that in the first ten cases, those involving foreign ships, the decrees of dismissal were right and should be affirmed, and in the remaining two, those involving domestic ships, the decrees of dismissal were erroneous, and should be reversed, with directions to enter decrees refusing any relief as respects the operations of the ships within the territorial waters of the United States and awarding the relief sought as respects operations outside those waters.

Decrees in Nos. 659, 660, 661, 662, 666, 667, 668, 669, 670 and 678, affirmed.

Decrees in Nos. 693 and 694, reversed.

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*Mr. Justice McREYNOLDS dissents.

Mr. Justice SUTHERLAND dissenting.

I agree with the judgment of the court in so far as it affects domestic ships, but I am unable to accept the view that the Eighteenth Amendment applies to foreign ships coming into our ports under the circumstances here disclosed.

It would serve no useful purpose to give my reasons at any length for this conclusion. I therefore state them very generally and briefly.

The general rule of international law is that a foreign ship is so far identified with the country to which it belongs that its internal affairs, whose effect is confined to the ship, ordinarily are not subjected to interference at the hands of another state in whose ports it is temporarily present, 2 Moore, *Int. Law. Dig.*, p. 292; *United States v. Rodgers*, 150 U. S. 249, 260, 14 Sup. Ct. 109, 37 L. Ed. 1071; *Wildenhus's Case*, 120 U. S. 1, 12, 7 Sup. Ct. 385, 30 L. Ed. 565; and, as said by Chief Justice Marshall, in *Murray v. Schooner Charming Betsy*, 2 Cranch, 64, 118 (2 L. Ed. 208):

"* * * An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. * * *"

That the government has full power under the Volstead Act to prevent the landing or transshipment from foreign vessels of intoxicating liquors or their use in our ports is not doubted, and, therefore, it may provide for such assurances and safeguards as it may deem necessary to those ends. Nor do I doubt the power of Congress to do all that the court now holds has been done by that act, but such power exists not under the Eighteenth Amendment, to whose provisions the act is confined, but by virtue of other provisions of the Constitution, which Congress here has not attempted to exercise. With great deference to the contrary conclusion of the court, due regard for the principles of international comity, which exists be-

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*tween friendly nations, in my opinion, forbids the construction of the Eighteenth Amendment and of the act which the present decision advances. Moreover, the Eighteenth Amendment, it must not be forgotten, confers concurrent power of enforcement upon the several states, and it follows that if the general government possesses the power here claimed for it under that amendment, the several states within their respective boundaries, possess the same power. It does not seem possible to me that Congress, in submitting the amendment or the several states in adopting it, could have intended to vest in the various seaboard states a power so intimately connected with our foreign relations and whose exercise might result in international confusion and embarrassment.

In adopting the Eighteenth Amendment and in enacting the Volstead Act the question

of their application to foreign vessels in the circumstances now presented does not appear to have been in mind. If, upon consideration, Congress shall conclude that when such vessels, in good faith carrying liquor among their sea stores, come temporarily into our ports their officers should, ipso facto, become liable to drastic punishment and the ships themselves subject to forfeiture, it will be a simple matter for that body to say so in plain terms. But interference with the purely internal affairs of a foreign ship is of so delicate a nature, so full of possibilities of international misunderstandings and so likely to invite retaliation that an affirmative conclusion in respect thereof should rest upon nothing less than the clearly expressed intention of Congress to that effect, and this I am unable to find in the legislation here under review.

(262 U. S. 165)

UNITED STATES v. SISCHO.

(Reargued April 23, 1923. Decided May 7, 1923.)

No. 76.

1. Customs duties ☞129—Penalty for bringing in goods not on manifest applies to smoking opium; "merchandise."

Rev. St. § 2809 (Comp. St. § 5506), imposing penalty on master of vessel when "merchandise" not on the manifest is brought into the country, when construed in connection with sections 2766, 3116, 4197 (Comp. St. §§ 5462, 5828, 7789), and Act Jan. 17, 1914 (Comp. St. §§ 8800-8801f), applies to opium for smoking purposes, the importation of which is prohibited by the Act of 1914, and as applied thereto is not repealed by that act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Merchandise.]

2. Customs duties ☞129—"Merchandise," as used in statute, includes opium and its derivatives physically capable of being imported.

Rev. St. § 2766 (Comp. St. § 5462), providing that, as used in that title, "merchandise" may include goods, wares, and chattels of every description capable of being imported, means, so far as derivatives of opium are concerned, goods physically capable of being imported, in view of Act Jan. 17, 1914 (Comp. St. §§ 8800-8801f).

3. Statutes ☞147—Revised Statutes not to be lightly read as changing existing law.

The Revised Statutes were primarily a codification of general statutes in force, and are not lightly to be read as making a change, though they may do so.

4. Statutes ☞185—No rule against making explicit what is implied and emphasizing endeavor to make proposition broad.

There is no canon against making explicit what is implied in a statute and adding em-

phasis to endeavors to make the proposition broad.

5. Customs duties ☞129—Penalty for omitting from ship's manifest implies that goods have value, notwithstanding prohibition of importation.

As Rev. St. § 2809 (Comp. St. § 5506), imposing penalty on master of vessel equal to the value of merchandise not included in the manifest, applies to opium for smoking purposes, the importation of which is prohibited by Act Jan. 17, 1914 (Comp. St. §§ 8800-8801f), the penalty imposed implies that such articles may have value notwithstanding the prohibition.

6. Customs duties ☞129—Foreign value of smoking opium omitted from manifest may be taken as evidence of value.

In imposing a penalty on the master of a vessel under Rev. St. § 2809 (Comp. St. § 5506), equal to the value of smoking opium not included in the manifest, the foreign value may be taken as evidence.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the United States against Wesley L. Sischo. A judgment for defendant (262 Fed. 1001) was affirmed by the Circuit Court of Appeals (270 Fed. 958), and the government brings certiorari. Reversed.

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*The Attorney General and Mr. Alfred A. Wheat, of New York City, for the United States.

Mr. John M. Woolsey, of New York City, for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the United States to recover a penalty of \$6,400 from the defendant for bringing into this country one hundred five-*tael* tins of opium prepared for smoking purposes without including the same in the ship's manifest. The defendant was master of the vessel in which the opium was imported and was charged by the Collector of Customs with a liability for the above sum, that being the price paid by the defendant for the goods. By Rev. Sts. § 2809 (Comp. St. § 5506):

"If any merchandise is brought into the United States in any vessel whatever from any foreign ports * * * which shall not be included or described in the manifest * * * the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

The District Court, sitting without a jury, held that opium prepared for smoking purposes was not merchandise within the meaning of section 2809 and that being outlawed

by the statutes it had no value; and gave judgment for the defendant. 262 Fed. 1001. The judgment was affirmed by the Circuit Court of Appeals, one Judge dissenting, on the former ground. 270 Fed. 958. A writ of certiorari was granted by this Court. 256 U. S. 688, 41 Sup. Ct. 624, 65 L. Ed. 1172. It was stated below that the defendant had been

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convicted of smuggling; but the *record does not disclose the fact, if material, and nothing turns upon it. The points mentioned are the only ones to be discussed.

[1] The collection of duties is not the only purpose of a manifest, as is shown by the requirement of one for outward bound cargoes and from vessels in the coasting trade bound for a port in another collection district, Rev. Sts. §§ 4197, 3116 (Comp. St. §§ 7789, 5828), and more clearly by the plain reason of the thing. A government wants to know, without being put to a search, what articles are brought into the country, and to make up its own mind not only what duties it will demand but whether it will allow the goods to enter at all. It would seem strange if it should except from the manifest demanded those things about which it has the greatest need to be informed—if in that one case it should take the chance of being able to find what it forbids to come in, without requiring the master to tell what he knows. It would seem doubly strange when at the same time it required any other person who had knowledge that the forbidden article was on the vessel to report the fact to the master. Act of January 17, 1914, c. 9, § 4, 38 Stat. 275, 276 (Comp. St. § 8801b). It is not an answer to say that if the master knows that he has contraband goods on board he is subject to a penalty for that and probably will lie. The law naturally, one would think, would put the screws on to make him tell the truth, and in that way diminish the chance of his carrying contraband and help him to show his innocence if he has made a mistake. *Harford v. United States*, 8 Cranch, 109, 3 L. Ed. 504. We are of opinion that this policy, which has been expressed in terms in later statutes (Act of May 26, 1922, c. 202, § 3, 42 Stat. 596, 598; Tariff Act of September 21, 1922, c. 356, §§ 401[c], 431, 584, 42 Stat. 858, 948, 950, 980), governs also in the statutes to be construed here. There is less contradiction between the requirement of the manifest and the prohibition of the import

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than there is between such a *prohibition and a tax. *United States v. Remus*, 260 U. S. 477, 43 Sup. Ct. 197, 67 L. Ed. —, January 2, 1923.

[2] The main foundation of the decision below is Rev. Sts. § 2766 (Comp. St. § 5462):

"The word 'merchandise' as used in this Title [the Title including section 2809 upon which this suit is based], may include goods, wares and chattels of every description capable of being imported."

It is argued that this is a definition; that "capable of being imported" must be taken to mean capable of being imported lawfully as otherwise the phrase hardly would do more than exclude chattels real, and would want the poignant significance attributed to every word of legislation; and that therefore the merchandise to be included in the manifest does not embrace opium for smoking which the law has done all it can to exclude. Act of January 17, 1914, c. 9, 38 Stat. 275. Yet this very act of 1914 provides that whenever there shall be found upon a vessel arriving at any port of the United States opium "or any preparations or derivatives thereof" "which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes." Section 8 (Comp. St. § 8801f). We see no adequate reason for not taking these words in their natural sense as including smoking opium and as meaning that it must be included in the manifest, or for limiting them to forfeiture of the vessel. We rather should read them as showing that, at least for the future and at least so far as derivatives from opium are concerned, the language quoted from Rev. Sts. § 2766, was also to be taken in its natural sense as meaning physically capable of being imported.

[3, 4] The language under consideration was an insertion in the Revised Statutes. That volume was primarily a codification of

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the general statutes then in force and is *not lightly to be read as making a change, although of course it may do so. The words on their face indicate rather an extension than a restriction. "May include" seems to point to the removal of a doubt as to whether previously "merchandise" might include all that is mentioned. It is a most unnatural way of saying that henceforth it shall not include something that otherwise might have been included. To give it the latter meaning we have again to read "capable of being imported" in an artificial sense instead of taking the phrase simply for what it says to a plain mind. The only objection to reading it in the natural way is that it is thought to add nothing to what was contained in "goods, wares and chattels of every description." But there is no canon against making explicit what is implied and adding a little emphasis to the endeavors to make the proposition broad. The doubts that have been felt show that the endeavor was not very successful, but we believe that it was made. There can be little doubt that before the insertion of section 2766 goods that could not be imported lawfully were merchandise within the meaning of the statutes. It was held in *Harford v. United States*, 8 Cranch, 109, 3 L. Ed.

504, that the unloading of such goods without a permit was an offense subjecting them to forfeiture, upon reasoning that applies to the requirement that they should be entered on the manifest, with equal force.

[5, 6] What we have said sufficiently disposes of the suggestion that the requirement was repealed by the opium act that we have cited. That is merely saying in another way that a manifest is not necessary for goods forbidden to enter the country. All that remains is the suggestion that smoking opium has no value. But assuming it to be established that the statutes require the manifest to disclose prohibited articles the penalty imposed implies that such articles may have value and does not require the Courts to set up a technical rule in face of the plain truth.

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*So the provision that smoking opium shall be forfeited implies that however evil it may be it has an owner. Act of January 17, 1914, c. 9, § 4, 38 Stat. 275; Act of May 26, 1922, c. 202, § 3, 42 Stat. 596, 598. In the circumstances we see no objection to taking the foreign value as evidence, in accordance with the rulings of the Treasury Department. Treas. Dec. No. 32083, December, 1911; 21 T. D. 687.

Judgment reversed.

(262 U. S. 196)

BEGG et al. v. CITY OF NEW YORK et al.

(Argued April 13-16, 1923. Decided May 7, 1923.)

No. 5.

1. Courts ⇐382(5)—Jurisdiction of Supreme Court of appeal from ruling on petition of receivers depends on jurisdiction over main suit.

The rule that jurisdiction of a petition in intervention asserting a claim upon the property or fund being administered by the court is determined by the jurisdiction invoked in the main cause by virtue of which the intervening petition is entertained, applies with especial force to a petition of receivers to protect the exercise of the jurisdiction of the court itself, even though the intervening petition discloses an independent ground of Federal jurisdiction.

2. Courts ⇐382(5)—Receivers cannot appeal to Supreme Court on constitutional question where jurisdiction of main suit depends on citizenship.

Judicial Code, § 128 (Comp. St. § 1120), making judgments of the Circuit Court of Appeals final, where the jurisdiction depends on diversity of citizenship, requires dismissal of an appeal by receivers from the denial by the Circuit Court of Appeals of a temporary injunction, where the jurisdiction of the main cause depended on diversity of citizenship, though the injunction was sought on the ground that the threatened acts would deprive the de-

fendant corporation of its property without due process of law.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Suit by the Gas & Electric Securities Company against the Manhattan & Queens Traction Corporation, in which William R. Begg and another were appointed receivers of the defendant corporation. An order of the District Court, granting a temporary injunction against the City of New York and others, was reversed by the Circuit Court of Appeals (266 Fed. 625), and the receivers appeal. Appeal dismissed.

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*Messrs. Lindley M. Garrison and Charles A. Frueauff, both of New York City, for appellants.

Mr. Vincent Victory, of New York City, for appellees.

Mr. Justice SANFORD delivered the opinion of the Court.

On the threshold of the hearing the appellees moved to dismiss this appeal, upon the ground that jurisdiction depends entirely upon diversity of citizenship and the decree of the Circuit Court of Appeals is therefore final.

The appellants were appointed receivers of the Manhattan & Queens Traction Corporation in a suit in equity brought against it in the United States District Court for the Eastern District of New York by a judgment creditor, for the administration of its assets. The jurisdiction depended entirely upon diversity of citizenship of the parties. The receivers, after taking possession of the Corporation's railway in the City of New York, which had been partly completed, filed a petition in this equity cause, alleging that the City, through its Board of Estimate and Apportionment, was threatening to adopt a resolution declaring a forfeiture of the franchise contract of the Corporation and of the completed portion of the railway for failure to complete the railway with-

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in the *prescribed time. This, it was averred, would deprive the Corporation of its property in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article First of the Constitution of New York, and cause irreparable injury to the Corporation, its creditors, and the property in the custody of the receivers. Upon this petition the court granted the receivers ex parte a temporary injunction and an order to show cause why it should not be continued during the receivership; and thereafter, upon a summary hearing, the temporary injunction was made permanent and the City and the Board were enjoined until further order of the court from passing a resolution forfeiting or affecting

the franchise contract of the Corporation or declaring its railway and property in the hands of the receivers to be the property of the City or otherwise interfering therewith in any manner. Upon appeal by the City and the Board, the Circuit Court of Appeals reversed the order of the District Court granting this injunction. *Gas & Elec. Securities Co. v. Traction Corporation*, 266 Fed. 625, 641. And the receivers have appealed to this Court.

[1] Section 128 of the Judicial Code (Comp. St. § 1120) provides that, with certain exceptions not here involved, "the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States." This refers to the jurisdiction of the Federal court of first instance; and if the jurisdiction of the District Court depended entirely upon diversity of citizenship the appeal must be dismissed. *Shulthis v. McDougal*, 225 U. S. 561, 568, 32 Sup. Ct. 704, 56 L. Ed. 1205.

It is well settled that jurisdiction of a petition in intervention asserting a claim upon the property or fund being administered by the court is determined by the jurisdiction

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originally invoked in the main cause, by *virtue of which the intervening petition is entertained; and hence that if the jurisdiction in the main cause is such that a decree of the Circuit Court of Appeals would be final in respect thereto it is likewise final in respect to the intervening petition. *St. Louis Railroad v. Wabash Railroad*, 217 U. S. 247, 250, 30 Sup. Ct. 510, 54 L. Ed. 752; *Rouse v. Letcher*, 156 U. S. 47, 49, 15 Sup. Ct. 266, 39 L. Ed. 341; *Gregory v. Van Ee*, 160 U. S. 643, 645, 16 Sup. Ct. 431, 40 L. Ed. 566; *Rouse v. Hornsby*, 161 U. S. 588, 591, 16 Sup. Ct. 610, 40 L. Ed. 817; *Pope v. Louisville Railway*, 173 U. S. 573, 577, 19 Sup. Ct. 500, 43 L. Ed. 814; *Railroad Commission v. Worthington*, 225 U. S. 101, 104, 32 Sup. Ct. 653, 56 L. Ed. 1004; *Shulthis v. McDougal*, supra, 225 U. S. at page 568, 32 Sup. Ct. 704, 56 L. Ed. 1205. And this is true even although the intervening petition discloses an independent ground of Federal jurisdiction; the jurisdiction by virtue of which it is entertained as an intervention being ascribed entirely to that which is invoked and exercised in the main cause. *Rause v. Letcher*, supra, 156 U. S. at pages 49 and 50, 15 Sup. Ct. 266, 39 L. Ed. 341; *Gregory v. Van Ee*, supra, 160 U. S. at page 646, 16 Sup. Ct. 431, 40 L. Ed. 566. Manifestly the reason of the foregoing rule in reference to an affirmative petition of intervention, as set forth in the cases cited, applies with equal or greater force to a petition filed in a cause to protect the exercise of the jurisdiction of the court itself and prevent interference with property in its custody;

which necessarily depends upon that jurisdiction and partakes directly of its character. This is recognized in *Railroad Commission v. Worthington*, supra, 225 U. S. at page 104, 32 Sup. Ct. 653, 56 L. Ed. 1004, in which the distinction is pointed out between petitions filed in the main cause, taking their jurisdiction from it alone, and plenary suits of an ancillary character in which Federal jurisdiction is invoked, not merely as ancillary to that in the main suit, but also upon independent grounds.

[2] In the present case the jurisdiction of the District Court to entertain the summary proceedings against the City and the Board was dependent entirely upon the jurisdiction in the main cause and cannot be ascribed to the Federal constitutional grounds upon

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which the claim for *relief was partly predicated, which in no wise enlarged the summary jurisdiction of the court, and could only have been relied upon as independent grounds of Federal jurisdiction in a plenary suit.

It results that the decree of the Circuit Court of Appeals as to the petition of the receivers has the same finality as would a decree in the main cause; jurisdiction of the one as of the other depending entirely upon the diversity of citizenship in the main cause.

The appellees' motion is accordingly granted, and the appeal

Dismissed.

(262 U. S. 151)

ESSGEE CO. OF CHINA et al. v. UNITED STATES.

HANCLAIRE TRADING CORPORATION et al. v. SAME.

(Submitted April 25, 1923. Decided May 7, 1923.)

Nos. 706, 707.

I. Appeal and error ⇐893(1)—Denial of petition for return of property is reviewable *de novo*.

A petition for return of property produced in response to subpoena duces tecum is a special proceeding in which no jury can intervene, and is reviewable on appeal like equity and admiralty suits, or an order on a writ of habeas corpus, in which review the Supreme Court may re-examine the whole record, and the findings on both the law and the evidence therein.

2. Appeal and error ⇐14(½)—Pursuing different methods of review is unnecessary.

Since the enactment of Acts Sept. 6, 1916, § 4 (Comp. St. § 1649a), requiring the appellate court, when a mistake as to the method of review occurs, to disregard it and take the action which would be appropriate, if the proper appellate procedure had been followed, it is unnecessary in cases of doubt both to appeal and bring error, which results in unnecessary work in both courts.

3. Witnesses ⇨16—Corporations may be compelled to produce books by subpoena duces tecum.

Corporations do not have the same immunity as individuals, under Const. Amendments. 4, 5, from being compelled by due and lawful process to produce their books and records for examination by the state or federal governments, and they can be compelled to produce such books and records by subpoena duces tecum, which is a lawful process, so long as the order for such production is reasonable.

4. Witnesses ⇨16—Appearance of officers to testify not essential to valid subpoena duces tecum against corporations.

It is not essential to the validity of a subpoena duces tecum summoning corporations to appear and produce documents and papers that the officers of the corporation be called to testify when they produce books and papers.

5. Witnesses ⇨16—Corporate officers held to have waived objection to subpoena duces tecum.

Where one officer of a corporation, who first protested against the retention of the corporation's documents which he had produced on subpoena duces tecum, thereafter appeared before the grand jury at his own solicitation and voluntarily produced other documents and papers, and another officer absented himself from the country, with the consent of the court, but against the opposition of the district attorney, for eight months, during which he took no steps in respect to the documents and papers produced, there was a waiver of any objection there might be to the production of the books and papers.

6. Witnesses ⇨298—Corporate officer cannot refuse production of books which tend to incriminate him.

The officer of a corporation cannot refuse to produce the books and papers of the corporation which he holds, not as an individual but as a corporate officer, on the ground that the production thereof would tend to incriminate the officer.

In Error to, and Appeal from, the District Court of the United States for the Southern District of New York.

Separate petitions by Essgee Company of China and another and by the Hanclore Trading Corporation and another against the United States, for return of books and papers produced by petitioners in response to subpoena duces tecum. The District Court denied the petitions, and the petitioners appeal and bring error. Affirmed.

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*Messrs. W. M. K. Olcott and A. A. Silberg, both of New York City, for plaintiffs in error and appellants.

Messrs. Solicitor General Beck, of Washington, D. C., C. H. Byrnes, Asst. Atty. Gen., and Francis A. McGurk, of New York City, for the United States.

Mr. Chief Justice TAFT delivered the opinion of the Court.

These are appeals and writs of error to review the action of the District Court in denying petitions of the two companies, the Essgee Company of China and the Hanclore Trading Corporation, praying that the books and papers produced by an officer of the two companies, in response to a duces tecum issued to them by order of the federal grand jury, be returned to the petitioners, on the ground that the process issued and the detention of the books by the government were and are in violation of their rights under the Fourth and Fifth Amendments to the federal Constitution.

[1, 2] Both appeals and writs of error were allowed in these cases. This was unnecessary. The review sought is of an order of the District Court in a special proceeding

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in *which no jury can intervene. It likens itself in its appellate character to a review of cases in equity or in admiralty or of an order upon a writ of habeas corpus in which issues of facts are triable to the court, and in which the review may properly involve a re-examination by the reviewing court of the whole record and of the findings of the court upon both the law and the evidence therein. Since the passage of the Act of September 6, 1916, entitled an act to amend the Judicial Code (39 Stat. 726, c. 448, § 4 [Comp. St. § 1649a]), which provides that no court having power to review a judgment or decree passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal because a writ should have been sued out, but that when such mistake of error occurs, it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed, the distinction is not important from the standpoint of the jurisdiction of this court. In the interest, however, of orderly procedure, economy in time of both courts, and in the making up and printing of the record, counsel should make every effort to select the proper procedure in review and not duplicate methods out of an abundant caution which the act of 1916 makes unnecessary.

The Hanclore Trading Corporation and the Essgee Company of China were organized under the laws of New York and were doing an importing business in New York City. Schratter was an officer in both companies and Kramer was an officer of one and attorney for both. The federal grand jury in the Southern District of New York was investigating charges of frauds in importations by these two companies whose interests and transactions were intermingled. On October 14, 1921, a subpoena duces tecum was served upon each of the corporations by personal service upon Schratter as a chief officer thereof. Schratter then directed Kramer to

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gather together the *books and papers called

for and produce them at the federal court house. The subpoena was served by the United States marshal for the District. He was accompanied by three other government officials, who, it was charged, without authority examined and took away to the court house other books and papers not included in the list set forth in the *duces tecum*. This incident was made an issue in the affidavits; but it is evident from reading the record and the admission of counsel that we are not concerned with any such records and papers, but only with those which were produced by Kramer for the two companies in response to the *duces tecum*. Schratter in his affidavit and petition claims that under the subpoena some papers belonging to him individually were taken, but an examination of the list of records and papers produced, shows that the only personal paper produced by Kramer was the personal tax return of Schratter, which he does not assert was in any way relevant to the charges, or in any degree incriminating as to him. Kramer and Schratter brought the records and papers called for by the subpoena to a room in the court house and deposited them on a table where the district attorney found them and took charge of them. Neither Schratter nor Kramer was then called before the grand jury, but they were both at once arrested upon warrants for violation of the importing laws. They testified that they did not see the district attorney when he took the records and papers and that Kramer demanded a return of them and protested against their detention. Evidence to the contrary is offered by the government witnesses, but we do not regard the issue as material.

The next day, October 15, 1921, Schratter appeared before Judge Knox and applied for permission to go abroad in order to attend to business of vital personal importance. Schratter remained abroad until June, 1922, and on the 9th of that month appeared to plead to

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an indictment *which had in the meantime been found against the two corporations and himself. Meantime, Kramer, after much solicitation on his part, was given an opportunity to testify to the grand jury and to present to them other records and papers which he voluntarily produced. He was not indicted. After Schratter's return and Kramer's escape from indictment, the two corporations and Schratter filed the petition, denial of which by the District Court is now before us for review.

[3] The books and papers brought before the grand jury and the court in this case were the books, records and papers of corporations of the state of New York. Such corporations do not enjoy the same immunity that individuals have, under the Fourth and Fifth Amendments, from being compelled by due and lawful process to produce them for examination by the state or Federal Gov-

ernment. Referring to the books and papers of a corporation, Mr. Justice Hughes speaking for this court in *Wilson v. United States*, 221 U. S. 361, 382, 31 Sup. Ct. 538, 545 (55 L. Ed. 771, Ann. Cas. 1912D, 558), said:

"They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its charter privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the

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state, and in the *authority of the national government where the corporate activities are in the domain subject to the powers of Congress."

Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, and *Wheeler v. United States*, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309, are to the same point.

Counsel for appellants rely upon *Silverthorne Lumber Co., Inc., v. United States*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, but it has no application to the case before us. The *Silverthorne Case* was a writ of error to reverse a judgment for contempt against a corporation for refusal to obey an order of the court to produce books and documents of the company to be used to show violation of law by the officers of the company. This court found that without a shadow of authority and under color of an invalid writ, the marshal and other government officers had made a clean sweep of all the books, papers and documents in the office of the company while its officers were under arrest. These documents were copied and photographed and then the court ordered their return to the company. A subpoena was then issued to compel the production of the originals. The company refused to obey the subpoena. The court made an order requiring obedience and refusal to obey the order was the contempt alleged. This court held that the government could not, while in form repudiating the illegal seizure, maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had. In other words, we held that the search thus made was an unreasonable one against which the corporation was protected by the Fourth Amendment and which vitiated all the subsequent proceedings to compel production. There was nothing in-

consistent with the Wilson Case in this ruling for, as we have seen in the passage quoted from the opinion in that case, a corporation can only be compelled to produce its records against itself by the demand of the government expressed in lawful process, confining its requirements within limits which reason imposes in the circumstances of the

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case. It is to submit its books and *papers only to "duly constituted authority when demand is suitably made." In the case before us the demand was suitably made by duly constituted authority. In the Silverthorne Case it was not. Here it was expressed in lawful process, confining its requirements to certain described documents and papers easily distinguished and clearly described. Their relevancy to the subject of investigation was not denied. As said in the Wilson Case (221 U. S. 376, 31 Sup. Ct. 542, 55 L. Ed. 771, Ann. Cas. 1912D, 558):

"But there is no unreasonable search and seizure, where a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced."

[4] Objection is made that neither Kramer nor Schratter was called before the grand jury when they produced the books and papers in response to the duces tecum. That was not necessary. The subpoena only summoned the corporations to appear and produce the named documents and papers. There was no real *ad testificandum* clause in the subpoena because a corporation could not testify. It was expressly ruled in the Wilson Case, that the failure to put officers of the corporation on the stand in such a case did not in any way invalidate or destroy the lawful effect of the duces tecum.

[5] Kramer says that he protested against the retention of the documents he had produced at the time because he was not called before the grand jury. At his own solicitation he was thereafter called before that body and testified and voluntarily produced other documents and papers, and never renewed his demand for the documents produced under subpoena until after the grand

jury ignored the charge against him some eight months later. Schratter, against the opposition of the district attorney, but with the consent of the court absented himself from the country for eight months and took no steps in respect to the produced docu-

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ments and papers. Judge Knox *held that such conduct constituted a waiver of any irregularities in not calling these witnesses before the grand jury when the documents and papers were produced. If a waiver were needed, as we do not think it was under the Wilson Case, this clearly would have been sufficient.

[6] Schratter joined with each corporation in asking a return of the documents and papers of that corporation on the ground that they might incriminate him. But the cases of *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; *Wilson v. United States*, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, and *Wheeler v. United States*, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309, show clearly that an officer of a corporation in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his private capacity and is not, therefore, protected against their production or against a writ requiring him as agent of the corporation to produce them.

Appellants cite the cases of *Boyd v. The United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and *Gould v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647, to support their contention that the proceedings complained of herein violate their rights under the Fourth and Fifth Amendments. Those cases were all unreasonable searches of documents and records belonging to individuals. The distinction between the cases before us and those cases lies in the more limited application of the amendments to the compulsory production of corporate documents and papers as shown in the *Henkel*, *Wilson*, and *Wheeler* Cases.

The order of the District Court is affirmed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1922

(261 U. S. 610)

No. 121. The UNITED STATES, appellant, v. MASON & HANGER COMPANY; and

No. 122. The UNITED STATES, appellant, v. NORTH-EASTERN CONSTRUCTION COMPANY. April 9, 1923. Appeals from the Court of Claims. For former opinions, see 260 U. S. 323, 43 Sup. Ct. 128, 67 L. Ed. —, 260 U. S. 326, 43 Sup. Ct. 129, 67 L. Ed. —. The Attorney General, for the United States.

PER CURIAM. Upon rehearing the former opinions, as well as the judgment heretofore rendered are affirmed.

(261 U. S. 629)

No. 172. FEDERAL TRADE COMMISSION, petitioner, v. FRUIT GROWERS' EXPRESS (Inc.). April 9, 1923. On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. For opinion below, see 274 Fed. 205. The Attorney General, for petitioner. Dismissed per stipulation, on motion of Mr. Solicitor General Beck in that behalf.

(261 U. S. 629)

No. 683. SEABOARD AIR LINE RAILWAY COMPANY, appellant, v. A. D. WATTS, etc., Commissioner of Revenue. April 9, 1923. Appeal from the District Court of the United States for the Eastern District of North Carolina. Messrs. T. W. Davis, of Wilmington, N. C., and Murray Allen, of Raleigh, N. C., for appellant. Dismissed with costs, per stipulation.

(261 U. S. 630)

No. 684. ATLANTIC COAST LINE RAILROAD COMPANY, appellant, v. A. D. WATTS, etc., Commissioner of Revenue. April 9, 1923. Appeal from the District Court of the United States for the Eastern District of North Carolina. Mr. T. W. Davis, of Wilmington, N. C., for appellant. Dismissed with costs, per stipulation.

(261 U. S. 630)

No. 688. NORFOLK SOUTHERN RAILROAD COMPANY, appellant, v. A. D. WATTS, etc., Commissioner of Revenue. April 9, 1923. Appeal from the District Court of the United States for the Eastern District of North Carolina. Mr. W. B. Rodman, of Norfolk, Va., for appellant. Dismissed with costs, per stipulation.

(261 U. S. 609)

No. 756. SOUTHERN RAILWAY COMPANY, appellant, v. A. D. WATTS, Individually, etc., et al.;

No. 724. ATLANTIC COAST LINE RAILROAD COMPANY, appellant, v. A. D. WATTS, Commissioner of Revenue, etc., et al.;

No. 744. SEABOARD AIR LINE RAILROAD COMPANY, appellant, v. A. D. WATTS, Individually, etc., et al.; and

No. 727. NORFOLK SOUTHERN RAILROAD COMPANY, appellant, v. A. D.

WATTS, individually, etc., et al. April 9, 1923. Appeals from the District Court of the United States for the Eastern District of North Carolina. Messrs. S. R. Prince, of Washington, D. C., and W. M. Hendren, of Winston-Salem, N. C., for appellant Southern R. Co. Mr. T. W. Davis, of Wilmington, N. C., for appellant Atlantic Coast Line R. Co. Mr. Murray Allen, of Raleigh, N. C., for appellant Seaboard Air Line R. Co. Mr. W. B. Rodman, of Norfolk, Va., for appellant Norfolk Southern R. Co.

PER CURIAM. The motion to substitute the new Commissioner of Revenue, R. A. Doughton, for the ex-Commissioner of Revenue, A. D. Watts, is granted, on the ground that such substitution is authorized by section 461, Consol. St., N. C., 1919, as construed by the Supreme Court of North Carolina in Davenport v. McKee, 98 N. C. 500, 4 S. E. 545.

(261 U. S. 623)

No. 843. Dean SHERRY, Trustee in Bankruptcy, etc., et al., petitioners, v. J. B. LUCAS. April 9, 1923. For opinion below, see 284 Fed. 965. Messrs. J. J. Butts and Dean Sherry, both of Cisco, Tex., and C. G. Whitten, of Abilene, Tex., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(261 U. S. 623)

No. 856. John W. TALBOT, petitioner, v. The UNITED STATES of America. April 9, 1923. For opinion below, see 286 Fed. 21. Messrs. Cassius C. Shirley, Larz A. Whitcomb, and Samuel Dowden, all of Indianapolis, Ind., for petitioner. Messrs. James M. Beck, Sol. Gen., of Washington, D. C., John W. H. Crim, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Mr. Julian Clay Risk, of Chicago, Ill., amicus curiae. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(261 U. S. 629)

No. 866. The UNITED STATES, appellant, v. PENINSULAR STOVE COMPANY. April 9, 1923. Appeal from the Court of Claims. Mr. James M. Beck, Sol. Gen., of Washington, D. C., for the motion. Dismissed, on motion of Mr. Solicitor General Beck for the appellant.

(261 U. S. 623)

No. 868. WINDOW GLASS MACHINE COMPANY et al., petitioners, v. PITTSBURGH PLATE GLASS COMPANY. April 9, 1923. For opinion below, see 284 Fed. 645. Messrs. Clarence P. Byrnes, of Pittsburgh, Pa., Livingston Gifford, of New York City, and David A. Reed, of Pittsburgh, Pa., for petitioners. Messrs. Marshall A. Christy and George B. Gordon, both of Pittsburgh, Pa., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(261 U. S. 623)

No. 872. The PUSEY & JONES COMPANY, petitioner, v. WILLARD SAULSBURY et al., as Receivers, etc., et al. April 9, 1923. For opinion below, see 286 Fed. 88. Messrs. Lindley M. Garrison, Charles H. Tuttle, and Saul S. Myers, all of New York City, for petitioner. Messrs. William H. Button, of New York City, and John P. Nields, and William G. Mahaffy, both of Wilmington, N. C., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(261 U. S. 612)

No. 877. The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, petitioner, v. Edmund R. WELLS et al. April 9, 1923. For opinion below, see 285 Fed. 369. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

(271 U. S. 623)

No. 882. Herbert W. BACON, Administrator, etc., petitioner, v. John Barton PAYNE, Director General, etc. April 9, 1923. For opinion below, see 220 Mich. 672, 190 N. W. 716. Mr. F. S. Monnett, of Columbus, Ohio, for petitioner. Mr. J. Walter Dohany, of Detroit, Mich. (Mr. Frank E. Robson, of Detroit, Mich., of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied.

(261 U. S. 624)

No. 891. The FREIBERG MAHOGANY COMPANY, petitioner, v. The BATESVILLE LUMBER & VENEER COMPANY. April 9, 1923. For opinion below, see 285 Fed. 485. Mr. Murray Seasongood, of Cincinnati, Ohio, for petitioner. Messrs. Judson Harmon and George Hoadly, both of Cincinnati, Ohio, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(261 U. S. 612)

No. 897. NASSAU SMELTING & REFINING WORKS, petitioner, v. BRIGHTWOOD BRONZE FOUNDRY COMPANY. April 9, 1923. For opinion below, see 286 Fed. 72. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(261 U. S. 622)

No. 898. Robert W. HUNT et al., petitioners, v. D. L. GILLESPIE. April 9, 1923. For opinion below, see 276 Pa. 119, 119 Atl. 815. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

(261 U. S. 624)

No. 900. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, petitioner, v. McKinley C. MYERS. April 9, 1923. For opinion below, see 246 S. W. 257. Mr. R. Bruce Scott, of Chicago, Ill., for petitioner. Messrs. Melvin Duvall and W. J. Boyd, both of St. Joseph, Mo., and Geo. H. Kelly, Wm. Buchholz, I. B. Kimbrell, and Martin J. O'Donnell, all of Kansas City, Mo., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

(261 U. S. 624)

No. 904. Sam M. SALIBA et al., petitioners, v. The UNITED STATES of America. April 9, 1923. For opinion below, see Jolitt v. United States, 285 Fed. 209. Mr. Forney Johnston, of Washington, D. C. (Messrs. D. G. Ewing and W. R. C. Cocke, both of Birmingham, Ala., of counsel), for petitioners. Messrs. James M. Beck, Sol. Gen., of Washington, D. C., John W. H. Crim, Asst. Atty. Gen., and Harry S. Ridgely, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 292. Frederick WESCHE, appellant, v. Thomas W. MILLER, as Alien Property Custodian. April 13, 1923. Mr. Selden Bacon, of New York City, for appellant. Death of Frederick Wesche suggested; and United States Trust Co. of New York, as ancillary administrator of the estate of the said Frederick Wesche, deceased, substituted as the party appellant.

(262 U. S. 727)

No. —, original. Ex parte in the matter of Adolph PALEAIS, petitioner. April 16, 1923. Messrs. Joseph G. M. Browne and Barnett E. Kopelman, both of New York City, for petitioner. Motion for leave to file petition for a writ of habeas corpus denied, without prejudice to an application to the District Court.

(262 U. S. 728)

No. 366. J. A. CAMPBELL, plaintiff in error, v. The STATE OF NORTH CAROLINA. April 16, 1923. In error to the Supreme Court of the State of North Carolina. For opinion below, see 182 N. C. 911, 110 S. E. 86. Mr. L. M. Bourne, of Asheville, N. C., for plaintiff in error.

PER CURIAM. Affirmed upon the authority of Vigliotti v. Pennsylvania, 258 U. S. 403, 42 Sup. Ct. 330, 66 L. Ed. 686.

(262 U. S. 727)

No. 367. Victor Raymond HAMMAER, plaintiff in error, v. The UNITED STATES of America. April 16, 1923. In error to the District Court of the United States for the District of Oregon. Mr. Paul C. Dormitzer, of Portland, Or., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Zucht v. King, 260 U. S. 174, 43 Sup. Ct. 24, 67 L. Ed. —, decided November 13, 1922.

(262 U. S. 728)

No. 370. Charles I. STAGER, appellant, v. The UNITED STATES. April 16, 1923. Appeal from the Court of Claims. For opinion below, see 57 Ct. Cl. 116. Mr. E. R. Wakefield, of New York City, for appellant.

PER CURIAM. Affirmed upon the authority of Nicholas v. United States, 257 U. S. 71, 42 Sup. Ct. 7, 66 L. Ed. 133.

(262 U. S. 760)

No. 456. Eugene SCHAEFER et al., Trustees, etc., appellants, v. Thomas W. MILLER, as Alien Property Custodian of the United

States. April 16, 1923. Appeal from the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 281 Fed. 764. Mr. James M. Beck, Sol. Gen., of Washington, D. C., for the motion. Dismissed with costs on motion of Mr. James M. Beck in behalf of counsel for the appellants.

(262 U. S. 728)

No. 522. JAY BURNS BAKING COMPANY et al., plaintiffs in error, v. Samuel R. McKELVIE as Governor of the State of Nebraska, et al. April 16, 1923. See, also, 261 U. S. 625, 43 Sup. Ct. 359, 67 L. Ed. —, 261 U. S. 608, 43 Sup. Ct. 433, 67 L. Ed. —. Mr. Matthew A. Hall, of Omaha, Neb., for plaintiffs in error.

PER CURIAM. Motion to substitute the new governor, Charles W. Bryan, for the ex-governor, Samuel R. McKelvie, and to substitute the new secretary of the department of agriculture, Grant Shumway, for the ex-secretary, Leo B. Stuhr, is granted on the ground that such substitution is authorized by section 8546, Comp. St. Neb., 1922, as construed and applied by the Supreme Court of Nebraska.

(262 U. S. 727)

No. 634. Stefano SANGUINETTI, appellant, v. THE UNITED STATES. April 16, 1923. See, also, 261 U. S. 623, 43 Sup. Ct. 359, 67 L. Ed. —. Mr. Benj. Carter, of Washington, D. C. for appellant. Motion to reinstate this case on the docket granted.

(262 U. S. 727)

No. 805. LEHIGH & HUDSON RIVER RAILWAY COMPANY, petitioner, v. Florence M. OTTERSTEDT, on behalf of herself and minor children. April 16, 1923. For former opinion, see 261 U. S. 619, 43 Sup. Ct. 432, 67 L. Ed. —. Mr. J. J. Beattie, of Warwick, N. Y., for petitioner. Petition for a rehearing, herein granted.

(262 U. S. 742)

No. 883. GOSHO COMPANY (Inc.), petitioner, v. SOUTHERN PACIFIC COMPANY. April 16, 1923. For opinion below, see 285 Fed. 227. Messrs. R. W. Flournoy and Leroy A. Smith, both of Fort Worth, Tex., for petitioner. Messrs. Wm. F. Herrin, of San Francisco, Cal., Thompson, Barwise, Wharton & Hiner, of Fort Worth, Tex., and C. F. R. Ogilby, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 742)

No. 890. James C. DAVIS, Director General of Railroads, Agent, petitioner, v. Michael J. HANLON. April 16, 1923. For opinion below, see 276 Pa. 113, 119 Atl. 822. Mr. Thomas Patterson, of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

(262 U. S. 742)

No. 893. VULCANITE ROOFING COMPANY (Inc.), petitioner, v. COMMONWEALTH STEAMSHIP COMPANY (Ltd.). April 16, 1923. For opinion below, see 284

Fed. 439. Messrs. D. Roger Englar, of New York City, Henry H. Little, of Norfolk, Va., and Oscar R. Houston, of New York City, for petitioner. Messrs. John M. Woolsey, of New York City, and Edward R. Baird, Jr., of Norfolk, Va., for respondent. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(262 U. S. 742)

No. 894. BROWN-CRUMMER COMPANY, petitioner, v. W. M. RICE CONSTRUCTION COMPANY. April 16, 1923. For opinion below, see 285 Fed. 673. Mr. Oscar O'Neill Touchstone, of Dallas, Tex. (Messrs. W. M. Harris and C. A. Leddy, both of Dallas, Tex., James G. Martin, of Asheville, N. C., and W. G. Rogers, of counsel), for petitioner. Messrs. Francis Marion Etheridge, Joseph Manson McCormick, and Snowden Marshall Leftwich, all of Dallas, Tex., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 743)

No. 905. PUGET SOUND POWER & LIGHT COMPANY, petitioner, v. CITY OF SEATTLE et al. April 16, 1923. For opinion below, see 284 Fed. 659. Messrs. James B. Howe, Hugh A. Tait, and John H. Powell, all of Seattle, Wash., and Frederic D. McKenney, of Washington, D. C., for petitioner. Messrs. Thomas J. L. Kennedy, Corporation Counsel, Walter B. Beals, Robert H. Evans, and Charles T. Donworth, all of Seattle, Wash., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(262 U. S. 743)

No. 908. M. MCGIRR'S SONS COMPANY, petitioner, v. PENNSYLVANIA RAILROAD COMPANY et al. April 16, 1923. For opinion below, see 287 Fed. 334. Mr. J. Edward Murphy, of New York City (Mr. John Vance Hewitt, of New York City, of counsel), for petitioner. Mr. Chauncey I. Clark, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 743)

No. 909. HARLEY-DAVIDSON MOTOR COMPANY et al., petitioners, v. ECLIPSE MACHINE COMPANY et al. April 16, 1923. For opinion below, see 286 Fed. 68. Messrs. Melville Church, and Wm. S. Hodges, both of Washington, D. C., and Edwin B. H. Tower, Jr., of Milwaukee, Wis., for petitioners. Messrs. Archibald Cox and Robert W. Byerly, both of New York City, and C. L. Sturtevant, of Washington, D. C., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(262 U. S. 743)

No. 913. James C. DAVIS, Director General of Railroads, etc., petitioner, v. Robert B. CALDWELL. April 16, 1923. For opinion below, see 246 S. W. 312. Messrs. A. A. McLaughlin, of Washington, D. C., and N. S. Brown and Homer Hall, both of St. Louis, Mo.,

for petitioner. Mr. John G. Parkinson, of St. Joseph, Mo., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

(262 U. S. 744)

No. 914. Orlando Lee CLEVELAND, petitioner, v. Robert MATTINGLY, Judge, etc. April 16, 1923. For opinion below, see — App. D. C. —, 287 Fed. 948. Mr. T. Morris Wampler, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(262 U. S. 736)

No. 924. Thomas HAMMERSCHMIDT et al., petitioners, v. The UNITED STATES of America. April 16, 1923. For opinion below, see 287 Fed. 817. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

(262 U. S. 744)

No. 929. CENTRAL UNION TRUST COMPANY OF NEW YORK, petitioner, v. William H. EDWARDS, as Collector, etc. April 16, 1923. For opinion below, see 287 Fed. 324. Messrs. John M. Perry and Arthur H. Van Brunt, both of New York City, for petitioner. Messrs. William Hayward, of New York City, James M. Beck, Sol. Gen., of Washington, D. C., and Mrs. Mabel Walker Willebrandt, Asst. Atty. Gen., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 744)

No. 965. Duncan BEATON, petitioner, v. DULUTH, WINNIPEG & PACIFIC RAILWAY COMPANY. April 16, 1923. For opinion below, see 191 N. W. 44. Mr. Frederick M. Miner, of Minneapolis, Minn. (Mr. William A. Tautges, of Minneapolis, Minn., of counsel), for petitioner. Messrs. W. D. Bailey, Oscar Mitchell and A. C. Gillette, all of Duluth, Minn., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied.

(262 U. S. 744)

No. 969. Cuno H. RUDOLPH et al., Commissioners, etc., petitioners, v. Charles E. HUNT et al. April 16, 1923. For opinion below, see 286 Fed. 1007. Messrs. F. H. Stephens, R. L. Williams and George P. Barse, all of Washington, D. C., for petitioners. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(262 U. S. 761)

No. 384. SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, appellant, v. The RAILROAD COMMISSION OF GEORGIA et al. April 18, 1923. Appeal from the District Court of the United States for the Northern District of Georgia. For opinion below, see 274 Fed. 438. Mr. Sanders McDaniel, of Atlanta, Ga., for appellant. Dismissed with costs, on motion of counsel for the appellant.

(262 U. S. 761)

No. 293. RATON WATER WORKS COMPANY, appellant, v. The CITY OF RATON. April 23, 1923. Appeal from the District Court of the United States for the District of New Mexico. See, also, 261 U. S. 627, 43 Sup. Ct. 358, 67 L. Ed. —. Mr. Abram J. Rose, of New York City, for appellant. Dismissed with costs, on motion of counsel for the appellant.

(262 U. S. 744)

No. 873. T. J. BELL, petitioner, v. The UNITED STATES of America. April 23, 1923. For opinion below, see 285 Fed. 145. Messrs. Jed C. Adams and W. B. Harrell, both of Dallas, Tex., for petitioner. Mr. James M. Beck, Sol. Gen., of Washington, D. C., and Mrs. Mabel Walker Willebrandt, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 745)

No. 896. James C. DAVIS, as Agent, etc., plaintiff in error, v. Charles HAREFORD. April 23, 1923. For opinion below, see 245 S. W. 833. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied.

(262 U. S. 745)

No. 915. The YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, et al., petitioners, v. Ora DAVIS et al. April 23, 1923. For opinion below, see 140 N. E. 114. Messrs. Frank Davis, Jr., and Henry A. Williams, both of Columbus, Ohio, Guy W. Mallon, of Cincinnati, Ohio, and James I. Boulger, of Columbus, Ohio, for petitioners. Mr. Arthur I. Vorys, of Columbus, Ohio, for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied.

(262 U. S. 745)

No. 920. NEW YORK LIFE INSURANCE COMPANY, petitioner, v. Marion C. SLOCOMB. April 23, 1923. For opinion below, see 284 Fed. 810. Messrs. Fred W. Catlett, of Seattle, Wash., and Louis H. Cooke, of New York City, for petitioner. Messrs. Wm. Martin and Arthur E. Griffin, both of Seattle, Wash., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(262 U. S. 745)

No. 921. NEW YORK LIFE INSURANCE COMPANY, petitioner, v. Grace G. RUTHERFORD. April 23, 1923. For opinion below, see 284 Fed. 707. Messrs. Fred W. Catlett, of Seattle, Wash., and Louis H. Cooke, of New York City, for petitioner. Messrs. P. C. Sullivan and Walter Christian, both of Tacoma, Wash., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(262 U. S. 746)

No. 930. Le Verra M. McNULTY, by C. N. McNulty, her next friend, petitioner, v. The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. April 23, 1923. For opin-

ion below, see 285 Fed. 97. Messrs. Henry E. Lutz, of Denver, Colo., Chester B. Horn, of Colorado Springs, Colo., and G. Dexter Blount and Harry S. Silverstein, both of Denver, Colo., for petitioner. Messrs. Erl H. Ellis, Lewis B. Johnson, Pierpont Fuller, Percy Robinson, and Frank A. Kemp, Jr., all of Denver, Colo., and Gardiner Lathrop, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(262 U. S. 736)

No. 935. Harry H. WEISS, Collector of Internal Revenue, petitioner, v. Louis STEARN. April 23, 1923. For opinion below, see 285 Fed. 689. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

(262 U. S. 737)

No. 936. Harry H. WEISS, Collector of Internal Revenue, petitioner, v. John G. WHITE. April 23, 1923. For opinion below, see 285 Fed. 689. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

(262 U. S. 746)

Nos. 937 to 947, inclusive. Robert W. HUNT et al., petitioners, v. George H. CLAPP and others. April 23, 1923. For opinion below, see 276 Pa. 127, 119 Atl. 818. Messrs. Horace G. Stone, of Chicago, Ill., and Louis G. Richardson, of Indianapolis, Ind., for petitioners. Messrs. David A. Reed and George H. Calvert, both of Pittsburgh, Pa., for respondents. Petition for writs of certiorari to the Supreme Court of the State of Pennsylvania denied.

(262 U. S. 746)

No. 949. WALKER GRAIN COMPANY, Bankrupts, et al., petitioners, v. GREGG GRAIN COMPANY et al. April 23, 1923. For opinion below, see 285 Fed. 156. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 737)

No. 953. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, petitioner, v. O. J. NICHOLS. April 23, 1923. For opinion below, see 286 Fed. 1. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(262 U. S. 747)

No. 971. Jeanette L. MacKELVIE, petitioner, v. The MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY. April 23, 1923. For opinion below, see 287 Fed. 660. Messrs. Chadbourne, Babbitt & Wallace, of New York City (William Wallace, Jr., of New York City, of counsel), for petitioner. Messrs. Rounds, Schurman & Dwight, of New York City (Mr. Charles E. Hughes, Jr., of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 737)

No. 984. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, petitioner, v. SOUTHERN PACIFIC COMPANY et al. April 23, 1923. For opinion below, see 211 Pac. 460. Petition for a writ of certiorari to the Supreme Court of the State of California granted.

(262 U. S. 737)

No. 985. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, petitioner, v. The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. April 23, 1923. For opinion below, see 211 Pac. 460. Petition for a writ of certiorari to the Supreme Court of the State of California granted.

(262 U. S. 737)

No. 986. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, petitioner, v. LOS ANGELES & SALT LAKE RAILROAD COMPANY. April 23, 1923. For opinion below, see 211 Pac. 460. Petition for a writ of certiorari to the Supreme Court of the State of California granted.

(262 U. S. 737)

No. 998. Jacob GOLDMAN et al., Receivers, etc., petitioner, v. Frank M. McKEY, Trustee. April 23, 1923. For opinion below, see 288 Fed. 829. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

(262 U. S. 729)

No. —, original. Ex parte in the matter of TAUBEL-SCOTT-KITZMILLER CO. April 30, 1923. See, also, 286 Fed. 351. Mr. Frank J. Hogan, of Washington, D. C., for petitioner. Messrs. Irving L. Ernst and Olcott, Bonynge, McManus & Ernst, all of New York City, for respondents. The motion for leave to file a petition for a writ of prohibition herein is denied.

(262 U. S. 761)

No. 226. Fred W. SCHUTZ et al., plaintiffs in error, v. Justus S. WARDELL, U. S. Collector, etc. April 30, 1923. In error to the District Court of the United States for the Northern District of California. Mr. Robert Ash, of Washington, D. C., for the motion. Dismissed with costs and mandate granted, on motion of Mr. Robert Ash in behalf of counsel for the plaintiffs in error.

(262 U. S. 729)

No. 288. Joe BONNER, appellant, v. J. C. MIDDLEBROOKS, Sheriff of Jones County, Ga. April 30, 1923. Appeal from the District Court of the United States for the Southern District of Georgia. Mr. John R. Cooper, of Macon, Ga., for appellant.

PER CURIAM. Dismissed with costs for the want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 59 L. Ed. 101; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; *Toop v. Ulysses Land Co.*, 237 U. S. 580, 583, 35 Sup. Ct. 739, 59 L. Ed. 1127; *Piedmont Power & Light Co. v. Town of Graham*, 253 U. S. 193, 195, 40 Sup. Ct. 453, 64 L. Ed. 855.

(262 U. S. 747)

No. 805. **LEHIGH & HUDSON RIVER RAILWAY COMPANY**, petitioner, v. Florence M. OTTERSTEDT, on behalf of herself and minor children. April 30, 1923. For opinion below, see 234 N. Y. 203, 137 N. E. 26 which affirmed order 200 App. Div. 386, 193 N. Y. Supp. 104. See, also, 261 U. S. 619, 43 Sup. Ct. 432, 67 L. Ed. —, 262 U. S. 727, 43 Sup. Ct. 520, 67 L. Ed. —. Mr. J. J. Beattie, of Warwick, N. Y., for petitioner. Petition for a writ of certiorari to the Third Department, Appellate Division, of the Supreme Court of the State of New York denied.

(262 U. S. 747)

No. 899. **Charles E. ALBURY**, petitioner, v. Benjamin E. DYSON, United States Marshal, etc. April 30, 1923. For opinion below, see 285 Fed. 738. Messrs. S. J. Barco and Harry Hawkins, both of Miami, Fla., for petitioner. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 748)

No. 922. **Ike WINDSOR**, petitioner, v. The UNITED STATES of America. April 30, 1923. For opinion below, see 286 Fed. 51. Messrs. A. L. Kreisberg and Wm. Gordon, both of Cleveland, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(262 U. S. 761)

No. 957. **MISSOURI PACIFIC RAILROAD COMPANY**, petitioner, v. Mrs. Lulu MORGAN. April 30, 1923. Petition for writ of certiorari to the Court of Appeals for the Second Circuit, State of Louisiana. Mr. Henry Bernstein, of Monroe, La. (Messrs. Hudson, Potts, Bernstein & Sholars, of Monroe, La., of counsel), for petitioner. Dismissed with costs on motion of counsel for the petitioner.

(262 U. S. 748)

No. 959. **UNITED STATES FIDELITY & GUARANTY CO.**, petitioner, v. Robert S. BLAKE, a Minor, etc. April 30, 1923. For opinion below, see 285 Fed. 449. Messrs. Maurice McMicken, of Seattle, Wash., Jos. A. McCullough, of Baltimore, Md., and Chadwick, McMicken, Ramsey & Rupp, of Seattle, Wash., for petitioner. Messrs. Richard H. Johnson and Carey H. Nixon, both of Boise, Idaho, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(262 U. S. 748)

No. 960. **UNITED STATES FIDELITY & GUARANTY CO.**, petitioner, v. Grace Twigg BLAKE. April 30, 1923. For opinion below, see 285 Fed. 1022. Messrs. Maurice McMicken, of Seattle, Wash., Jos. A. McCullough, of Baltimore, Md., and Chadwick, McMicken, Ramsey & Rupp, of Seattle, Wash., for petitioner. Messrs. Richard H. Johnson and Carey H. Nixon, both of Boise, Idaho, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(262 U. S. 748)

No. 972. **NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH CO.**, plaintiff in error, v. John I. DOLAN, Collector of Taxes, etc. April 30, 1923. For opinion below see 121 Atl. 18. Petition for writ of certiorari to the Supreme Court of Delaware denied.

(262 U. S. 748)

No. 975. **The I. T. S. RUBBER CO.**, petitioner, v. **UNITED STATES RUBBER CO.** April 30, 1923. For opinion below, see 288 Fed. 786. Mr. Charles A. Brown, of Chicago, Ill., for petitioner. Messrs. Livingston Gifford and Charles S. Jones, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(262 U. S. 748)

No. 990. **Emanuel BOOKBINDER**, petitioner, v. The UNITED STATES of America. April 30, 1923. For opinion below, see 287 Fed. 790. Messrs. J. Washington Logue, of Philadelphia, Pa., A. Mitchell Palmer, and Frank Davis, Jr., both of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(262 U. S. 738)

No. 1003. **Thomas AGNELLO et al.**, petitioners, v. The UNITED STATES of America. April 30, 1923. For opinion below, see 290 Fed. 671. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(262 U. S. 762)

No. 375. **Harry PALMER**, plaintiff in error, v. The STATE OF INDIANA. May 2, 1923. In error to the Supreme Court of the State of Indiana. For opinion below, see 133 N. E. 388. Mr. Henry Adamson, of Terre Haute, Ind., for plaintiff in error. Dismissed with costs, per stipulation.

(262 U. S. 762)

No. 1050. **Elizabeth W. PLATT et al.**, plaintiffs in error, v. **David R. FRANCIS et al.** May 3, 1923. In error to the Circuit Court of the City of St. Louis, State of Missouri. Mr. George H. Lamar, of Washington, D. C., for the motion. Docketed and dismissed with costs on motion of Mr. George H. Lamar for the defendants in error.

(262 U. S. 730)

No. 880. **Charles Glen COLLINS**, appellant, v. **Victor LOISEL**, United States Marshal for the Eastern District of Louisiana. May 4, 1923. Appeal from the District Court of the United States for the Eastern District of Louisiana. Messrs. J. Zach Spearing, of New Orleans, La., and J. Kemp Bartlett, Guion Miller, and Bartlett, Poe & Claggett, all of Baltimore, Md., for appellant. Mr. Robert H. Marr, of New Orleans, La., for appellee.

PER CURIAM. Judgment affirmed with costs; and mandate ordered to issue forthwith.

(262 U. S. 731)

No. 96. **TAGGARTS PAPER COMPANY**, plaintiff in error, v. **The STATE OF NEW YORK**. May 7, 1923. In error to the Court of Claims of the State of New York. For opinion below, see 187 App. Div. 843, 176 N. Y. Supp. 97. Mr. Adelbert Moot, of Buffalo, N. Y., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *New York Central & H. R. R. Co. v. New York*, 186 U. S. 269, 273, 22 Sup. Ct. 916, 46 L. Ed. 1158; *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 326, 331, 33 Sup. Ct. 510, 57 L. Ed. 857; *Thomas v. Iowa*, 209 U. S. 258, 263, 28 Sup. Ct. 487, 52 L. Ed. 782.

No. 409. **UNION STOCK YARDS COMPANY OF OMAHA (Ltd.)**, plaintiff in error, v. **MAYHALL & NEIBLE**, a Copartnership, et al., etc. May 7, 1923. See, also, 260 U. S. 742, 43 Sup. Ct. 98, 67 L. Ed. —. Messrs. A. A. McLaughlin, of Washington, D. C., Francis A. Brogan, Alfred G. Ellick, and Anan Raymond, all of Omaha, Neb., R. Bruce Scott, of Chicago, Ill., and Byron Clark, of Omaha, Neb., for the motion. Messrs. Norris Brown, and Irving F. Baxter, both of Omaha, Neb., opposed. James C. Davis, as director general, etc., substituted as a party defendant in error herein, on motion of Mr. A. A. McLaughlin in that behalf. Motion to dismiss submitted by Mr. A. A. McLaughlin, Mr. Francis A. Brogan, Mr. Alfred G. Ellick, Mr. Anan Raymond, Mr. R. Bruce Scott, and Mr. Byron Clark for the defendants in error in support of the motion, and by Mr. Norris Brown and Mr. Irving F. Baxter for the plaintiff in error in opposition thereto.

(262 U. S. 730)

No. 665. **Laura LYON**, appellant, v. **Charles B. LOHMILLER**, as Superintendent and Disbursing Agent, etc. May 7, 1923. Appeal from the District Court of the United States for the District of Nebraska. Mr. Hiram Chase, of Pender, Neb., for appellant.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Equitable Life Assurance Co. v. Brown*, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123, 137, 34 Sup. Ct. 874, 58 L. Ed. 1245; *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U. S. 20, 24, 38 Sup. Ct. 35, 62 L. Ed. 124; (2) *Anchor Oil Co. v. Gray*, 256 U. S. 519, 522, 41 Sup. Ct. 544, 65 L. Ed. 1070; *Blanset v. Cardin*, 256 U. S. 319, 41 Sup. Ct. 519, 65 L. Ed. 950.

(262 U. S. 749)

No. 954. **FOUR-IN-ONE COAL COMPANY**, petitioners, v. **Eli H. BROWN**. May 7, 1923. For opinion below, see 286 Fed. 512. Mr. Emile Steinfeld, of Louisville, Ky. (Messrs. D. A. Sachs, Jr., Morris B. Gifford, and Isaac L. Steinfeld, all of Louisville, Ky., of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(262 U. S. 749)

No. 961. **Tony PANZICH et al.**, petitioners, v. **The UNITED STATES of America**. May 7, 1923. For opinion below, see 285 Fed. 871. Messrs. Frank P. Doherty, and Randall, Bartlett & White, by Thomas P. White, all of Los Angeles, Cal., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(262 U. S. 749)

No. 968. **C. W. JOHNSON**, Trustee in Bankruptcy, etc., petitioner, v. **GRAINGER & COMPANY**. May 7, 1923. For opinion below, see 286 Fed. 833. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(262 U. S. 738)

No. 974. **William H. EDWARDS**, Formerly Collector of Internal Revenue, etc., petitioner, v. **Joseph Jermain SLOCUM et al.** May 7, 1923. For opinion below, see 287 Fed. 651. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(262 U. S. 738)

No. 978. **MAGNUM IMPORT COMPANY (Inc.)**, petitioner, v. **Francois Joseph de SPOTURNO COTY**;

No. 979. **Max L. COHN**, trading as the Mac-len Import Company (Inc.), petitioner, v. **Francois Joseph de SPOTURNO COTY**;

No. 980. **Arthur BAUM et al.**, petitioners, v. **Francois Joseph de SPOTURNO COTY**;

No. 981. **MAGNUM IMPORT COMPANY (Inc.)**, petitioner, v. **HOUBIGANT (Inc.)**; and

No. 982. **IVORY NOVELTIES TRADING COMPANY (Inc.)**, petitioner, v. **Francois Joseph de SPOTURNO COTY**. May 7, 1923. See, also, 262 U. S. 159, 43 Sup. Ct. 531, 67 L. Ed. —. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(262 U. S. 749)

No. 983. **Moe H. BARON et al.**, petitioners, v. **The UNITED STATES of America**. May 7, 1923. For opinion below, see 286 Fed. 822. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(262 U. S. 749)

No. 989. **A. BALDINI**, petitioner, v. **The UNITED STATES of America**. May 7, 1923. For opinion below, see 286 Fed. 133. Annette Abbott Adams, and Messrs. Clifford D. Good and Theodore J. Savage, all of San Francisco, Cal., and McCarran & Mashburn, of Reno, Nev., for petitioner. Mr. James M. Beck, Sol. Gen., of Washington, D. C., and Mrs. Mabel Walker Willebrandt, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(262 U. S. 738)

No. 994. **The UNITED STATES of America**, petitioner, v. **GULF REFINING COMPANY**. May 7, 1923. For opinion below, see

284 Fed. 90. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(262 U. S. 750)

No. 1002. James C. DAVIS, Director General of Railroads, etc., petitioner, v. Ellen A. LONG, Administratrix of Edward R. Long. May 7, 1923. For opinion below, see 203 App. Div. 876, 196 N. Y. Supp. 937. Mr. Charles C. Paulding, of New York City (Mr. Leroy B. Williams, of Syracuse, N. Y., of counsel), for petitioner. Mr. George H. Bond, of Syracuse, N. Y. (Mr. A. Lee Olmsted, of Syracuse, N. Y., of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(262 U. S. 750)

No. 1009. George R. BROADWELL, petitioner, v. The BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA. May 7, 1923. For opinion below, see 211 Pac. 1040. Mr. Geo. P. Glaze, of Oklahoma City, Okl., for petitioner. Messrs. J. A. Shirley and Paul M. Buford, Asst. Co. Atty., both of Durant, Okl., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(262 U. S. 750)

No. 1011. Samuel KRIVIT et al., petitioners, v. The UNITED STATES of America. May 7, 1923. For opinion below, see 288 Fed. 12. Mr. Louis Marshall, of New York City, for petitioners. Mr. James M. Beck, Sol. Gen., of Washington, D. C., and Mrs. Mabel Walker Willebrandt, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(262 U. S. 750)

No. 1023. Ray LEVINSON, petitioner, v. William A. GREENE, Trustee, etc. May 7, 1923. For opinion below, see 212 Pac. 569. Mr. Walter B. Allen, of Seattle, Wash., for petitioner. Messrs. McClure & McClure, of Seattle, Wash. (Mr. Joseph W. Cox, of Washington, D. C., of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied.

(262 U. S. 750)

No. 1024. MANHATTAN INVESTMENT COMPANY, petitioner, v. William A. GREENE, Trustee, etc. May 7, 1923. For opinion below, see 212 Pac. 569. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied.

(262 U. S. 170)

BIANCHI et al. v. MORALES et al.(Submitted on Motion to Affirm April 16, 1923.
Decided May 7, 1923.)

No. 934.

Constitutional law ⚡306—**Mortgages** ⚡381
—Porto Rico Mortgage Act, providing for summary proceedings for foreclosure and limiting defenses, does not deny due process of law.

The provisions of Mortgage Law Regulations of Porto Rico, art. 175, permitting foreclosure by a summary suit in which no defense is permitted but payment, and articles 42, 91, authorizing a separate action to annul the mortgage, in which any defense may be set up, and also providing for a cautionary notice, which the Supreme Court of Porto Rico considered equivalent to an injunction, do not deny due process of law, in view of the common practice under the Roman law, not wholly unknown under the common law, of excluding claims of ultimate right from possessory actions.

Appeal from the District Court of the United States for Porto Rico.

Suit in equity by Francisco Bianchi and another against Manuel Mendia Morales and others. From a decree dismissing the bill, plaintiffs appeal. Decree affirmed on motion.

Mr. Phelan Beale, of New York City, for appellant.

Mr. Carroll G. Walter, of New York City, for appellee.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity filed in the District Court to restrain proceedings under the mortgage law of Porto Rico to foreclose a mortgage. That law gives a summary suit in which, speaking broadly, no defence is open except payment, Mortgage Law Regulations, Art. 175; and it is contended that this deprives the plaintiffs, appellants, of their property without due process of law. The statutes give a separate action to annul the mortgage in which any defense to it may be set up, and also provided for a cautionary notice, Mortgage Law, Art. 42; Mortgage Law Regulations, Art. 91, which the Supreme Court of Porto Rico regards as a sufficient substitute for an injunction. *American Trading Co. v. Monserrat*, 18 Porto Rico, 268. See *Romeu v. Todd*, 206 U. S. 358, 27 Sup. Ct. 724, 51 L. Ed. 1093. The bill was dismissed by the District Court for want of jurisdiction. The appellees move that the decree be affirmed.

The facts stated and admitted in the motion papers make it so plain that the bill cannot be maintained that we shall affirm the decree below without putting the parties

to the expense of printing the full record. Apart from other matters urged by the appellees the constitutional objection is simply another form of the objection to the separation between possessory and petitory suits familiar to countries that inherit Roman law and not wholly unfamiliar in our own. The United States, the States, and equally Porto Rico, may exclude all claims of ultimate right from possessory actions, consistently with due process of law. *Grant Timber & Manufacturing Co. v. Gray*, 236 U. S. 133, 35 Sup. Ct. 279, 59 L. Ed. 501; *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. 403. Before these decisions it had been strongly intimated by Chief Justice White that the foreclosure by summary process allowed by the law of Porto Rico was valid, *Torres v. Lothrop*, 231 U. S. 171, 177, 34 Sup. Ct. 108, 58 L. Ed. 172, and a decision

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to the same effect was rendered by *the Supreme Court of the Island. *Giménez v. Brenes*, 10 Porto Rico, 124. In view of these decisions we are of opinion that the constitutional question raised was only colorable and that the decree dismissing the bill was right.

Decree affirmed.

(262 U. S. 172)

OLIVER IRON MINING CO. v. LORD et al.
No. 560.

CLEVELAND-CLIFFS IRON CO. v. SAME.
No. 561.

MESABA-CLIFFS IRON MINING CO. v. SAME.
No. 562.

BENNETT MINING CO. et al. v. SAME.
No. 563.

REPUBLIC IRON & STEEL CO. et al. v. SAME.
No. 564.

BIWABIK MINING CO. et al. v. SAME.
No. 565.

INTERSTATE IRON CO. v. SAME.
No. 566.

(Argued Dec. 6 and 7, 1922. Decided May 7, 1923.)

I. Licenses ⚡1—**State tax on mining held occupation tax.**

The tax levied by Laws Minn. 1921, c. 223, on all persons engaged in the mining of iron ore or other ore within the state, based on the value of the ore mined during the year immediately after its severance from the soil, is what the statute calls it, an occupation tax, and not a property tax, since it is not laid on the land containing the ore, nor on the ore after removal, but on the business of mining the ore, which is a well-recognized business.

2. Commerce ⇐16—Mining iron ore held not part of interstate commerce.

The mining of iron ore within a state is not interstate commerce, but, like manufacturing, is a local business, subject to local regulation and taxation, even though practically all of the ore mined is shipped out of the state, and, in the case of open pit mining especially, there is practically no break in the continuity of movement from the time the ore is severed from the land until it starts in its interstate transportation.

3. Commerce ⇐16—Character of mining as local business is not affected by disposition of product.

The character of mining as a local business is intrinsic, and is not affected by the intended use or disposal of the product, by contractual engagements or shipment of the product in interstate commerce, nor by the close connection between the business and interstate commerce.

4. Commerce ⇐63—State tax on mining ore subsequently shipped to another state is not forbidden burden on interstate commerce.

Ore mined within a state does not enter interstate commerce until after the mining is done, and, even if the state tax imposed on the business of mining it by Laws Minn. 1921, c. 223, indirectly and incidentally affects interstate commerce, it is not a forbidden burden or interference; there being no discrimination against interstate commerce.

5. Constitutional law ⇐230(2)—Licenses ⇐7(3)—State may levy occupation tax on only one class.

The Legislature of a state may, under both Const. U. S. Amend. 14, guarantying equal protection of the laws, and under Const. Minn. art. 9, § 1, requiring uniform taxation of the same class of subjects, exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes, and may select those who are engaged in one class of business and exclude all others, if all similarly situated are brought within the class and are dealt with according to uniform rules.

6. Licenses ⇐7(3)—Selection of those mining ore on own account for taxation as owners or lessees is permissible.

The selection of all who are engaged within the state in mining ore or producing ores on their own account, that is to say, as owners or lessees, as the subjects of an occupation tax, is permissible.

7. Licenses ⇐7(3)—Exemption of contractors from mining occupation tax does not invalidate it.

The exemption from a state tax on the occupation of mining ore, of contractors who strip off the overburden of soil, who load the ore in the cars, or take it out of underground mines, all of whom are in effect employees of those engaged in producing the ore, does not invalidate the tax.

8. Constitutional law ⇐230(2)—Licenses ⇐7(3)—Exemption of unproductive mining from occupation tax does not invalidate it.

The exemption from the mining occupation tax of all owners and lessees, who do extensive development work, but remove no ore, does not invalidate the tax, since equality does not require that unproductive mining be taxed along with productive, and, if ore is uncovered by such development work, the tax will be imposed when it is mined.

9. Constitutional law ⇐42—Invalidity of exemptions which there is no one to claim cannot be attacked by taxpayer.

Under the rule that only those whose rights are directly affected can properly question the constitutionality of a state statute, lessees engaged in the mining of iron ore for which they pay royalties to the owner cannot object that the provisions of the state occupation tax, exempting royalties from the computation of the tax, is a discrimination in favor of those who lease, and against those who operate and own mines and pay no royalties, especially where the record showed that all but six mines in the state were operated under leases, and that none of the other six were operated in any way during the year for which the tax was imposed.

10. Licenses ⇐7(2)—Inequality of deductions in computing occupation tax held permissible.

The fact that the deduction, from the occupation tax on mining ore, of the royalties paid, before computing the value of the ore which was the basis of the tax, would subject some of the taxpayers to a higher tax than others, because of the differences in royalties paid by them, does not invalidate the tax, any more than the provision for deduction of other taxes and expenses, which would differ in different mines.

Appeals from the District Court of the United States for the District of Minnesota,

Separate suits in equity by the Oliver Iron Mining Company, by the Cleveland-Cliffs Iron Company, by the Mesaba-Cliffs Iron Mining Company by the Bennett Mining Company and others, by the Republic Iron & Steel Company and others, by the Biwabik Mining Company, and others, and by the Interstate Iron Company against Samuel Lord and others, to restrain the enforcement of a state taxing act. From decrees dismissing the complaints, complainants appeal in each case. Affirmed.

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*Mr. C. A. Severance, of St. Paul, Minn., for appellant Oliver Iron Mining Co.

Mr. H. J. Grannis, of Duluth, Minn., for appellants Cleveland-Cliffs Iron Co. and Mesaba-Cliffs Iron Mining Co.

Messrs. Oscar Mitchell and Wm. D. Bailey, both of Duluth, Minn., for appellants Bennett Mining Co. and others and Republic Iron & Steel Co. and others.

Mr. E. W. MacPherran, of Duluth, Minn., for appellants Biwabik Mining Co. and others and Interstate Iron Co.

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*Messrs. Egbert S. Oakley and Patrick J. Ryan, both of St. Paul, Minn., for appellees.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

These are suits to restrain and prevent the enforcement of a taxing act adopted by the state of Minnesota, April 11, 1921. Chapter 223, Laws 1921. The principal sections of the act are copied in the margin¹ and may be summarized as follows: The first subjects all who are "engaged in the busi-

¹"Section 1. Every person engaged in the business of mining or producing iron ore or other ores in this state shall pay to the state of Minnesota an occupation tax equal to 6 per cent. of the valuation of all ores mined or produced, which said tax shall be in addition to all other taxes provided for by law, said tax to be due and payable from such person on May 1 of the year next succeeding the calendar year covered by the report thereupon to be filed as hereinafter provided.

"Sec. 2. The valuation of iron or other ores for the purposes of determining the amount of tax to be paid under the provisions of section 1 of this act shall be ascertained by subtracting from the value of such ore at the place where the same is brought to the surface of the earth, such value to be determined by the Minnesota Tax Commission:

"1. The reasonable cost of separating the ore from the ore body, including the cost of hoisting, elevating, or conveying the same to the surface of the earth.

"2. If the ore is taken from an open pit mine, an amount for each ton of ore mined or produced during the year equal to the cost of removing the overburden, divided by the number of tons of ore uncovered, the number of tons of ore uncovered in each such case to be determined by the Minnesota Tax Commission.

"3. If the ore is taken from an underground mine, an amount for each ton of ore mined or produced during the year equal to the cost of sinking and construction shafts and running drifts, divided by the number of tons of ore that can be advantageously taken out through such shafts and drifts, the number of tons of ore that can be advantageously taken out in each such case to be determined by the Minnesota Tax Commission.

"4. The amount of royalties paid on the ore mined or produced during the year.

"5. A percentage of the ad valorem taxes levied for said year against the realty in which the ore is deposited equal to the percentage that the tons mined or produced during such year bears to the total tonnage in the mine.

"6. The amount or amounts of all the foregoing subtractions shall be ascertained and determined by the Minnesota Tax Commission.

"Sec. 3. Every person engaged in such mining or production of ores shall, on or before the first day of February, 1922, and annually thereafter on or before the first day of February of each year, file with said Commission under oath a correct report in such form and containing such information as the Tax Commission may require, covering the preceding calendar year."

"Sec. 6. If any person, subject to this act, shall fail to make the report provided for in section 3 hereof at the time and in the manner therein provided, the Tax Commission shall in such case, upon such information as it may possess or obtain, ascertain the kind and amount of ore mined or produced, together with the valuation thereof, and shall thereon find and determine the amount of the tax due from such person, and there shall be added thereto a penalty for failure to report, which penalty shall equal ten per cent. of the tax imposed and shall be treated as a part thereof."

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er *ores" within the state to the payment in each year of "an occupation tax" equal to 6 per cent. of the value of the ore mined or produced during the preceding year—such tax to be "in addition to all other taxes." The second directs that the tax be computed on the value of the ore at the place where it is "brought to the surface of the earth" less certain deductions to be noticed presently. The third requires all who are engaged in such business to make on or before the 1st of February in each year a true report under oath of relevant information respecting their mining operations during the preceding year. And the sixth provides that, where such a report is not made, the State Tax Commission shall determine, from such information as it may possess or obtain, the amount and

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*value of the ore, and shall compute the tax and include therein a penalty of 10 per cent. for the failure to make the report.

The plaintiffs are corporations engaged in the business of mining or producing iron ore from mines within the state, and the defendants are the officers designated to carry the act into effect.

Preparatory to assessing the tax in 1922 the defendants requested the plaintiffs to make the prescribed reports of their mining operations during 1921, which the plaintiffs refused to do because they conceived that the act was invalid. The defendants then proceeded to take the requisite steps for imposing the tax, and the plaintiffs brought these suits to restrain and prevent such action on the grounds that the act and the tax about to be imposed were in conflict with the commerce clause of the Constitution of the United States, with the equal protection clause of the Fourteenth Amendment, and with a clause in section 1 of article 9 of the state Constitution providing:

"Taxes shall be uniform upon the same class of subjects."

The cases were heard together on an agreed statement of facts and some supplemental evidence which was free from conflict. One of the matters stipulated was that the suits were brought in circumstances making them cognizable in equity. The District Court sustained the act and the tax and dismissed the suits on the merits. The cases are here on direct appeals by the plaintiffs under section 238 of the Judicial Code (Comp. St. § 1215).

[1] The parties differ about the nature of the tax; the plaintiffs insisting it is a property tax, and the defendants that it is an occupation tax. Both treat the question as affecting the solution of other contentions. There has been no ruling on the point by the Supreme Court of the state. We think the tax in its essence is what the act calls it—an occupation tax. It is not laid on the land containing the ore, nor on the ore after re-

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moval, but on *the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts. Mining is a well-recognized business, wherein capital and labor are extensively employed. This is particularly true in Minnesota. Obviously a tax laid on those who are engaged in that business, and laid on them solely because they are so engaged, as is the case here, is an occupation tax. It does not differ materially from a tax on those who engage in manufacturing. *Stratton's Independence v. Howbert*, 231 U. S. 399, 414, 34 Sup. Ct. 136, 58 L. Ed. 285; *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 114, 36 Sup. Ct. 278, 60 L. Ed. 546. The plaintiffs regard *Dawson v. Kentucky Distilleries & Warehouse Co.*, 235 U. S. 288, 41 Sup. Ct. 272, 65 L. Ed. 638, as making the other way. But that case is not in point. The tax there considered, as the opinion shows (255 U. S. 292-294, 41 Sup. Ct. 272, 65 L. Ed. 638), was not laid on any business, but on the mere exertion by an owner of distilled spirits of his right to withdraw them from a bonded warehouse, and had "none of the ordinary incidents of an occupation tax."

We shall therefore treat the tax as an occupation tax in dealing with the contentions presented.

[2] The chief contention is that mining as conducted by the plaintiffs, if not actually a part of interstate commerce, is so closely connected therewith that to tax it is to burden or interfere with such commerce, which a state cannot do consistently with the commerce clause of the Constitution of the United States.

The facts on which the contention rests are as follows: The demand or market within the state for iron ore covers only a negligible percentage of what is mined by the plaintiffs.² Practically all of their output is mined to fill existing contracts with consum-

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ers outside the state *and passes at once into the channels of interstate commerce. Three-fourths of it is from open pit mines and one-fourth from underground mines. At the open pit mines empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. The several steps follow in such succession that there is practical continuity of movement from the time the ore is severed from its natural bed. The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transportation is

by public carriers. At the underground mines the plaintiffs dig the ore, bring it to the surface through shafts and put it in elevated pockets where it readily can be loaded into cars. The subsequent movements are much the same as at the open pit mines, but their continuity is not so pronounced. Some of the ore from both kinds of mines—between 10 and 20 per cent.—is concentrated by washing or beneficiated after coming out of the mine and before starting out of the state, but our conclusion respecting the usual operations renders this deflection immaterial.

[3] Plainly the facts do not support the contention. Mining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation. *Kidd v. Pearson*, 128 U. S. 1, 20, 9 Sup. Ct. 6, 32 L. Ed. 346; *Capital Dairy Co. v. Ohio*, 183 U. S. 238, 245, 22 Sup. Ct. 120, 46 L. Ed. 171; *Delaware, Lackawanna & Western R. Co. v. Yurkonis*, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397; *Hammer v. Dagenhart*, 247 U. S. 251, 272, 38 Sup. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 410, 42 Sup. Ct. 570, 66 L. Ed. 975. Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements,

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and persists even though the *business be conducted in close connection with interstate commerce. *Cornell v. Coyne*, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. Ed. 504; *Browning v. Waycross*, 233 U. S. 16, 22, 34 Sup. Ct. 578, 58 L. Ed. 828; *Delaware, Lackawanna & Western R. Co. v. Yurkonis*, supra; *General Railway Signal Co. v. Virginia*, 246 U. S. 500, 38 Sup. Ct. 360, 62 L. Ed. 854; *Hammer v. Dagenhart*, supra; *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 151, 39 Sup. Ct. 237, 63 L. Ed. 517; *Crescent Cotton Oil Co. v. Mississippi*, 257 U. S. 129, 136, 42 Sup. Ct. 42, 66 L. Ed. 166; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 43 Sup. Ct. 83, 67 L. Ed. —.

[4] The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference.

The contentions made under the equal protection provision of the Fourteenth Amendment and under the state constitutional provision that "taxes shall be uniform upon the same class of subjects" present a question of classification and have been argued together.

[5, 6] Consistently with both provisions, the Legislature of the state may exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes. It may select those who are engaged in

² In 1921, out of a total output of 18,167,370 tons, the amount sold and used within the state was 261,622 tons.

one class of business and exclude others, if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules. *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 121, 30 Sup. Ct. 496, 54 L. Ed. 688; *State ex rel. v. Parr*, 109 Minn. 147, 152, 123 N. W. 408, 134 Am. St. Rep. 759. Here the selection is of all who are engaged in mining or producing ores on their own account; that is to say, as owners or lessees. The selection seems to be an admissible one, so we turn to the objections urged against it.

[7] One is that contractors who strip off the overburden of soil, gravel, etc., in open

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pit mines, other contractors who *load the ore in such mines into cars, and still others, usually four in a group, who take ore out of underground mines, are not included. But none of these are engaged in mining on their own account. Instead, they are working for those who are so engaged. However important their service, they are not principals in the business, but employees; and their pay, whatever it be, is part of the expense of the business. Their omission has a reasonable basis.

[8] Another objection is that all owners and lessees who mine or produce ore are included, while those who do extensive development work, but remove no ore, are omitted. This is not fairly subject to criticism. Equality does not require that unproductive mining be taxed along with productive mining. Besides, if ore is uncovered or made accessible by such development work, the tax will be imposed when the ore is mined.

[9] Among the deductions which the act provides shall be made from the value of the ore before computing the tax is "the amount of royalties paid on the ore mined and produced during the year." This provision is assailed as working a serious discrimination in favor of those who operate under leases and pay royalties, as all the lessees do, and against owners who operate their own mines and pay no royalties. The question is an important one, and has not been before the Supreme Court of the state. It apparently requires a construction of the particular provision along with other parts of the act, and possibly of the state constitutional provision. After that it may be that there would be need for turning to the Fourteenth Amendment. "Only those whose rights are directly affected can properly question the consti-

tutionality of a state statute and invoke our jurisdiction in respect thereto." *Hendrick v. Maryland*, 235 U. S. 610, 621, 35 Sup. Ct. 140, 142 (59 L. Ed. 385); *Hatch v. Reardon*, 204 U. S. 152, 160, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 34 Sup. Ct. 359, 58 L. Ed. 713. The record shows that of the many iron mines in the state all

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but six are operated *under leases, and that none of the six was operated in any way during 1921, the year in respect of which the tax was about to be imposed when these suits were begun. Therefore no tax could be imposed in respect of the six mines based on that year's operations, and it is made plain that the defendants have no purpose to impose one. It cannot be merely assumed that mining has been resumed at those mines, nor that any tax in respect of them for later years is now threatened. The situation in these cases is therefore such that none of the plaintiffs is entitled to invoke a decision of the question. We accordingly leave it entirely open.

[10] It also is said that the royalty provision and others respecting deductions will work a discrimination as between different lessees in that some will be subjected to a higher tax than others. No doubt there will be differences in the amount, but they will result from differences in situation and not from differences in treatment. Some lessees pay higher royalties than others and will secure a higher deduction on that score. Some are subjected to greater expense in mining than others and will secure reductions accordingly. And some are subjected to higher local taxes on their mines than others—the mines being scattered through several counties and minor municipal subdivisions—and this will cause the deductions to vary. But all lessees will have the benefit of deductions adjusted to the royalties, expenses and taxes actually paid; and the value of the ore, according to which the tax will be computed, will in each instance be its actual value when it is brought out of the mine less those deductions. In short, the tax is to be adjusted to the value of the output less the major expenses of the business, and this according to uniform rules. We therefore cannot say that it is intended to or will work any arbitrary or unreasonable discrimination as between different lessees.

Decrees affirmed.

(262 U. S. 159)

MAGNUM IMPORT CO. v. COTY.
No. 978.**COHN v. SAME.**
No. 979.**BAUM et al. v. SAME.**
No. 980.**IVORY NOVELTIES TRADING CO., Inc., v. SAME.**
No. 982.**MAGNUM IMPORT CO. v. HOUBIGANT, Inc.**
No. 981.(Argued on Return to Rule April 16, 17, 1923.
Decided May 7, 1923.)**1. Certiorari** ⇨47—Supreme Court has jurisdiction to suspend decree pending application for certiorari.

Under Judicial Code, § 262 (Comp. St. § 1239), authorizing issuance of writs necessary for exercise of jurisdiction, the Supreme Court has jurisdiction to suspend or modify order or decree of the Circuit Court of Appeals pending application for writ of certiorari in trade-mark case, which it has jurisdiction to review under section 240 (Comp. St. § 1217) and section 128, as amended by Act Jan. 28, 1915, § 2 (Comp. St. § 1120).

2. Courts ⇨383(f)—Jurisdiction of Supreme Court on certiorari not intended to give defeated party another hearing.

The jurisdiction conferred on the Supreme Court to review decrees of the Circuit Courts of Appeals on certiorari was not conferred merely to give the defeated party another hearing, but to secure uniformity of decision and to bring up cases of importance, which it is in the public interest to have decided by the court of last resort.

3. Certiorari ⇨47—Application to suspend decree should first be made to Circuit Court of Appeals.

Petition to suspend or modify decree of the Circuit Court of Appeals pending application to the Supreme Court for a writ of certiorari should in the first instance be made to the Circuit Court of Appeals.

4. Certiorari ⇨47—Suspension of decree pending application is discretionary.

While the Circuit Court of Appeals may, in its discretion, facilitate an application to the Supreme Court for a writ of certiorari by withholding its mandate or suspending its decree, this is a matter wholly within its discretion, and refusal to do so involves no disrespect for the Supreme Court.

5. Certiorari ⇨47—Extraordinary showing required to suspend decree pending application.

When the Circuit Court of Appeals refuses to withhold its mandate or suspend its decree pending application to the Supreme Court for writ of certiorari, it requires an extraordinary showing before the Supreme Court will grant a stay, and, even after it has granted the writ

of certiorari, a clear case and a decided balance of convenience must exist.

Petitions for Orders Pending Applications for Certiorari, Suspending Decrees of the Circuit Court of Appeals of the Second Circuit.

Suits by Francois Joseph de Spoturno Coty against the Magnum Import Company, against Max L. Cohn, against Arthur Baum and another, and against the Ivory Novelties Trading Company, Inc., and by Houbigant, Incorporated, against the Magnum Import Company. A decree in each suit in favor of plaintiff was modified by the Circuit Court of Appeals, and defendants apply for certiorari and pray for orders suspending the decrees pending such applications. Petitions for orders suspending decrees denied.

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*Mr. Charles H. Tuttle, of New York City, for petitioners.

Mr. Asher Blum, of New York City, for respondent Coty.

Mr. Geo. S. Hornblower, of New York City, for respondent Houbigant, Inc.

Mr. Chief Justice TAFT delivered the opinion of the Court.

All these cases involved the question how far the purchasers of perfumes made by manufacturers whose perfumes have gained a high reputation with the public may use the name and trade-mark of such manufacturers in rebottling or repacking and selling them, when as claimed by the manufacturers and owners of the trade-mark, the process of rebottling and repacking injures the perfumes and impairs the value of the trade-mark and the reputation of the manufacturers. In a case presenting a similar question, to wit, *Prestonettes, Inc., v. Coty*, No. 793, 260 U. S. 720, 43 Sup. Ct. 250, 67 L. Ed. —, October Term, 1922, January 22, 1923, this court granted a writ of certiorari, and applications in the above entitled cases are now pending. They are also before us on petitions praying that this court issue orders suspending the operation of the decrees of the Circuit Court of Appeals and that, pending the applications for certiorari in this court, we restore the temporary injunctions of the District Court which the Circuit Court of Appeals enlarged.

The District Court found that the defendants in all these cases were infringing the rights of the complainants in their trade-

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marks and the use of their trade-names, *but thought it sufficient to permit the defendants to continue their rebottling and repacking of complainants' perfumes and powders if, in the form in which resold, the bottles or boxes bore a legend reciting all the facts and not giving any more prominence to the fact that these were complainants' perfumes or powders than to the fact that they had been re-

bottled and repacked by defendants. The Circuit Court of Appeals found that such rebottling and repacking as done by defendants so impaired the delicate odors and qualities of the perfumes and powders that it unlawfully injured the right of the complainants in their trade-marks and business, that such rebottling and repacking and resale with the use of the original manufacturer's trade-mark and name were a violation of a criminal statute of the state of New York, that the proposed inspection of defendants' rebottling and repacking with a view to preserving the excellence of the perfumes and powders would entail such expense and burden upon complainants as to be impracticable, and that the only complete and satisfactory remedy to which complainants were entitled was an injunction against the use of the complainants' trade-marks or names upon the rebottled or repacked articles for sale, and the temporary injunctions granted by the District Court were accordingly modified and the case was remanded to the District Court for final hearing. Applications were then made to the Circuit Court of Appeals to stay the mandate and to grant an application upon proper bond to suspend its modification of the District Court's orders until applications for certiorari and motions for a suspending order could be made to this court. After full consideration, these motions were denied by the Circuit Court of Appeals, its mandate has gone down and the injunctions as enlarged by it are now in force. Meantime these applications for certiorari have

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been made here, and in advance of our consideration of them in due course, motions for the suspension of the orders of the Circuit Court of Appeals have been presented to us on affidavits and heard, and are now to be decided.

[1] It is objected for Houbigant, one of the respondents in these petitions for certiorari, that this court has no jurisdiction to suspend the operation of the order or decree of the Circuit Court of Appeals pending a petition for certiorari and before it is granted. The cases of *In re Massachusetts*, 197 U. S. 482, 25 Sup. Ct. 512, 49 L. Ed. 845, *In re Glaser*, 198 U. S. 171, 25 Sup. Ct. 653, 49 L. Ed. 1000, and *McIntire v. Wood*, 7 Cranch, 504, 3 L. Ed. 420, are cited to this point. They are wholly without application. The first two were cases pending in inferior courts which, under the Constitution and the statutes of the United States could never, by any possibility, come within the jurisdiction of this court. The third case was one of an application to a Circuit Court for the issuing of a mandamus to the register of the land office to compel him to issue a final certificate of purchase of land to the relator. This court found that under the statute, the Circuit Court was not given original power to issue a mandamus in such a case when not neces-

sary or ancillary to the exercise of its jurisdiction otherwise conferred.

Under section 262 of the Judicial Code (Comp. St. § 1239) this court is given power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law. Here the jurisdiction of this court to grant the application for certiorari already made and pending is conferred by section 240 of the Judicial Code (Comp. St. § 1217). That section provides that in any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final, it shall be competent for this court by certiorari upon the petition of a party thereto to bring the case here for review as if it had come by error or appeal. By section 128 of the Judicial

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Code as amended by the Act of *Jan. 28, 1915, c. 22, § 2, 38 Stat. 803 (Comp. St. § 1120), the judgment or decree of the Circuit Courts of Appeals is made final in trade-mark cases. Hence if, in its discretion, this court conceives that upon the showing made it should order the suspension or modification of a judgment or decree of the Circuit Court of Appeals, interlocutory or final, to preserve or secure a status of the case for the full and satisfactory exercise of its reviewing power over it, it may make the necessary order of suspension or modification upon such terms as seem equitable upon the filing of the petition for certiorari and pending its disposition. So much on the question of the power.

[2] The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80 per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. When, therefore, after the petition is filed and before its submission, an application is made for a suspension of the judgment or decree of the Circuit Court of Appeals, a heavy burden rests on the applicant.

[3-5] The petition should, in the first instance, be made to the Circuit Court of Appeals which with its complete knowledge of the cases may with full consideration promptly pass on it. That court is in a position to judge first whether the case is one likely under our practice to be taken up by us on certiorari, and second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate. It

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involves no dis*respect to this court for the Circuit Court of Appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us. If it thinks a question involved should be ruled upon by this court, it may certify it. If it does not certify, it may still consider that the case is one in which a certiorari may properly issue, and may in its discretion facilitate the application by withholding the mandate or suspending its decree. This is a matter however wholly within its discretion. If it refuses, this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari, and even after it has granted a certiorari, it requires a clear case and a decided balance of convenience before it will grant such stay. These remarks, of course, apply also to applications for certiorari to review judgments and decrees of the highest courts of states.

Coming now to the circumstances presented on the inquiry before us, we find nothing to justify our granting the motion. It is clear that the Circuit Court of Appeals gave full consideration to a similar motion and with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a matter. We have read the affidavits and we do not find that the petitioners have, in the light of what we have said, made a case for the suspension of the order. On the contrary, the weight of the evidence is clearly with the respondents.

The petitions are denied.

(262 U. S. 147)

DIER v. BANTON, Dist. Atty. of New York County, et al.

(Argued April 17, 1923. Decided May 7, 1923.)

No. 330.

1. Bankruptcy ⚡242(2)—When bankrupt loses possession of books and papers, his right to object to their use as evidence ceases.

When, in due course of bankruptcy proceedings, possession and control of the bankrupt's books and papers pass from him into the hands of the receiver and into the custody of the court, his right to object to their use as evidence against him under the Fourth and Fifth Amendments ceases until their return to him.

2. Bankruptcy ⚡242(2)—Bankrupt cannot attach conditions to surrender of books and papers.

A bankrupt cannot make his surrender of books and papers to the receiver in bankruptcy conditional on their not being used against him as evidence in any criminal case.

3. Bankruptcy ⚡20(1)—Books and papers cannot be taken under state court subpoena without bankruptcy court's consent.

When a bankrupt's books and papers are in the custody of the bankruptcy court, they cannot be taken therefrom by subpoena of a state court, except with the bankruptcy court's consent.

4. Courts ⚡504—Court exercises discretion, dependent on circumstances and in view of comity, when books and papers sought on state court's subpoena.

In granting or withholding consent to the taking, under a subpoena from a state court, of books and papers of a bankrupt in the custody of the bankruptcy court, that court exercises a judicial discretion, dependent on the circumstances and having due regard to the comity which should be observed toward state courts exercising jurisdiction within the same territory.

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of Elmore D. Dier and others, bankrupts. From an order (279 Fed. 274) denying an injunction against Joab H. Banton, District Attorney of the County of New York, and another, and discharging a rule nisi, the bankrupts appeal. Affirmed.

Mr. Nash Rockwood, of New York City, for appellants.

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*Mr. John Caldwell Myers, Asst. Dist. Atty., of New York City, for appellees.

Mr. Chief Justice TAFT delivered the opinion of the Court.

[1] This appeal is from an order of the District Court for the Southern District of

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New York discharging a rule nisi and *refusing an injunction. On January 14th a petition in involuntary bankruptcy was filed against Elmore D. Dier and others, partners, as E. D. Dier & Co. Two days after the filing of the petition, Mandred Ehrich was appointed receiver of the estate of the alleged bankrupts, and they and their servants were directed to turn over all their property, assets, account books and records, and were restrained from suing out of any other court any process to impound or take possession of them. This order was complied with and the receiver took possession of the books and papers of the alleged bankrupts and of the firm. On February 16th, Dier informed the court that the district attorney of New York City had applied to the receiver for the production of these books and papers before the grand jury, and asked for the rule nisi against the receiver and the district attorney, and upon a hearing thereof an injunction to prevent the use of such books and papers against him before the grand jury, on the ground that they would incriminate him and that his right to refuse to testify against himself under the Fourth and Fifth Amend-

ments would thus be violated by the process of the federal District Court. Judge Learned Hand, sitting in bankruptcy, discharged the rule and refused to enjoin the proposed use of the books. Judge Hand's action was based on the ruling of this court in *Johnson v. United States*, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263. He quoted the language used in the *Johnson Case*:

"A party is privileged from producing the evidence, but not from its production."

He alluded to the circumstance that in the *Johnson Case* there were both title and possession in the trustee, whereas in this case the books and papers were in the hands of the receiver, who has no title; but that, he said, made no difference. We agree with this view, and hold that the right of the alleged bankrupt to protest against the use of his books and papers relating to his business as evidence against him ceases as soon as his

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possession and control over them pass from him by the order directing their delivery into the hands of the receiver and into the custody of the court. This change of possession and control is for the purpose of properly carrying on the investigation into the affairs of the alleged bankrupt and the preservation of his assets pending such investigation, the adjudication of bankruptcy vel non, and, if bankruptcy is adjudged, the proper distribution of the estate. It may be that the allegation of bankruptcy will not be sustained, and in that case the alleged bankrupt will be entitled to a return of his property, including his books and papers, and, when they are returned, he may refuse to produce them and stand on his constitutional rights. But while they are, in the due course of the bankruptcy proceedings, taken out of his possession and control, his immunity from producing them, secured him under the Fourth and Fifth Amendments, does not inure to his protection. He has lost any right to object to their use as evidence because, not for purpose of evidence, but in the due investigation of his alleged bankruptcy and the preservation of his estate pending such investigation, the control and possession of his books and papers relating to his business were lawfully taken from him.

[2] It is pressed upon us that the bankrupt may prevent the use of such books and papers taken over by a receiver in the bankruptcy proceedings for evidence in a criminal case in the state court by resisting surrender and protesting against their use for such a purpose at the time the receiver took possession. But we think the alleged bankrupt has no such right. We so held in *Matter of Fuller*, 262 U. S. 91, 43 Sup. Ct. 496, 67 L. Ed. —, decided April 30, 1923, in which it was sought to attach conditions of this kind to

the turning over of the books and papers of a bankrupt to the trustee in bankruptcy. We are of opinion that the same principle must apply to the delivery of the books and papers relating to the bankrupt's business and property included in the estate into the custody of the receiver of the bankruptcy court.

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[3, 4] *Of course, where such books and papers are in the custody of the bankruptcy court, they cannot be taken therefrom by subpoena of a state court, except upon consent of the federal court. In granting or withholding that consent, the latter exercises a judicial discretion dependent on the circumstances, and having due regard to the comity which should be observed toward state courts exercising jurisdiction within the same territory. *Ponzi v. Fessenden*, 258 U. S. 254, 259, 42 Sup. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879. All we hold here is that, the court below having exercised discretion to allow the use of the books and papers in the custody of its officer upon subpoena by another court, the alleged bankrupt's rights under the Fourth and Fifth Amendments have not been violated.

Order affirmed.

(262 U. S. 182)

CITY OF TRENTON v. STATE OF NEW JERSEY.

(Argued March 2, 1923. Decided May 7, 1923.)

No. 430.

1. Waters and water courses ☞202—State has power and duty to control and conserve water resources.

A state has the power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants.

2. Waters and water courses ☞190—City could only acquire right to divert water from state, or one to whom right had been granted by state.

The only way a city could acquire the right to divert water from a river for the use of its inhabitants was by grant from the state, or by authorized purchase or condemnation from one to whom the right had been granted by the state.

3. Constitutional law ☞50—Determination of conditions of diversion of water is legislative function.

The power to determine the conditions on which waters may be diverted from a stream is a legislative function, and the state may grant and withhold the privilege as it sees fit.

4. Municipal corporations ☞53—City is political subdivision created as agency to exercise governmental powers intrusted to it.

A city is a political subdivision of the state, created as a convenient agency for the exercise of such governmental powers of the state as may be intrusted to it.

5. Constitutional law $\S$ 63(2)—State may perform function of furnishing water directly or through political bodies or municipalities, or leave it to bodies politic or municipalities.

The state may leave the function of diverting water for the use of the inhabitants of the state to private enterprises, subject to state regulation, or perform it directly, or delegate it to bodies politic created for that purpose, or to municipalities.

6. Municipal corporations $\S$ 57 — No inherent right of self-government beyond control of the state.

In the absence of state constitutional provisions, municipalities have no inherent right of self-government which is beyond the legislative control of the state.

7. Municipal corporations $\S$ 54—State may grant or withdraw powers or privileges as it sees fit.

A municipality is merely a department of the state and the state may withhold, grant, or withdraw powers and privileges as it sees fit, however great or small the sphere of action of the municipality.

8. Constitutional law $\S$ 127—Municipal corporations $\S$ 68—State's power over city's property and rights unrestrained by contract clause or Fourteenth Amendment.

The power of a state over the rights and property of cities held and used for governmental purposes is unrestrained by the contract clause or the Fourteenth Amendment of the federal Constitution.

9. Constitutional law $\S$ 124—Waters and water courses $\S$ 182—City cannot invoke contract clause or Fourteenth Amendment against state's imposition of fee or charge on diversion of water.

The distinction between a municipality's governmental and proprietary capacities gives a city no right to invoke the contract clause or the Fourteenth Amendment of the federal Constitution against the state's imposition of a fee or charge on the diversion of water from streams, though it diverts such water under the rights acquired by the purchase of the property of a water company, to which such right had been granted by the state.

10. Courts $\S$ 394(9, 10)—Contention of city that state's imposition of charge on diversion of water violates federal Constitution raises no substantial federal question.

The contention of a New Jersey city, diverting water from streams for use of its inhabitants under rights acquired by its purchase of the property of a water company, that the imposition by the state of a fee or charge on such diversion by Act N. J. June 17, 1907 (P. L. p. 633), violates its rights under the contract clause and the due process clause of the Fourteenth Amendment of the federal Constitution, presents no substantial federal question on writ of error to the state court.

Error to the Supreme Court of the State of New Jersey.

Action by the State of New Jersey against the City of Trenton. A judgment for plaintiff was affirmed by the Court of Errors and Appeals of New Jersey (117 Atl. 158), and defendant brings error. Writ of error dismissed.

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*Mr. A. V. Dawes, of Trenton, N. J., for plaintiff in error.

Mr. William Newcorn, of Plainfield, N. J., for the State of New Jersey.

Mr. Justice BUTLER delivered the opinion of the Court.

The state of New Jersey recovered judgment against the city of Trenton for \$14,310, in an action brought in the state Supreme Court. The judgment was affirmed by the Court of Errors and Appeals, and is here on writ of error.

The state's right to recover depends upon the validity of an act of the Legislature (chapter 252, Laws of 1907). The city asserts that this act offends against the contract clause of the Constitution of the United States, and that it takes property owned by the city in its private or proprietary capacity for public use without just compensation and without due process of law, in violation of the Fourteenth Amendment. The act provides that:

"Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water supply shall make annual payments on the first day of May to the state treasurer for all such water hereafter diverted in excess of the amount now being legally diverted: Provided, however, no payment shall be required until such legal diversion shall exceed a total amount

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equal to one hundred *(100) gallons daily per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five." Section 8.

The city claims the right to take from the Delaware river all the water that it requires, without limitation as to quantity and without license fee for any part thereof, and that such right was acquired by the president and directors of the Trenton Waterworks (hereinafter called the water company) by grant direct from the state March 24, 1852, and that the city acquired this right by purchase from the water company. Briefly, the basis of the city's claim is as follows:

By an act of February 29, 1804, the president and directors of the Trenton Waterworks were created a body politic and corporate. They and their successors and assigns were made capable of disposing of water to such as might apply for the same for such annual rent and under such restrictions as they might think proper, and they were authorized to lay and extend their water

mains through the streets of the city. Certain springs constituted the company's source of supply, and by reason of increase of population ceased to be adequate. March 24, 1852 (P. L. p. 289), a supplement to the above-mentioned act was passed, by which the company was authorized to take the water required either in whole or in part from the Delaware river. Later, March 2, 1855 (P. L. p. 141), an act was passed, authorizing the city to purchase the whole or a majority of the shares of the capital stock of the water company, and the city purchased all of the stock. Thereafter an act of March 1, 1859 (P. L. p. 38), required the company to convey unto "the inhabitants of the city of Trenton" all the real estate, works and property and all the corporate powers, franchises and privileges of the company, and this conveyance was duly made.

If the provision of the act of 1907 imposing the license fee is valid as against the

city, the judgment is right. *The Court of Errors and Appeals held that it was valid, that the state under its police power might impose a license fee as specified in the act, and that this does not deprive the city of any contractual or property right.

[1-3] The state undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the act of 1907 was passed pursuant to the policy of the state to prevent waste and to economize its water resources. Decision of the Court of Errors and Appeals in this case, 117 Atl. 158; *McCarter v. Hudson Water Co.*, 70 N. J. Eq. 695, 701, 702, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116, †affirmed by this court in 209 U. S. 349, 355, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; *Collingswood v. Water-Supply Commission*, 84 N. J. Law, 104, 110, 86 Atl. 660; *Cobb v. Davenport*, 32 N. J. Law, 369, 378. The only way the city could acquire the right to take the water of the Delaware river was by grant from the state or by authorized purchase or condemnation from one to whom the right had been granted by the state. *State v. Jersey City*, 94 N. J. Law, 431, 433, 111 Atl. 544, 19 A. L. R. 646. The power to determine the conditions upon which waters may be so diverted is a legislative function. The state may grant or withhold the privilege as it sees fit. Assuming in favor of the city, that its grantor received a perpetual right, unburdened by license fee or other charge, to divert all the water required for the use of the city and its inhabitants, does it follow that the state as against the city is bound by contract and is without power to impose a license fee as provided in the act?

[4, 5] The relations existing between the state and the water company were not the same as those between the state and the city. The company was organized and car-

ried on its business for pecuniary profit. Its rights and property were privately owned and therefore safeguarded by the constitutional provisions here sought to be invoked by the city against the legislation of the state. The city is a political subdivision of

the state, created as a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted to it. The diversion of waters from the sources of supply for the use of the inhabitants of the state is a proper and legitimate function of the state. This function may be left to private enterprise, subject to regulation by the state; it may be performed directly; or it may be delegated to bodies politic created for that purpose, or to the municipalities of the state. Power to own, maintain and operate public utilities, such as waterworks, gas and electric plants, street railway systems, public markets, and the like is frequently conferred by the states upon their cities and other political subdivisions. For the purpose of carrying on such activities, they are given power to hold and manage personal and real property.

As said by this court, speaking through Mr. Justice Moody, in *Hunter v. Pittsburgh*, 207 U. S. 161, 178, 179, 28 Sup. Ct. 40, 46 (52 L. Ed. 151):

"The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state, within the meaning of the federal Constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme and its legislative body, conforming its action to the state Con-

stitution, may do as it will, unrestrained by any provision of the Constitution of the United States. * * * The power is in the state and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

In New Jersey it has been held that within the limits prescribed by the state Constitution, the Legislature may delegate to municipalities such portion of political power as they may deem expedient, withholding other powers, and may withdraw any part of that which has been delegated. *Van Cleve v. Passaic Valley Sewerage Commissioners*, 71 N. J. Law, 183, 198, 58 Atl. 571.

† 65 Atl. 489.

[6, 7] In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state.¹ A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will. See *Barnes v. District of Columbia*, 91 U. S. 540, 544, 545, 23 L. Ed. 440.

In *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 524, 525 (25 L. Ed. 699), it was held that where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the Legislature otherwise provides, becomes entitled to all its property and immunities. In the opinion it is said (100 U. S. 524, 525, 25 L. Ed. 699):

"Institutions of the kind, whether called cities, towns, or counties, are the auxiliaries of the state in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the Legislature of the state, be-

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cause there is *not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with everything partaking of the nature of compact."

[8] The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned. In *Hunter v. Pittsburgh*, 207 U. S. 179, 28 Sup. Ct. 40, 52 L. Ed. 151, reference is made to the distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private or proprietary capacity, and decisions of this court which mention that distinction are referred to.² In none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the Contract Clause or the Fourteenth Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state.³

¹ Cf. 1 *Dillon, Municipal Corporations* (5th Ed.) § 98, p. 154, et seq.

² *Commissioners v. Lucas*, 93 U. S. 108, 115, 23 L. Ed. 122; *Meriwether v. Garrett*, 102 U. S. 472, 518, 530, 26 L. Ed. 197; *Essex Board v. Skinkle*, 140 U. S. 334, 342, 11 Sup. Ct. 790, 35 L. Ed. 446; *New Orleans v. Water Works Co.*, 142 U. S. 79, 91, 12 Sup. Ct. 142, 35 L. Ed. 943; *Covington v. Kentucky*, 173 U. S. 231, 240, 19 Sup. Ct. 333, 43 L. Ed. 679; *Worcester v. Street Railway Co.*, 196 U. S. 539, 551, 25 Sup. Ct. 327, 49 L. Ed. 591; *Monterey v. Jacks*, 203 U. S. 360, 27 Sup. Ct. 67, 51 L. Ed. 220.

³ Some state cases holding that the state Legislature is not restrained by federal constitutional

In *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 534, 536, 13 L. Ed. 518, it appeared that for many years a franchise to operate a ferry over the Connecticut river belonged to the town of Hartford, that upon

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the incorporation of *East Hartford the Legislature granted to it one-half of the ferry during the pleasure of the General Assembly, and that subsequently, after the building of a bridge across the river, the Legislature discontinued the ferry. It was held that this was not inconsistent with the contract clause of the federal Constitution. The reasons given in the opinion (10 How. 533, 534, 13 L. Ed. 518) support the contention of the state here made that the city cannot possess a contract with the state which may not be changed or regulated by state legislation.

In *Worcester v. Street Railway Co.*, 196 U. S. 539, 548, 25 Sup. Ct. 327, 49 L. Ed. 591, it was held that the obligation of the street railway company to the city to pave and repair streets occupied by it, based on accepted conditions of a municipal ordinance granting right of location, is not private property beyond the legislative control of the state, and that state legislation taxing the company, and thereby relieving it from its obligation to the city to pave and repair such streets, was not void as violating the contract clause of the federal Constitution. In the opinion it is said (196 U. S. 548, 549, 25 Sup. Ct. 327, 329, 49 L. Ed. 591):

"The question then arising is whether the Legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide another and a different method for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the Legislature of the commonwealth had that power. A municipal corporation is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department. The Legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district com-

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prised within the limits of *the former city. The city is the creature of the state"—citing *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 534, 13 L. Ed. 518; *United States v. Railroad Co.*, 17 Wall. 322, 329, 21 L. Ed. 597; *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521; *Commissioners of Laramie County v.*

provisions: *City of St. Louis v. Shields*, 52 Mo. 351, 354; *Police Jury of Bossier v. Corporation of Shreveport*, 5 La. Ann. 661, 665; *Trustees of Schools v. Tatman*, 13 Ill. 27; *Board of Education v. Aberdeen*, 56 Miss. 518; *Darlington v. Mayor &c. of New York*, 31 N. Y. 164, 193, 88 Am. Dec. 248. See contra: *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93, 109; *Grogan v. City of San Francisco*, 18 Cal. 590, 612, 613; *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 519, 33 N. E. 695, 35 Am. St. Rep. 515; *Spaulding v. Andover*, 54 N. H. 38, 66; *Ellerman v. McMains*, 30 La. Ann. 190, 31 Am. Rep. 218.

Commissioners of Albany County et al., 92 U. S. 307, 23 L. Ed. 552; Commissioners v. Lucas, 93 U. S. 108, 114, 23 L. Ed. 822.

In *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394, 399, 39 Sup. Ct. 526, 63 L. Ed. 1054, it was held that a legislative grant to a city of the power to regulate rates to be charged to the city and its inhabitants by a gas company might be withdrawn by the state from the city and conferred upon a commission, and that thereby no question was presented under the contract clause of the federal Constitution. In the opinion, after a statement of the issue, it is said (250 U. S. 397, 398, 39 Sup. Ct. 527, 528, 63 L. Ed. 1054):

"Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the state is final. * * * In *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, where a city, relying on the contract clause, sought a review by this court of a judgment of a state court sustaining a statute so modifying the franchise of a waterworks company as to require the city to pay for water used for municipal purposes, to which it theretofore was entitled without charge, the writ of error was dismissed on the ground that no question of impairment within the meaning of the contract clause was involved."⁴

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[9, 10] *The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. See *Harris v. District of Columbia*, 256 U. S. 650, 41 Sup. Ct. 610, 65 L. Ed. 1146, 14 A. L. R. 1471, and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have

⁴ Cf. *Williams v. Eggleston*, 170 U. S. 304, 310, 18 Sup. Ct. 617, 42 L. Ed. 1047; *Mason v. Missouri*, 179 U. S. 323, 335, 21 Sup. Ct. 125, 45 L. Ed. 214.

been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited.⁵ Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is

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difficult to state, and there *is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations.⁶ But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the city of Trenton against the state of New Jersey. They do not apply as against the state in favor of its own municipalities. We hold that the city cannot invoke these provisions of the federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question. In view of former opinions of this court, no substantial federal question is presented. *Pawhuska v. Pawhuska Oil Co.*, supra, and cases cited.⁷

The writ of error is dismissed.

⁵ See *City of Winona v. Botzet*, 169 Fed. 321, 332, et seq., 94 C. C. A. 563, 23 L. R. A. (N. S.) 204, and cases cited. See, also, *Brantman v. City of Canby*, 119 Minn. 397, 138 N. W. 671, 43 L. R. A. (N. S.) 862 (recovery permitted for gas explosion where city furnished gas to inhabitants); *Pettengill v. City of Yonkers*, 116 N. Y. 558, 565, 22 N. E. 1095, 15 Am. St. Rep. 442 (recovery permitted for injury sustained by excavation in street to lay mains); *Watson v. Needham*, 161 Mass. 404, 411, 37 N. E. 204, 24 L. R. A. 287 (damages recovered for breach of contract by water commissioners to furnish water for plaintiff's boiler, resulting in injury to vegetables in greenhouse heated thereby); *Brown v. Salt Lake City*, 33 Utah, 222, 234, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004 (city held liable for death by drowning in conduit forming a part of city waterworks system). These cases and others that might be cited serve in general to illustrate the course of decision.

⁶ Cf. 1 Dillon, *Municipal Corporations* (5th Ed.) § 110, p. 154.

⁷ See decisions per curiam: *City of Chicago v. Dempsey*, 250 U. S. 651, 40 Sup. Ct. 53, 63 L. Ed. 1189; *People of the State of Michigan ex rel. Groesbeck v. Detroit United Railway*, 257 U. S. 610, 42 Sup. Ct. 46, 66 L. Ed. 395; *City of Chicago v. Chicago Railways Company*, 257 U. S. 617, 42 Sup. Ct. 95, 66 L. Ed. 399; *Township of Avon v. Detroit United Railway*, 257 U. S. 613, 42 Sup. Ct. 163, 66 L. Ed. 400; *Borough of Edgewood v. Wilkinsburg & East Pittsburgh Street Railway Co.*, 253 U. S. 605, 42 Sup. Ct. 313, 66 L. Ed. 786; *City of Sapulpa v. Oklahoma Natural Gas Co.*, 253 U. S. 603, 42 Sup. Ct. 316, 66 L. Ed. 783.

(262 U. S. 192)

(43 Sup.Ct.)

CITY OF NEWARK v. STATE OF NEW JERSEY.

(Argued March 2, 1923. Decided May 7, 1923.)

No. 469.

1. Constitutional law $\S$ 225(1)—Waters and water courses $\S$ 182—Imposition of charge for diversion of water in excess of that diverted at date of act does not deny city the equal protection of the laws.

The enforcement against a New Jersey city of the provisions of Act N. J. June 17, 1907 (P. L. p. 633), imposing a charge on all parties diverting water from streams in excess of the amount legally diverted at the date of the act does not violate the equal protection clause of the Fourteenth Amendment.

2. Municipal corporations $\S$ 54—Regulation is within domain of the state.

The regulation of municipalities is a matter peculiarly within the domain of the state.

3. Courts $\S$ 394(10)—Contention of city that statute imposing charge on diversion of water denies equal protection of the laws held to raise no substantial federal question.

The contention of a New Jersey city that the enforcement against it of Act N. J. June 17, 1907 (P. L. p. 633), imposing an annual charge on the diversion of water by any party in excess of the amount legally diverted at the date of the act, denies it the equal protection of the laws, raises no substantial federal question on writ of error to the state court.

In Error to the Supreme Court of the State of New Jersey.

Action by the State of New Jersey against the City of Newark. A judgment for plaintiff was affirmed by the New Jersey Court of Errors and Appeals (117 Atl. 158), and defendant brings error. Writ of error dismissed.

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*Messrs. Geo. W. Wickersham, of New York City, and J. T. Congleton, of Newark, N. J., for plaintiff in error.

Mr. William Newcorn, of Plainfield, N. J., for the State of New Jersey.

Mr. Justice BUTLER delivered the opinion of the Court.

The state of New Jersey recovered judgment against the city of Newark for \$18,104.08 and costs, in an action brought in the state Supreme Court. The judgment was affirmed by the Court of Errors and Appeals, and the case is here on writ of error. It is based on a state enactment which is attacked on the sole ground that it violates the equal protection clause of the Fourteenth Amendment.

The state's right to recover depends upon the validity of an enactment of the state (chapter 252, Laws of 1907), which is sufficiently set forth in the decision of this court in *Trenton v. New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534, 67 L. Ed. —, handed down on this day.

In *East Jersey Water Co. v. Board of Conservation & Development*, 91 N. J. Law, 448, 453, 103 Atl. 853, 855, it is said:

"The statute requires payment 'for all such water hereafter diverted in excess of the amount now being legally diverted,' with the proviso that no payment be required until the legal diversion

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shall exceed one hundred gallons per day per capita. We are of opinion that 'legally diverted' means not a future diversion, but one now being exercised under a legal right, and that under this statute a legal abstractor may take what he was diverting in 1907, and, if that did not reach the statutory maximum of exemption, as much more as is required to make the total diversion one hundred gallons per day per capita for each of the municipalities supplied, without payment of the license fee.

"If, in 1907, the daily diversion exceeded one hundred gallons per capita, the amount then diverted, if lawful, may be taken without payment, and if it was less, no license fee can be imposed until it exceeds the statutory quantity."

The complaint alleged that under the provisions of this act the city was "permitted to divert * * * an average daily free allowance of water to the amount of 36,241,666 gallons, the said last mentioned amount being the amount of water which was being diverted by said municipality on June 17th aforesaid, the date when the act aforesaid became effective and operative," and claimed for each of the years subsequent to July 1, 1914, a license fee of \$1 per million gallons for the excess of the daily average diversion of water over the quantity above specified. The answer alleged that prior to the passage of the act of 1907, the city had acquired a plant capable of furnishing 50,000,000 gallons of water per day, and set up certain separate defenses. At the trial, the court on motion of the state, struck out the separate defenses; the facts were not in controversy, and judgment was given for the amount claimed. About the same time, the state also recovered judgment against the city of Trenton for the license fee imposed by the same act. Both cases were taken to the Court of Errors and Appeals, the highest court of the state, and there by one decision the judgments were affirmed. 117 Atl. 158. That court said:

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"The facts are not in dispute. It is conceded that the city of Trenton, at the time of the enactment of the act of 1907, was taking from the Delaware river daily 14,200,000 gallons of water for local use, and that the city of Newark was daily extracting from the Pequannock river 36,241,666 gallons for local use. These diversions represent the ante-statutory flowage, and are considered by the state under the eighth section of the act of 1907 to be nontaxable."

To establish its contention that section 8 of the enactment in question so discriminates between those authorized to divert water that it violates the equal protection clause of

the Fourteenth Amendment, the city says that the highest court has in this case construed the words "now being legally diverted" to mean the amount of water which was actually diverted on the day when the act went into effect, namely, June 17, 1907; that, had the city flowed into its mains 50,000,000 gallons that day the tax would have been levied only upon the excess over that amount, and on the facts shown in the complaint, there would have been no tax in the years above referred to; that the purely accidental figure of 36,241,666 gallons, the amount actually diverted on that day, will for all time be the basis of the assessment of the tax upon the city. It is suggested that cities less populous by one-half than Newark, but owning plants far in excess of their needs might have diverted on June 17, 1907, twice the amount of water which the city of Newark diverted, and that a city twice as large might have diverted half as much, and the former of such cities would thereby have procured an almost perpetual exemption, and the latter would have brought on itself an insupportable burden of indefinite duration; and that accidents of climate, of conflagrations and of breaks in the mains on the critical date, June 17, 1907, would have resulted in increasing the exemption.

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[1-3] *The enforcement by the state of the provision of the act imposing upon the city the specified annual payments for such diversion of water does not violate the equal protection clause of the Fourteenth Amendment. The regulation of municipalities is a matter peculiarly within the domain of the state. *In Trenton v. New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534, 67 L. Ed. —, decided this day, it is held that the imposition of the license fee specified in this act is not a taking of property of that city in violation of the Fourteenth Amendment. The reasons supporting that conclusion apply here. The city cannot invoke the protection of the Fourteenth Amendment against the state.¹ Considering the former opinions of this court, there is no substantial federal question in the case.

The writ of error is dismissed.

(262 U. S. 271)

HART v. B. F. KEITH VAUDEVILLE EXCHANGE et al.

(Argued May 2 and 3, 1923. Decided May 21, 1923.)

No. 763.

1. Courts ⇨279—Bill making claim within jurisdiction confers jurisdiction, regardless of merits.

The jurisdiction of the District Court of the United States is determined by the allega-

tions of the bill, and usually if the bill makes a claim that, if well founded, is within the jurisdiction of the court, the court has jurisdiction, regardless of whether the claim is well founded.

2. Courts ⇨351½—Rule excluding jurisdiction because federal question is devoid of merit, confined to plain cases.

The rule permitting dismissal of a bill brought in the United States courts to assert a claim under the Constitution, because the claim is absolutely devoid of merit, is confined to cases that are very plain.

3. Courts ⇨289—Bill alleging restraint of interstate commerce in vaudeville acts held to state question within federal jurisdiction.

A bill charging that defendants had conspired to restrain the employment and exhibition of vaudeville acts, that it was necessary to transport the actors and their scenery and equipment from one state to another, and that frequently the transportation of the equipment was the more important part of the transaction, and that such transportation was restrained by the acts of defendants, states a federal question which is not wholly frivolous, so as to give the District Court jurisdiction thereof.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Max Hart against the B. F. Keith Vaudeville Exchange and others. From a decree dismissing the bill for want of jurisdiction, complainant appeals. Reversed.

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*Messrs. Martin W. Littleton and L. B. Eppstein, both of New York City, for appellant.

Mr. Geo. W. Wharton Pepper, of Philadelphia, Pa., for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by one whose business is getting contracts for vaudeville performers to perform in theatres all over the United States and acting as their manager and personal representative. It is brought against a combination of corporations engaged in similar business, and the owners of a large number of theatres known as the Keith Circuit, the owners of others known as the Orpheum Circuit, and some other persons not needing special mention here, who it is alleged are ruining the plaintiff's business by a conspiracy forbidden by the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. §§ 8820-8823, 8827-8830). An injunction and enormous damages are asked. The bill was dismissed for want of jurisdiction by the District Court on the ground that it did not state a cause of action arising under the Constitution or laws of the United States.

The bill sets out at superfluous length a combination of the defendants to exclude actors from the theatres controlled by them, being practically all the theatres in the Unit-

¹ Cf. *Williams v. Eggleston*, 170 U. S. 304, 310, 18 Sup. Ct. 617, 42 L. Ed. 1047; *Mason v. Missouri*, 179 U. S. 328, 335, 21 Sup. Ct. 125, 45 L. Ed. 214.

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ed States and in Canada in which high class vaudeville entertainments are produced, and to exclude the managers and personal representatives of actors from the defendants' booking exchange in New York and from business, unless they respectively comply with the defendants' requirements, including the payment of considerable sums. It is alleged that a part of the defendants' business is making contracts that call on performers to travel between the States and from abroad

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and in connection therewith require the transportation of large quantities of scenery, costumes and animals. Some or many of these contracts are for the transportation of vaudeville acts, including performers, scenery, music, costumes and whatever constitutes the act, so that it is said that there is a constant stream of this so-called commerce from State to State. The defendants contend and the judge below was of opinion that the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental to that, and therefore that the case is governed by *Federal Baseball Club v. National League*, 259 U. S. 200, 42 Sup. Ct. 465, 66 L. Ed. 898. On the other hand it is argued that in the transportation of vaudeville acts the apparatus sometimes is more important than the performers and that the defendants' conduct is within the statute to that extent at least.

[1-3] The jurisdiction of the District Court is the only matter to be considered on this appeal. That is determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not. *Louisville & Nashville R. Co. v. Rice*, 247 U. S. 201, 203, 38 Sup. Ct. 429, 62 L. Ed. 1071; *Lamar v. United States*, 240 U. S. 60, 36 Sup. Ct. 255, 60 L. Ed. 526; *Geneva Furniture Manufacturing Co. v. S. Karpen & Bros.*, 238 U. S. 254, 258, 35 Sup. Ct. 788, 59 L. Ed. 1295; *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 33 Sup. Ct. 410, 57 L. Ed. 716. While appeals to this Court often are dismissed as frivolous, *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 311, 23 Sup. Ct. 123, 47 L. Ed. 190, *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 109, 110, 33 Sup. Ct. 80, 57 L. Ed. 140, the former case expressly and the latter by implication follow and reaffirm *Swafford v. Templeton*, 185 U. S. 487, 493, 22 Sup. Ct. 783, 46 L. Ed. 1005, to the effect that when a suit is brought in a federal court and the very matter of the controversy is federal it cannot be dismissed for want of jurisdiction "however wanting in merit" may be the aver-

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ments intended to *establish a federal right. See also *St. Louis, Iron Mountain & Southern Ry. Co. v. McWhirter*, 229 U. S. 265, 275, 276,

33 Sup. Ct. 858, 57 L. Ed. 1179. It is not necessary to draw the line between the foregoing and other cases brought in Courts of the United States to assert a claim under the Constitution that have been ordered to be dismissed below because "absolutely devoid of merit," *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 576, 579, 24 Sup. Ct. 553, 48 L. Ed. 795, beyond confining the latter to those that are very plain. It is enough that we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress, or at least that the claim is wholly frivolous. The bill was brought before the decision of the *Baseball Club Case*, and it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently. The logic of the general rule as to jurisdiction is obvious and the case should be decided upon the merits unless the want of jurisdiction is entirely clear. What relief, if any, could be given and how far it could go it is not yet time to discuss.

Decree reversed.

(262 U. S. 209)

AMERICAN STEEL FOUNDRIES v. ROBERTSON, Commissioner of Patents, et al.

(Argued April 19, 1923. Decided May 21, 1923.)

No. 291.

Trade-marks and trade-names and unfair competition — Bill in equity lies to compel registration.

Trade-Mark Act, § 9 (Comp. St. § 9494), giving an applicant for registration of trade-marks a right to appeal to the Court of Appeals of the District of Columbia from an adverse decision from the Commissioner of Patents, and providing that the same rules of practice and procedure as in case of an appeal by an applicant for a patent shall govern in every stage of such proceedings, makes applicable to trade-mark proceedings Rev. St. § 4915 (Comp. St. § 9460), authorizing a bill in equity to obtain a patent, which has been refused by the Commissioner or on the appeal.

Appeal from the United States Court for the Northern District of Illinois.

Bill in equity by the American Steel Foundries against Thomas E. Robertson for an adjudication entitling defendant to registration of the trade-mark, in which the Simplex Electric Heating Company was permitted to intervene as the real party in interest. From a decree dismissing the bill for lack of jurisdiction, complainant appeals. Reversed and remanded.

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*Mr. Geo. L. Wilkinson, of Chicago, Ill., for appellant.

Mr. Nathan Heard, of Boston, Mass., for certain appellees.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a direct appeal under section 238 of the Judicial Code (Comp. St. § 1215) from a decree of the District Court of the United States for the Northern District of Illinois dismissing a bill in equity. The District Judge certifies that the motion to dismiss the bill was sustained solely for lack of jurisdiction.

The bill was filed by the appellant, the American Steel Foundries, against the Commissioner of Patents to secure an adjudication that the appellant is entitled to have its trade-mark "Simplex" registered and authorizing the Commissioner of Patents to register the same. The Commissioner appeared as defendant and by stipulation the Simplex Electric Heating Company was allowed to intervene as the real party in interest. The bill averred that the American Steel Foundries had duly filed an application in the Patent Office for the registration, that the Examiner of Trade-Marks had refused the application, that the Commissioner of Patents had affirmed this refusal, and that on appeal the Court of Appeals of the District of Columbia had affirmed the action of the Commissioner, that a petition for certiorari had been filed in this court and granted, and that thereaft-

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er the cause *was dismissed by this court for lack of jurisdiction, on the ground that the decree of the Court of Appeals was not a final one.

The appellant then filed this bill under section 9 of the Trade-Mark Act of February 20, 1905 (33 Stat. 724, c. 592 [Comp. St. § 9494]), and section 4915, Revised Statutes (Comp. St. § 9460). The intervener based its motion to dismiss on the lack of jurisdiction "over the subject-matter or alleged cause of action," and the motion was granted without opinion.

Section 9 of the Trade-Mark Act reads as follows:

"Sec. 9. That if an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for a patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable."

Section 4915 of the Revised Statutes reads as follows:

"Sec. 4915. Patents obtainable by bill in equity. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall au-

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thorize the *Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The question in this case is whether the closing words of section 9, "and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable," are broad enough in their scope to include "the remedy by bill in equity" granted to unsuccessful applicants for a patent in section 4915.

In *Gandy v. Marble*, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. Ed. 1223, an unsuccessful applicant for a patent who had carried his application by appeal to the Supreme Court of the District, which was dismissed on its merits January 30, 1880, on May 3, 1883, filed a bill of equity in the District Supreme Court under section 4915 against the Commissioner of Patents. That court dismissed the bill on the ground that the applicant had failed to prosecute his application within two years after the dismissal of his appeal from the Commissioner by the Supreme Court of the District, basing it on section 4894 of the Revised Statutes, reading as follows:

"Sec. 4894. All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

This section applies to proceedings in the Patent Office and before the Commissioner, and it was pressed upon this court that it

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could not apply to such an independent *proceeding as the bill in equity provided for in section 4915. But this court held that section 4894 did apply. Mr. Justice Blatchford, speaking for the court, admitted (122 U. S. 439, 7 Sup. Ct. 1292, 30 L. Ed. 1223), following *Butterworth v. Hoe*, 112 U. S. 50, 61, 5 Sup. Ct. 25, 28 L. Ed. 656, that the pro-

ceeding by bill in equity, under section 4915, "intends a suit according to the ordinary course of equity practice and procedure, and is not a technical appeal from the Patent Office, nor confined to the case as made in the record of that office but is prepared and heard upon all competent evidence adduced and upon the whole merits," but continued, "yet the proceeding is, in fact and necessarily, a part of the application for the patent." He summed up the conclusion of the court as follows (122 U. S. 440, 7 Sup. Ct. 1293, 30 L. Ed. 1223):

"The presumption of abandonment, under section 4894, unless it is shown that the delay in prosecuting the application for two years and more after the last prior action, of which notice was given to the applicant, was unavoidable, exists as fully in regard to that branch of the application involved in the remedy by bill in equity as in regard to any other part of the application, whether so much of it as is strictly within the Patent Office, or so much of it as consists of an appeal to the Supreme Court of the District of Columbia under section 4911. The decision of the court on a bill in equity becomes, equally with the judgment of the Supreme Court of the District of Columbia on a direct appeal under section 4911, the decision of the Patent Office, and as to govern the action of the Commissioner. It is, therefore, clearly a branch of the application for the patent, and to be governed by the rule as to laches and delay declared by section 4894 to be attendant upon the application."

This view of the intimate relation of the bill in equity allowed in section 4915 to the application for a patent and the practice and procedure provided in due course thereof is of much assistance in giving proper scope to the words of section 9 of the Trade-Mark

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Act. After making provision for *an appeal to the District Court of Appeals from a simple refusal of registration, and from decisions of the Patent Office in three different kinds of adversary proceedings therein in respect of such registration, on complying with the conditions required in case of an appeal from refusal of a patent or a decision in a patent interference proceeding, the words are "and the same rules of practice and procedure shall govern in every stage of such proceedings as far as the same may be applicable." If the bill in equity of section 4915 is only a part of the proceeding for an application for a patent as held in *Gandy v. Marble*, it is no straining of the language to make these words include a bill in equity for the registration of a trade-mark. This court has taken exactly this view in *Atkins v. Moore*, 212 U. S. 285, 29 Sup. Ct. 390, 53 L. Ed. 515.

In that case it was held that a decision of the Court of Appeals of the District of Columbia affirming the decision of the Commissioner of Patents refusing registration of a trade-mark on an appeal under section 9 of the Trade-Mark Act was not a final judgment of the Court of Appeals which could be appealed to this court, and in the argument to show that it was not, Chief Justice Fuller, who spoke for the court, said:

"Under section 4914 of the Revised Statutes no opinion or decision of the Court of Appeals on appeal from the Commissioner precludes 'any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question,' and by section 4915 a remedy by bill in equity is given where a patent is refused, and we regard these provisions as applicable in trade-mark cases under section 9 of the Act of February 20, 1905."

This language is quoted with approval in the opinion of this court in *Baldwin Co. v. Howard Co.*, 256 U. S. 35, 41 Sup. Ct. 405, 65 L. Ed. 816, in which it was held that there could be no review in this court, by appeal or certiorari, of a decision of the District Court of Appeals in respect to the registration of a trade-mark under section 9 of the Trade-Mark Act.

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"It is pressed upon us, however, that this language in *Atkins v. Moore* and in *Baldwin Co. v. Howard Co.* was not necessary to the conclusion in those cases and is to be regarded as obiter dictum. It was used in arguendo and was the unanimous expression of the court in both cases. It may be that the conclusion that the decision of the Court of Appeals was not final and appealable to this court could have been reached without this argument; but, however this may be, the construction put by the court on section 9 is most persuasive and follows so clearly from the decision in *Gandy v. Marble*, that we find no reason to question its correctness.

An argument has been made to us against giving such an effect to section 9 based on the intrinsic differences between the nature of the patent right, and that in a trade-mark. We do not regard such differences as important in interpreting section 9 when it is obvious from that section and the whole of the Trade-Mark Act that Congress intended to produce a parallelism in the mode of securing these two kinds of government monopoly from the Patent Office.

The decree of the District Court is reversed, and the case is remanded for further proceedings.

(262 U. S. 276)

STATE OF MISSOURI ex rel. SOUTHWESTERN BELL TELEPHONE CO. v. PUBLIC SERVICE COMMISSION OF MISSOURI et al.

(Argued Dec. 8, 1922. Decided May 21, 1923.)

No. 158.

1. Evidence ¶5(2)—Increase in cost of material, labor, etc., during war, held to be judicially noticed.

It is a matter of common knowledge that, in costs of material, labor, supplies, etc., used by public service corporations, there were large increases between the years 1913, 1914, and 1916, and the year 1919.

2. Constitutional law ¶298(1)—Public service corporation entitled to fair return on value, not cost, of its property.

Under the due process clause of the federal Constitution, fair return on the property of a public service corporation to which it is entitled, and which must be determined in inquiry as to the reasonableness of regulation of its rates, is the fair return on the reasonable value of the property at the time it is being used for the public, and not merely its cost with increases of value excluded.

3. Public service commissions ¶7—Rise in cost of labor considered in reviewing order fixing public service rates.

It is impossible to ascertain what will amount to a fair return on properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made, and an honest and intelligent forecast of probable future values, made on a view of all the relevant circumstances, is essential.

4. Telegraphs and telephones ¶33(1)—Valuation held too low.

Public Service Commission's valuation of telephone company's property, without considering the increased cost of material, labor, etc., over such cost before the World War, held too low.

5. Telegraphs and telephones ¶33(1)—5/3 per cent. return on telephone company's property held insufficient.

Where rates for telephone company fixed by Public Service Commission would yield the company 11½ per cent. of the minimum value of its property, of which 6 per cent. concededly should be allowed for depreciation, the remainder, or 5½ per cent. on the value of the property, held a wholly inadequate return, considering the character of the investment and the prevailing interest rates.

6. Telegraphs and telephones ¶33(1)—Commission not authorized to disallow item of expense by telephone company, in absence of showing of bad faith.

In determining rates of a telephone company, Public Service Commission held not warranted in disallowing an item of expense, consisting of \$174,048.60, 55 per cent. of the 4½ per cent. of gross revenues paid by the telephone company to a parent company as rents for telephone equipment, etc., where no bad

faith appeared, and apparently the telephone company's board of directors had exercised a proper discretion about this matter, requiring business judgment.

7. Public service commissions ¶7—State not clothed with general power of management.

While the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership; hence Public Service Commission cannot ignore items charged by the utility as operating expenses, unless there is an abuse of discretion by the corporate officers.

In Error to the Supreme Court of the State of Missouri.

Writ of review by the State of Missouri, on the relation of the Southwestern Bell Telephone Company, against the Public Service Commission of Missouri and others. Judgment affirming an order of the Commission was affirmed by the Supreme Court of Missouri (233 S. W. 425), and relator brings error. Reversed.

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*Messrs. Frederick W. Lehmann and Thomas O. Stokes, both of St. Louis, Mo., for plaintiff in error.

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*Messrs. L. H. Breuer, of Rolla, Mo., and James D. Lindsay, of Jefferson City, Mo., for defendants in error.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The Supreme Court of Missouri (233 S. W. 425) affirmed a judgment of the Cole county

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circuit court, *which sustained an order of the Public Service Commission of Missouri, effective December 1, 1919. That order undertook to reduce rates for exchange service and to abolish the installation and moving charges theretofore demanded by plaintiff in error. It is challenged as confiscatory and in conflict with the Fourteenth Amendment.

During the period of federal control—August 1, 1918, to August 1, 1919—the Postmaster General advanced the rates for telephone service and prescribed a schedule of charges for installing and moving instruments. The Act of Congress approved July 11, 1919—41 Stat. 157—directed that the lines be returned to their owners at midnight July 31, 1919, and further—

"that the existing toll and exchange telephone rates as established or approved by the Postmaster General on or prior to June 6, 1919, shall continue in force for a period not to exceed four months after this act takes effect, unless sooner modified or changed by the public authorities—state, municipal, or otherwise—having control or jurisdiction of tolls, charges, and rates or by contract or by voluntary reduction." Section 1.

August 4, 1919, the commission directed plaintiff in error to show why exchange service rates and charges for installation and moving as fixed by the Postmaster General should be continued. After a hearing, it made an elaborate report and directed that the service rates should be reduced and the charges discontinued.

The company produced voluminous evidence, including its books, to establish the value of its property dedicated to public use. The books showed that the actual cost of "total plant, supplies, equipment, and working capital" amounted to \$22,888,943. Its engineers estimated the reproduction cost new as of June 30, 1919, thus: Physical telephone property, \$28,454,488; working capital, \$1,051,564; establishing business, \$5,594,816; total \$35,100,868. They also esti-

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estimated existing values *(after allowing depreciation) upon the same date: Physical telephone property, \$24,709,295; working capital, \$1,051,564; establishing business, \$5,594,816; total, \$31,355,675.

The only evidence offered in opposition to values claimed by the company were appraisals of its property at St. Louis, Caruthersville, and Springfield, respectively, as of December, 1913, February, 1914, and September, 1916, prepared by the commission's engineers and accountants, together with statements showing actual costs of additions subsequent to those dates.

Omitting a paragraph relative to an unimportant reduction—\$17,513.52—from working capital account, that part of the commission's report which deals with property values follows:

The company offered in evidence exhibits showing the value of its property in the entire state (outside the cities of Kansas City and Independence, whose rates are not involved in this case), and also at 46 of its local exchanges in the state. It shows by such exhibits that the value of the property in the entire state (and when speaking of the property in the state in this report we mean exclusive of Kansas City and Independence) is as follows: Reproduction cost new, \$35,100,471; reproduction cost new, less depreciation, \$31,355,278; and cost as per books, \$22,888,943. It also shows the company's estimate of reproduction cost new, less depreciation, and the prorated book cost, at each of the 46 local exchanges mentioned.

The engineers of this commission have made a detailed inventory and appraisal, and this commission has formally valued the company's property at only three of its exchanges, viz.: At the city of Caruthersville, reported in Re Southwestern Tel. & Tel. Company, 2 Mo. P. S. C. 492; at the city of St. Louis in cases No. 234 and No. 235, as yet unreported; and at the

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city of Springfield reported *in Re Missouri and Kansas Telephone Company, 6 Mo. P. S. C. 279—and as a result we have only the estimates and appraisals of the company before us in relation to the value of the property at the other exchanges. We think it is clear, however, from

the data at hand, that the values placed by the company upon the property are excessive, and not a just basis for rate-making.

The values fixed by this commission at Caruthersville, St. Louis, and Springfield in the cases above mentioned aggregate \$11,003,898, while the company estimates the aggregate cost of reproduction new of these plants in this case at \$18,971,011. The ratio of the latter figure is 172.4 per cent. This percentage, divided into \$35,100,471, the company's estimate of the aggregate cost of the reproduction new of its property in Missouri in this case, equals \$20,350,000, which might be said to be one measure of the value of the property.

Again, the company's estimate of the aggregate cost of reproduction new, less depreciation, of its properties at Caruthersville, St. Louis, and Springfield, in this case is \$16,913,673. The ratio of this figure to the aggregate value fixed by the commission at these exchanges, plus additions reported by the company, is 153.7 per cent. This percentage divided into \$31,355,278, the company's estimate of the aggregate cost of reproduction new, less depreciation, of its property in Missouri in this case, equals \$20,400,000, which may be said to be another measure of the value of the property.

The company also shows by Exhibits 19 and 212 that its return under the Postmaster General's rates on \$22,888,942, the book value of its property in the state, is at the rate of 11.63 per cent. per annum for depreciation and return on the investment, which would yield the company 6 per cent. for depreciation and 5.63 per cent. for return on the book cost of the property. As stated, however, we do not think that

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the book cost or the "prorated book cost" of the property as claimed by the company would be a fair basis for rate making.

As we understand it, the "prorated book cost" given in evidence by the company for the various exchanges is simply the percentage relation of reproduction cost new, which the original cost of all property bears to reproduction cost new of all property and in individual instances the actual cost might vary greatly, either up or down, from what an appraisal would show. If the company, to eliminate competition, paid a price in excess of the value or because of discouraged local operation were enabled to purchase a plant far below its actual value, the "prorated book cost" basis would not reflect anything like the original cost.

We also think that the figure of \$22,888,943, claimed by the company to represent the book cost or original of the property cost in the state, is subject to certain adjustments with reference to the amount of nonuseful property included, working capital, and the amounts to be deducted account extinguished value recouped from patrons by charges to depreciation.

In the St. Louis Case, supra, the original cost of the nonuseful property deducted and disallowed by the commission amounted to \$454,689.16. It appears from the company's Exhibit 256 that the "prorated book cost" of the St. Louis exchange is just about half of that given for the state. However, it is clear that the proportion of nonused and nonuseful property in St. Louis bears a much larger percentage relation to useful property than would obtain throughout the state. It would appear that es-

timating the company's property not used and useful for the entire state at \$500,000 would be a fair approximation. This sum at least should be deducted. * * *

The depreciation reserve applicable to the Missouri property is not shown by the compa-

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ny. However, on *the Company's Exhibit 15, the balance sheet as of June 30, 1919, of the Southwestern Bell Telephone Company (Missouri corporation), operating in Missouri, Kansas, and Arkansas, the reserve for accrued depreciation and reserve for amortization of intangibles is given as \$7,963,082.37. The same exhibit shows the original cost of fixed capital for Missouri, Kansas, and Arkansas property as \$46,061,162.76. The total fixed capital of the Missouri property shown on the Company's Exhibit 19 is \$21,837,759, which is 47.4 per cent. of \$46,061,162.76 and 47.4 per cent. of the reserve for depreciation. \$7,963,082.37 equals \$3,774,501 or the portion assignable to the Missouri property.

Adjusting in accordance with the above, we have: Total plant and equipment, including working capital, as per Company's Exhibit No. 19, \$22,888,943; deduct property not used or useful, \$500,000.00; deduct excess working capital, \$17,513.52; deduct depreciation reserve, \$3,774,501.00; [total to be deducted] \$4,292,014.52. [Net total] \$18,596,928.48; add for intangibles, 10 per cent., \$1,859,692.85; total adjusted original cost, \$20,456,621.33.

After carefully considering all the evidence as to values before us in this case, we are of the opinion that the value of the company's property in the state, exclusive of Kansas City and Independence, devoted to exchange service, will not exceed the sum of \$20,400,000, and we will tentatively adopt this sum as the value of the property for the purposes of this case. As stated, *supra*, this commission has formally valued only a part of this property, and we should not be understood as authoritatively fixing the value of the property at this time.

The three earlier valuations to which the commission referred are: St. Louis, December, 1913, \$8,500,000; Caruthersville, Febru-

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ary, 1914, \$25,000; Springfield, September, 1916, \$815,000; total, \$9,340,000. Between those dates and June 30, 1919, additions were made to these properties, which cost, respectively, \$1,623,765, \$5,992, and \$34,141. Adding these to the original valuations gives \$11,003,898, the base sum used by the commission for the estimates now under consideration.

[1,2] Obviously, the commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914, and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum.

In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41, 52, 29 Sup. Ct. 192, 195, 200 (53 L. Ed. 382, 48 L. R. A. [N. S.] 1134, 15 Ann. Cas. 1034), this court said:

There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * * * And we

concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase.

In the *Minnesota Rate Cases*, 230 U. S. 352, 454, 33 Sup. Ct. 729, 762 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18), this was said:

The making of a just return for the use of the property involves the recognition of its fair value, if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law.

See, also, *Denver v. Denver Union Water Co.*, 246 U. S. 178, 191, 38 Sup. Ct. 278, 62 L. Ed. 649, *Newton v. Consolidated Gas Co. of New York*, 258 U. S. 165, 42 Sup. Ct. 264, 66 L. Ed. 538 (March 6, 1922), and *Galveston Electric Co. v. City of Galveston*, 258 U. S. 388, 42 Sup. Ct. 351, 66 L. Ed. 678 (April 10, 1922).

[3] It is impossible to ascertain what will amount to a fair return upon properties de-

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voted to public service, without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day.

[4] Witnesses for the company asserted—and there was no substantial evidence to the contrary—that, excluding cost of establishing the business, the property was worth at least 25 per cent. more than the commission's estimates, and we think the proof shows that, for the purposes of the present case, the valuation should be at least \$25,000,000.

[5] After disallowing an actual expenditure of \$174,048.60 for rentals and services by the American Telephone & Telegraph Company and some other items not presently important, the commission estimated the annual net profits on operations available for depreciation and return as \$2,828,617.60—approximately 11½ per cent. of \$25,000,000. That 6 per cent. should be allowed for depreciation appears to be accepted by the commission. Deducting this would leave a possible 5½ per cent. return upon the minimum value of the property, which is wholly inadequate, considering the character of the investment and interest rates then prevailing.

[6,7] The important item of expense disallowed by the commission—\$174,048.60—is 55 per cent. of the 4½ per cent. of gross revenues paid by plaintiff in error to the American Telephone & Telegraph Company as rents

for receivers, transmitters, induction coils, etc., and for licenses and services under the customary form of contract between the latter company and its subsidiaries. Four and one-half per cent. is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper dis-

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cretion about this matter *requiring business judgment. It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *States Public Utilities Commission ex rel. Springfield v. Springfield Gas & Electric Co.*, 291 Ill. 209, 234, 125 N. E. 891, 901:

"The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the corporate officers."

See *Interstate Commerce Commission v. Chicago Great Western Railway Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. Ed. 705; *Chicago, Milwaukee & St. Paul Railroad Co. v. Wisconsin*, 238 U. S. 491, 35 Sup. Ct. 869, 59 L. Ed. 1423, L. R. A. 1916A, 1133; *People ex rel. v. Stevens*, 197 N. Y. 1, 90 N. E. 60. Reversed.

Mr. Justice BRANDEIS, with whom Mr. Justice HOLMES concurs.

I concur in the judgment of reversal. But I do so on the ground that the order of the state commission prevents the utility from earning a fair return on the amount prudently invested¹ in it. Thus, I differ fundamentally from my brethren concerning the rule to be applied in determining whether a prescribed rate is confiscatory. The court, adhering to the so-called rule of *Smyth v. Ames*,

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*169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and further defining it, declares that what is termed value must be ascertained by giving weight, among other things, to estimates of what it would cost to reproduce the property at the time of the rate hearing.

The so-called rule of *Smyth v. Ames* is, in my opinion, legally and economically unsound. The thing devoted by the investor to the public use is not specific property, tangible

and intangible, but capital embarked in the enterprise. Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return.² Thus it sets the limit to the power of the state to regulate rates. The Constitution does not guarantee to the utility the opportunity to earn a return on the value of all items of property used by the utility or of any of them. The several items of property constituting the utility, taken singly, and freed from the public use, may conceivably have an aggregate value greater than if the items are used in combination. The owner is at liberty, in the absence of controlling statutory provision, to withdraw his property from the public service, and, if he does so, may obtain for it exchange value. Compare *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; *Erie Railroad Co. v. Public Utility Commissioners*, 254 U. S. 394, 411, 41 Sup. Ct. 169, 65 L. Ed. 322; *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, 42 Sup. Ct. 281, 66 L. Ed. 566. But, so long as the specific items of property are employed by the utility, their exchange value is not of legal significance.

The investor agrees, by embarking capital in a utility, that its charges to the public

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shall be reasonable. *His company is the substitute for the state in the performance of the public service, thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes, not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor, the allowance for risk incurred, and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined.

To decide whether a proposed rate is confiscatory the tribunal must determine both what sum would be earned under it and whether that sum would be a fair return. The decision involves ordinarily the making of four subsidiary ones:

(1) What the gross earnings from operating the utility under the rate in controversy would be. (A prediction.)

¹ The term "prudent investment" is not used in a critical sense. There should not be excluded, from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

² Except that rates may, in no event, be prohibitive, exorbitant, or unduly burdensome to the public. *Covington & Lexington Turnpike Co. v. Sandford*, 164 U. S. 578, 596, 17 Sup. Ct. 193, 41 L. Ed. 560; *Smyth v. Ames*, 169 U. S. 466, 544, 18 Sup. Ct. 418, 42 L. Ed. 819; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Minnesota Rate Cases*, 230 U. S. 352, 454, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Mr. Justice Miller in Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 413, 456, 10 Sup. Ct. 462, 33 L. Ed. 970.

(2) What the operating expenses and charges, while so operating, would be. (A prediction.)

(3) The rate base; that is, what the amount is on which a return should be earned. (Under *Smyth v. Ames*, an opinion, largely.)

(4) What rate of return should be deemed fair. (An opinion, largely.)

A decision that a rate is confiscatory (or compensatory) is thus the resultant of four subsidiary determinations. Each of the four involves forming a judgment, as distinguished from ascertaining facts; and as to each factor there is usually room for difference in judgment. But the first two factors do not ordinarily present serious difficulties. The

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doubts and uncertainties incident to *prophecy, which affect them, can often be resolved by a test period; and meanwhile protection may be afforded by giving a bond. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 18, 19, 29 Sup. Ct. 148, 53 L. Ed. 371; *St. Louis, Iron Mountain & Southern Railway Co. v. McKnight*, 244 U. S. 368, 37 Sup. Ct. 611, 61 L. Ed. 1200. The doubts and uncertainties incident to the last two factors can be eliminated, or lessened, only by redefining the rate base, called value, and the measure of fairness in return, now applied under the rule of *Smyth v. Ames*. The experience of the 25 years since that case was decided has demonstrated that the rule there enunciated is delusive. In the attempt to apply it insuperable obstacles have been encountered. It has failed to afford adequate protection either to capital or to the public. It leaves open the door to grave injustice. To give to capital embarked in public utilities the protection guaranteed by the Constitution, and to secure for the public reasonable rates, it is essential that the rate base be definite, stable, and readily ascertainable, and that the percentage to be earned on the rate base be measured by the cost, or charge, of the capital employed in the enterprise. It is consistent with the federal Constitution for this court now to lay down a rule which will establish such a rate base and such a measure of the rate of return deemed fair. In my opinion, it should do so.

The rule of *Smyth v. Ames* sets the laborious and baffling task of finding the present value of the utility. It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. Nor can the present value of the utility be determined by capitalizing its net earnings, since the earnings are determined, in large measure, by the rate which the company will be permitted to charge, and thus the vicious circle would be encountered. So, under the rule of *Smyth v. Ames*, it is usually sought to prove the present value of a utility by

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ascertaining what it actually cost to construct and install it, or by estimating what

it should have cost, or by estimating what it would cost to reproduce or to replace it. To this end an enumeration is made of the component elements of the utility, tangible and intangible;³ then the actual, or the proper, cost of producing, or of reproducing, each part is sought; and finally it is estimated how much less than the new each part, or the

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whole, is *worth. That is, the depreciation is estimated.⁴ Obviously each step in the process of estimating the cost of reproduction, or replacement, involves forming an opinion, or exercising judgment, as distinguished from merely ascertaining facts. And this is true, also, of each step in the process of estimating how much less the existing plant is worth than if it were new. There is another potent reason why, under the rule of *Smyth v. Ames*, the room for difference in opinion as to the present value of a utility is so wide. The rule does not measure the present value either by what the utility cost to produce, or by what it should have cost, or by what it would cost to reproduce, or to replace it.⁵ Under that rule the tribunal is directed, in forming its judgment, to take into considera-

³ In estimating replacement cost the first step is to determine what part of the property owned is used and useful in the public service. That involves, among other things, a consideration of retired or discarded property, and the question whether the size and capacity of the plant are, in part, excessive.

The property included in the valuation is commonly treated under the following heads (see Report of Special Committee on Valuation, Amer. Society of Civil Engineers, October 23, 1916, Vol. 42, Proceedings, pp. 1708-1938):

A. Tangibles: (a) Land and buildings. (b) Plant. B. Incidentals during construction: (a) Administration. (b) Engineering and superintendence. (c) Legal expenses. (d) Brokerage. (e) Promotion fees. (f) Insurance. (g) Taxes. (h) Bond discount. (i) Contingencies.

C. Intangibles: (a) Good will. (b) Franchise value. (c) Going concern value. (d) Working capital. "Going value" was declared by the Special Report (p. 1727) to embrace, among other things, "efficiency, favorable business arrangements and design"; intangibles to include also "leases, easements, water rights, traffic and operating agreements, strategic location and advantages, and other privileges."

⁴ Several different methods are used for measuring depreciation: (1) The replacement method; (2) the straight-line method; (3) the compound interest method; (4) the sinking fund method; (5) the unit cost method. It is largely a matter of judgment whether, and to what extent, any one of these several methods of depreciation should be applied. They may give widely different results. Special Report, October 23, 1916, Valuation of Public Utilities, Amer. Society of Civil Engineers, Vol. 42, Proceedings, pp. 1723-1727, 1846-1900.

⁵ This court declared in *Smyth v. Ames*, 169 U. S. 466, 547, 18 Sup. Ct. 418, 434 (42 L. Ed. 819) that "present as compared with the original cost of construction" is to be considered, and in *Minnesota Rate Cases*, 230 U. S. 352, 452, 33 Sup. Ct. 729, 761 (67 L. Ed. 1511, 43 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18) that "the cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty." Reproduction cost was thus held to be evidence of value. But it has never been held to be the measure of value.

tion all those and also other elements, called relevant facts.⁶

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*Obviously, "value" cannot be a composite of all these elements. Nor can it be arrived at on all these bases. They are very different, and must, when applied in a particular case, lead to widely different results. The rule of *Smyth v. Ames*, as interpreted and applied, means merely that all must be considered. What, if any, weight shall be given to any one, must practically rest in the judicial discretion of the tribunal which makes

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the determination. Whether a desired result is reached may depend upon how any one of many elements is treated. It is true that the decision is usually rested largely upon records of financial transactions, on statistics and calculations. But as stated in *Louisville v. Cumberland Telegraph & Telephone Co.*, 225 U. S. 430, 436, 32 Sup. Ct. 741, 742 (56 L. Ed. 1151) "every figure * * * that we have set down with delusive exactness" is "speculative."

The efforts of courts to control commissions' findings of value have largely failed. The reason lies in the character of the rule declared in *Smyth v. Ames*. The rule there stated was to be applied solely as a means

⁶ Some of these so-called relevant facts are, as the rule has been applied:

(a) Capitalization; i. e., bonds, stock, and other securities outstanding.

(b) Book cost; i. e., the investment account, as shown on the books.

(c) Actual cost; i. e., amounts actually paid in cash for installing the original plant and business, and the additions thereto.

(d) Historical cost; i. e., the proper cost of the existing plant and business, estimated on the basis of the price levels existing at the respective dates when the plant and the additions were constructed. This is often called prudent investment. Historical cost would, under normal conditions, be equal in amount to the original cost. The phrases are sometimes used to denote the same thing. But they are not the same, and they are often ascertained by different processes. Original cost is the amount actually paid to establish the utility. The amount is ascertained, where possible, by inspection of books and vouchers, and by other direct evidence. If this class of evidence is not complete, it may be necessary to supplement it by evidence as to what was probably paid for some items, by showing prices prevailing for work and materials at the time the same were supplied. But the evidence of these prices is merely circumstantial, or corroborative, evidence of the amount actually paid. In determining actual cost, whatever the evidence, there is no attempt to determine whether the expenditure was wise or foolish, or whether it was useful or wasteful. Historical cost, on the other hand, is the amount which normally should have been paid for all the property which is usefully devoted to the public service. It is, in effect, what is termed the prudent investment. In enterprises efficiently launched and developed, historical cost and original cost would practically coincide both in items included and in amounts paid; that is, the subjects of expenditure would coincide, and the cost at prices prevailing at the time of installation would substantially coincide with the actual cost.

(e) Reproduction cost of plant and business, estimated on price levels prevailing at the date of valuation.

(f) Reproduction cost of plant and business, estimated on average price levels prevailing during periods of, say, 5 to 10 years preceding the valuation.

of determining whether rates already prescribed by the Legislature were confiscatory. It was to be applied judicially after the rate had been made, and by a court which had had no part in making the rate. When applied under such circumstances, the rule, although cumbersome, may occasionally be effective in destroying an obstruction to justice, as the action of a court is, when it sets aside the verdict of a jury. But the commissions undertook to make the rule their standard for constructive action. They used it as a guide for making or approving rates, and the tendency developed to fix as reasonable the rate which is not so low as to be confiscatory.⁷ Thus the rule which assumes that rates of utilities will ordinarily be higher than the minimum required by the Constitution has, by the practice of the commissions, eliminated the margin between a reasonable rate and a merely compensatory rate, and, in the process of rate-making, effective judicial review is very often rendered impossible.⁸ The

⁷ This, it appears, was the purpose of the board in *Galveston Electric Co. v. City of Galveston*, 258 U. S. 338, 42 Sup. Ct. 351, 66 L. Ed. 678.

⁸ A rate order will not be set aside unless the evidence compels conviction that a fair-minded board could not have reached the conclusion that the rate would prove adequate. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754, 19 Sup. Ct. 804, 43 L. Ed. 1154; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 433, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 17, 29 Sup. Ct. 148, 53 L. Ed. 371; *Van Dyke v. Geary*, 244 U. S. 39, 49, 37 Sup. Ct. 483, 61 L. Ed. 973; *Galveston Electric Co. v. Galveston*, 258 U. S. 338, 401, 402, 42 Sup. Ct. 351, 66 L. Ed. 678. The range for difference of opinion on each of the many factors to be taken into consideration in fixing the rate base is so wide that such compelling evidence can rarely be adduced, where the report filed recites that, after full hearing, all the so-called relevant facts were given consideration by the commission in reaching the decision made. There may often be found in opinions of utility commissions, after a lengthy and detailed discussion of a vast quantity of expert opinion, a conclusion like the following from *Re Illinois Northern Utilities Co.*, P. U. R. 1920D, 979, 999:

"After considering all the evidence and arguments of counsel in this case, bearing upon the valuation of the properties herein involved, the investment therein, their original costs, cost to reproduce, and present values, including all overheads, preliminary costs, cost of engineering, supervision, interest, insurance, organization, and legal expenses during construction, working capital, materials and supplies, and all other elements of value, tangible and intangible, and considering the plants are now going concerns in successful operation, the commission finds * * * for the purposes of this proceeding, and for those purposes only, the fair rate-making values * * * as follows."

Hence a commission's order must ordinarily be allowed to stand, unless it appears that there was some irregularity in the proceedings or that some erroneous rule of law was applied.

Since *Smyth v. Ames* this court has dealt with the validity (under the Fourteenth Amendment) of rate regulation by the states in over 50 cases. In only 25 of these has the court passed upon the question whether a rate fixed, or approved, by a state commission denied to the utility the opportunity of earning a fair return upon the fair value of the property. In none of these 25 cases has an order of a state commission, made after a full hearing, been declared void by this court, on the ground that the finding of the rate base, or value, was too low. In

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*result, inherent in the rule itself, is arbitrary action on the part of the rate-regulating body; for the rule not only fails to

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furnish any applicable standard of judgment. but directs consideration of so many elements that almost any result may be justified.

The adoption of present value of the utility's property, as the rate base, was urged in 1893 on behalf of the community, and it was adopted by the courts, largely, as a protection against inflated claims, based on what were then deemed inflated prices of the past. See argument in *Smyth v. Ames*, 169 U. S. 466, 479, 480, 18 Sup. Ct. 418, 42 L. Ed. 819; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 758, 19 Sup. Ct. 804, 43 L. Ed. 1154; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442, 443, 23 Sup. Ct. 571, 47 L. Ed. 892; *Stanislaus County v. San Joaquin & Kings River Canal & Irrigation Co.*, 192 U. S. 201, 214, 24 Sup. Ct. 241, 48 L. Ed. 406. Reproduction cost, as the measure, or as evidence, of present value, was also pressed then by representatives of the public, who sought to justify legislative reductions of railroad rates.⁹ The long depression which followed the panic of 1893 had brought prices to the lowest level reached in the nineteenth century. Insistence upon reproduction cost was the shippers' protest against burdens believed to have resulted from watered stocks, reckless financing, and unconscionable construction contracts. Those were the days before state legislation prohibited the issue of public utility securities without authorization from state officials, before accounting was prescribed and supervised, when outstanding bonds and stocks were hardly an indication of the amount of capital embarked in the enterprise, when depreciation accounts were unknown, and when book values, or property accounts, furnished no trustworthy evidence either of cost or of real value. Estimates of reproduction cost were then offered, largely as a means, either of supplying lacks in the proof of actual cost

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and investment, or of testing the credibility of evidence adduced, or of showing that the cost of installation had been wasteful. For these purposes evidence of the cost of reproduction is obviously appropriate.

none of them has the order been declared void on the ground that the commission fixed too low a percentage of return. Lower federal courts and state courts have occasionally intervened with effect. But the instances are relatively few as compared with the number of adverse decisions of the commissions. Even where orders fixing rates have been set aside for irregularity or error, the result of the new hearing is not always advantageous to the company.

⁹ See *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 374, 72 N. W. 713; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 568, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; *Metropolitan Trust Co. v. Houston & Texas Central R. Co.* (C. C.) 90 Fed. 683, 687, 688.

At first reproduction cost was welcomed by commissions as evidence of present value. Perhaps it was because the estimates then indicated values lower than the actual cost of installation; for, even after the price level had begun to rise, improved machinery and new devices tended for some years to reduce construction costs.¹⁰ Evidence of reproduction costs was certainly welcomed, because it seemed to offer a reliable means for performing the difficult task of fixing, in obedience to *Smyth v. Ames*, the value of a new species of property to which the old tests—selling price or net earnings—were not applicable. The engineer spoke in figures—a language implying certitude. His estimates seemed to be free of the infirmities which had stamped as untrustworthy the opinion evidence of experts common in condemnation cases. Thus, for some time, replacement cost, on the basis of prices prevailing at the date of the valuation, was often adopted by state commissions as the standard for fixing the rate base. But gradually it came to be realized that the definiteness of the engineer's calculations was delusive, that they rested upon shifting theories, and that their estimates varied so widely as to intensify, rather than to allay

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doubts.¹¹ When the price levels had risen largely, and estimates of replacement cost indicated values much greater than the actual cost of installation, many commissions refused to consider valuable what one declared to be assumptions based on things that never happened and estimates requiring the projection of the engineer's imagination into the future and methods of construction and installation that have never been and never will be adopted by sane men.¹² Finally the great

¹⁰ Compare Mr. Justice Field in *Railroad Commission Cases*, 116 U. S. 307, 343, 344, 6 Sup. Ct. 334, 338, 1191, 29 L. Ed. 636; *Steenerson v. Great Northern Ry.*, 69 Minn. 353, 374, 72 N. W. 713.

¹¹ Thus in *Re Marin Municipal Water District* (Cal.) P. U. R. 1915C, 433, 452, the several valuations of five experts were \$670,163, \$723,001.85, \$763,028, \$919,204, and \$1,031,436. In *Springfield v. Springfield Gas & Electric Co.* (Ill.) P. U. R. 1916C, 281, 307, the several valuations of five experts were \$547,488, \$588,262, \$806,404, \$898,785, and \$940,988. In *Duluth Street Ry. Co. v. Railroad Commission*, 161 Wis. 245, 152 N. W. 887, P. U. R. 1915D, 211, the valuations of two experts, both employed by the state were \$600,000 and \$1,100,000.

¹² 15 Mich. Law Rev. 205, 216; *Re Grafton County Electric Light & Power Co.* (N. H.) P. U. R. 1916E, 879, 885-888. Compare *Appleton Waterworks Co. v. Railroad Commission*, 154 Wis. 121, 154, 142 N. W. 476, 487 (47 L. R. A. [N. S.] 770, Ann. Cas. 1915B, 1160), quoting: "Skilled witnesses came with such prejudice in their minds that hardly any weight should be given to their evidence."

In *Danbury v. Danbury & Bethel Gas & Electric Light Co.* (Conn.) P. U. R. 1921D, 193, at page 206, the commission said:

"This method [reproduction at prices prevailing at time of valuation] of determining value usually includes percentages for engineering services never rendered, hypothetical efficiency of unknown labor, conjectural depreciation, opinion as to the condition of property, the supposed action of the elements, and, of course, its correctness depends upon whether superintendence was or would be wise or

fluctuation in price levels incident to the World War led to the transfusion of the engineer's estimate of cost with the economist's prophecies concerning the future price plateaus. Then the view that these estimates were not to be trusted as evidence of present

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*value was frequently expressed, and state utility commissions, while admitting the evidence in obedience to *Smyth v. Ames*, failed, in ever-increasing numbers to pay heed to it in fixing the rate base.¹³ The conviction is widespread that a sound conclusion as to the actual value of a utility is not to be reached by a meticulous study of conflicting estimates of the cost of reproducing new the congeries of old machinery and equipment, called the plant, and the still more fanciful estimates concerning the value of the intangible elements of an established business.¹⁴ Many commissions, like that of Massachusetts, have declared recently that

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"capital honestly and *prudently invested must, under normal conditions, be taken as

foolish, the investment improvident or frugal. It is based upon prophecy, instead of reality, and depends so much upon half truths that it bears only a remote resemblance to fact, and rises at best, only to the plane of a dignified guess."

In *Public Service Commission v. Pacific Telephone & Telegraph Co.*, P. U. R. 1916D, 947, 955, the commission said: "The old methods have proven uncertain, indefinite, and unsatisfactory to honest utilities and commissions alike."

See, also, in *re Northampton Gas Petition* (Mass.) P. U. R. 1915A, 618, 626; *Public Service Commission v. Pacific Telephone & Telegraph Co.*, P. U. R. 1916D, 947, 955.

¹³ Their action is in accord with views commonly held by legal writers. Compare *Edwin C. Goodard*, "Public Utility Valuation," 15 Mich. Law Rev. 205; *Robert L. Hale*, "The 'Physical Value' Fallacy in Rate Cases," 30 Yale Law Journal, 710; *Donald R. Richberg*, "A Permanent Basis for Rate Regulation," 31 Yale Law Journal, 263; *Robert H. Whitten*, "Fair Value for Rate Purposes," 27 Harv. Law Rev. 419; *Henry W. Edgerton*, "Value of the Service as a Factor in Rate-Making," 32 Harv. Law Rev. 516; *Gerard C. Henderson*, "Railway Valuation and the Courts," 33 Harv. Law Rev. 902, 1031; *Armistead M. Doble*, "Judicial Review of Administrative Action in Virginia," 8 Va. Law Rev. 477, 504. See, also, 32 Yale Law Journal, 390, 393; 19 Mich. Law Rev. 849.

¹⁴ The *Public Utility Reports* for 1920, 1921, 1922, and 1923 (to March 1) contain 363 cases in which the rate base or value was passed upon. Reproduction cost at unit prices prevailing at the date of valuation appears to have been the predominant element in fixing the rate base in only 5. In 63 the commission severely criticized, or expressly repudiated, this measure of value. In nearly all of the 363 cases, except 5, the commission either refused to pay heed to this factor as the measure of value, or indeed as evidence of any great weight.

The following summary shows the predominant element in fixing the rate base in the several cases: In 5 cases: Reproduction cost at unit prices prevailing at the date of the valuation.

In 28 cases: Reproduction cost at unit prices prevailing at some date, or the averages of some period, prior to the date of the valuation.

In 12 cases: Reproduction cost at unit prices prevailing at some date not specifically stated.

In 22 cases: Reproduction cost of an inventory of a prior date at prices prevailing at that date or prior thereto, plus subsequent additions at actual cost (so-called split inventory method).

In 3 cases: Reproduction cost on basis of future

the controlling factor in fixing the basis for computing fair and reasonable rates."¹⁵

To require that reproduction cost at the date of the rate hearing be given weight in fixing the rate base may subject investors to heavy losses when the high war and post-war price levels pass and the price trend is again

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*downward.¹⁶ The aggregate of the invest-

predicted prices (so-called trend prices, or new plateau method).

In 102 cases: A prior valuation by the commission plus the actual cost of subsequent additions.

In 85 cases: The actual original cost (including both initial cost and additions).

In 6 cases: Original cost arbitrarily appreciated.

In 27 cases: The historical cost or prudent investment.

In 28 cases: Book cost or investment.

In 12 cases: Bond and stock capitalization.

In 36 cases: Determination and classification of method impossible.

¹⁵ *Middlesex & Boston Rate case*, *Public Service Commission* (Mass.) Oct. 28, 1914, Report pp. 7-14; *Bay State Rate Case*, P. U. R. 1916F, 221, 233. And see *Id.* for a quotation from an address delivered at the "Conference on Valuation" in Philadelphia, November, 1915, in which the late John M. Eshleman, first president of the California Railroad Commission, said: "If we had this problem at the beginning, and were not attacking it in the middle, we would have no difficulty in agreeing with the holder of capital upon this subject, for he would quite readily agree to take the cost of doing the business plus an earning upon the money actually invested comparable to the earning offered in other available investments. Therefore the cost of doing the business, plus a return upon the capital necessarily invested in the business, which return shall be as great as is offered in other businesses of similar hazard, is all that ought to be accorded for the future, and it is all that will be accorded, if the public has any business sense. And if more is asked by the private owner, then he may expect no sympathy when he finds the public his competitor and his earning power impaired."

No case involving the fixing of rates by a commission has ever come to this court from New England. The only case involving in any way the validity of rates is *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555.

See, also, *Re Cripple Creek Water Co.* (Colo.) P. U. R. 1916C, 788, 799, 800; *Butler v. Lewistown, Augusta & Waterville St. Ry.* (Me.) P. U. R. 1916D, 25, 35.

¹⁶ Engineers testifying in recent rate cases have assumed that there will be a new plateau of prices. In *Galveston Electric Co. v. Galveston*, 253 U. S. 338, 42 Sup. Ct. 351, 66 L. Ed. 678, the company contended that a plateau 70 per cent. above the price level of 1914 should be accepted, and a plateau 33½ per cent. above was found probable by the master and assumed to be such by the lower court. In *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 U. S. 679, 43 Sup. Ct. 675, 67 L. Ed. — (No. 256, October Term, 1922), one 50 per cent. above the 1914 level was contended for; in the case at bar a plateau 25 per cent. above. But for the assumption that there will be a plateau there is no basis in American experience. The course of prices for the last 112 years indicates, on the contrary, that there may be a practically continuous decline for nearly a generation, that the present price level may fall to that of 1914 within a decade, and that, later, it may fall much lower. Prices rose steadily (with but slight and short recessions) for the 20 years before the United States entered the World War. From the low level of 1897 they rose 21 per cent. to 1900; then rose further (with minor fluctuations, representing times of good business or bad) and reached in 1914 a point 50 per cent. above the 1897 level. Then the great rise incident to the war set in. "Wholesale Prices, 1890 to 1921," U. S. Department of Labor, Bureau of La-

ments which have already been made at high costs since 1914, and of those which will be made before prices and costs can fall heavily, may soon exceed by far the depreciated value, of all the public utility investments made theretofore at relatively low cost. For it must be borne in mind that depreciation is an annual charge. That accrued on plants constructed in the long years prior to 1914 is

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much larger than that accruing on the properties installed in the shorter period since.¹⁷

That part of the rule of *Smyth v. Ames* which fixes the rate of return deemed fair, at the percentage customarily paid on similar investments at the time of the rate hearing also exposes the investor and the public to danger of serious injustice. If the replacement cost measure of value and the prevailing rate measure of fairness of return should be applied, a company which raised, in 1920,

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*for additions to plant, \$1,000,000 on a 9 per cent. basis, by a stock issue, or by long-term bond issue, may find a decade later that the value of the plant (disregarding depreciation) is only \$600,000, and that the fair return on money then invested in such enterprise is only 6 per cent. Under the test of a compensatory rate, urged in reliance upon *Smyth v. Ames*, a prescribed rate would not be confiscatory, if it appeared that the utility could

earn under it \$36,000 a year; whereas \$90,000 would be required to earn the capital charges. On the other hand, if a plant had been built in times of low costs, at \$1,000,000 and the capital had been raised to the extent of \$750,000 by an issue at par of 5 per cent. 30-year bonds and to the extent of \$250,000 by stock at par, and 10 years later the price level was 75 per cent. higher and the interest rates 8 per cent. it would be a fantastic result to hold that a rate was confiscatory, unless it yielded 8 per cent. on the then reproduction cost of \$1,750,000; for that would yield an income of \$140,000, which would give the bondholders \$37,500, and to the holders of the \$250,000 stock \$102,500, a return of 41 per cent. per annum. Money required to establish in 1920 many necessary plants has cost the utility 10 per cent. on 30-year bonds. These long-time securities, issued to raise needed capital, will in 1930 and thereafter continue to bear the extra high rates of interest, which it was necessary to offer in 1920 in order to secure the required capital. The prevailing rate for such investments may in 1930 be only 7 per cent., or indeed 6 per cent., as it was found to be in 1904, in *Stanislaus County v. San Joaquin Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406; in 1909 in *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; and in 1912, in *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 670, 32 Sup. Ct. 389, 56 L. Ed. 594. A rule which limits the guaranteed rate of return on utility invest-

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ments to that which may prevail at the time of the rate hearing may fall far short of the capital charge then resting upon the company.

In essence, there is no difference between the capital charge and operating expenses, depreciation, and taxes. Each is a part of the current cost of supplying the service, and each should be met from current income. When the capital charges are for interest on the floating debt paid at the current rate, this is readily seen. But it is no less true of a legal obligation to pay interest on long-term bonds, entered into years before the rate hearing and to continue for years thereafter; and it is true, also, of the economic obligation to pay dividends on stock, preferred or common. The necessary cost, and hence the capital charge, of the money embarked recently in utilities, and of that which may be invested in the near future, may be more, as it may be less, than the prevailing rate of return required to induce capital to enter upon like enterprises at the time of a rate hearing ten years hence. To fix the return by the rate which happens to prevail at such future day, opens the door to great hardships. Where the financing has been proper, the cost to the utility of the capital, required to construct, equip, and operate its plant, should measure the rate of return

bor Statistics, Bulletin No. 320, pp. 9-26. These are averages of the wholesale prices of all commodities. In the Bureau chart the 1913 prices are taken as the datum line (100). As compared with them the 1897 level was 67, the 1900 level 81. The chart on page 10 of the pamphlet, entitled "Price Changes and Business Prospects," published by the Cleveland Trust Company, gives price fluctuations for the 110 years prior to 1921. It shows three abrupt rises in the price level, by reason of war, and some less abrupt falls, by reason of financial panic. These may be called abnormal. But the normal has never been a plateau. The chart shows that the peak price levels were practically the same during the War of 1812, the Civil War, and the World War, and it shows that practically continuous declines, for about 30 years, followed the first two wars. The experience after the third may be similar.

¹⁷ The new enterprises undertaken at the present high level, or projected, are many, among them, development and long-distance transmission of hydroelectric power, and of electric power generated at the coal mines. Moreover, nearly every utility now existing must make expenditures upon its plant to provide improvements, additions, or extensions. The growth of our communities, and increase in the demands of the individual, constantly compel enlargement of a utility's facilities. The present annual investment in public utility enterprises is much greater in amount than at any time in the past. Some of the construction done during the war was at prices for labor and materials 120 per cent. above those prevailing in 1914. Recent construction was at prices 70 per cent. higher. If replacement cost should become the measure of the rate base, the return on enterprises entered upon after 1914 would, obviously, be imperilled. And a serious decline of the price level would subject the return on many utilities established earlier to like dangers. A collapse of public utility values might result. And the impairment of public utility credit might be followed by the cessation of extensions and new undertakings.

which the Constitution guarantees opportunity to earn.¹⁸

The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as matter of opinion.

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It would not fluctuate *with the market price of labor, or materials, or money. It would not change with hard times or shifting populations. It would not be distorted by the fickle and varying judgments of appraisers, commissions, or courts. It would, when once made in respect to any utility, be fixed, for all time, subject only to increases to represent additions to plant, after allowance for the depreciation included in the annual operating charges. The wild uncertainties of the present method of fixing the rate base under the so-called rule of *Smyth v. Ames* would be avoided, and likewise the fluctuations which introduce into the enterprise unnecessary elements of speculation, create useless expense, and impose upon the public a heavy, unnecessary burden.

In speculative enterprises the capital cost of money is always high—partly because the risks involved must be covered; partly because speculative enterprises appeal only to the relatively small number of investors who are unwilling to accept a low return on their capital. It is to the interest both of the utility and of the community that the capital be obtained at as low a cost as possible. About 75 per cent. of the capital invested in utilities is represented by bonds. He who buys bonds seeks primarily safety. If he can obtain it, he is content with a low rate of interest. Through a fluctuating rate base the bondholder can only lose. He can receive no benefit from a rule which increases the rate base as the price level rises; for his return, expressed in dollars, would be the same, what-

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ever the income of the company.¹⁹ That *the stockholder does not in fact receive an increased return in time of rapidly rising prices under the rule of *Smyth v. Ames*, as applied, the financial record of the last six

¹⁸ The community may, of course, demand, in respect to financing, as in respect to operation, that the right to earn a fair return be limited by the requirement that reasonable efficiency be exercised.

¹⁹ Of course, any one who chances to have money to invest, when money rates are high, gets the advantage incident to investing in a favorable market. If he invests in utility bonds, the higher agreed return upon his capital would be provided for by a rule which measures fair return by capital charges, as suggested above. If he elects to invest in the stock, he would, under the rule suggested, have the opportunity of earning a return commensurate with the value of the capital at the time it was embarked as stock in the enterprise.

years demonstrates. But the burden upon the community is heavy, because the risk makes the capital cost high.

The expense and loss now incident to recurrent rate controversies is also very large. The most serious vice of the present rule for fixing the rate base is not the existing uncertainty, but that the method does not lead to certainty. Under it, the value for rate-making purposes must ever be an unstable factor. Instability is a standing menace of renewed controversy. The direct expense to the utility of maintaining an army of experts and of counsel is appalling. The indirect cost is far greater. The attention of officials high and low is, necessarily, diverted from the constructive tasks of efficient operation and of development. The public relations of the utility to the community are apt to become more and more strained, and a victory for the utility may in the end prove more disastrous than defeat would have been. The community defeated, but unconvinced, remembers, and may refuse aid when the company has occasion later to require its consent or co-operation in the conduct and development of its enterprise. Controversy with utilities is obviously injurious, also, to the public interest. The prime needs of the community are that facilities be ample and that rates be as low and as stable as possible. The community can get cheap service from private companies, only through cheap capital. It can get efficient service only if managers of the utility are free to devote themselves to problems of operation and of development. It can get ample service through private companies only if investors may be assured of receiving continuously a fair return upon the investment.

What is now termed the prudent investment is, in essence, the same thing as that

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which the court has always *sought to protect in using the term present value.²⁰ Twenty-five years ago, when *Smyth v. Ames* was decided, it was impossible to ascertain with accuracy, in respect to most of the utilities, in most of the states in which rate controversies arose, what it cost in money to establish the utility; or what the money cost with which the utility was established; or what income had been earned by it; or how the income had been expended. It was, therefore, not feasible, then, to adopt, as the rate base, the amount properly invested or, as the rate of fair return, the amount of the

²⁰ Compare *Mr. Justice Field in Railroad Commission Cases*, 116 U. S. 307, 343, 344, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Mr. Justice Harlan*, 116 U. S. 341, 6 Sup. Ct. 338, 29 L. Ed. 636; *Dow v. Beidelman*, 125 U. S. 680, 690, 691, 8 Sup. Ct. 1028, 31 L. Ed. 841; and *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 409, 412, 14 Sup. Ct. 1047, 38 L. Ed. 1014; where the necessity of limiting the broad power of regulation enunciated in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, was first given expression. See, also, "Public Utilities, Their Cost New and Depreciation," by H. V. Hayes, pp. 255, 256.

capital charge. Now the situation is fundamentally different. These amounts are, now, readily ascertainable in respect to a large, and rapidly increasing, proportion of the utilities. The change in this respect is due to the enlargement, meanwhile, of the powers and functions of state utility commissions. The issue of securities is now, and for many years has been, under the control of commissions, in the leading states. Hence the amount of capital raised (since the conferring of these powers) and its cost are definitely known, through current supervision and prescribed accounts, supplemented by inspection of the commission's engineering force. Like knowledge concerning the investment of that part of the capital raised and expended before these broad functions were exercised by the utility commissions has been secured, in many cases, through investigations undertaken later, in connection with the issue of new securities or the regulation of rates. The amount and disposition of cur-

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rent earnings of all the *companies are also known. It is, therefore, feasible now to adopt as the measure of a compensatory rate—the annual cost, or charge, of the capital prudently invested in the utility.²¹ And, hence, it should be done.

Value is a word of many meanings. That with which commissions and courts in these proceedings are concerned, in so-called confiscation cases, is a special value for rate-making purposes, not exchange value. This is illustrated by our decisions which deal with the elements to be included in fixing the rate base. In *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 669, 32 Sup. Ct. 389, 56 L. Ed. 594; and *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 165, 35 Sup. Ct. 811, 59 L. Ed. 1244, good will and franchise value

were excluded from the rate base in deter-

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mining whether the prescribed charges *of the public utility were confiscatory. In *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 42 Sup. Ct. 351, 66 L. Ed. 678, the cost of developing the business as a financially successful concern was excluded from the rate base. In *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 171, 35 Sup. Ct. 811, 59 L. Ed. 1244, the fact that the street had been paved (and hence the reproduction cost of laying gas mains greatly increased) was not allowed as an element of value. But, obviously, good will and franchise value are important elements when exchange value is involved; and where the community acquires a public utility by purchase or condemnation, compensation must be made for its good will and earning power, at least under some circumstances. *Omaha v. Omaha Water Co.*, 218 U. S. 180, 202, 203, 30 Sup. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 865, 10 C. C. A. 653, 27 L. R. A. 827. Likewise, as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. These cases would seem to require rejection of a rule which measured the rate base by cost of reproduction or by value in its ordinary sense.

The rule by which the utilities are seeking to measure the return is, in essence, reproduction cost of the utility or prudent investment, whichever is the higher. This is indicated by the instructions contained in the *Special Report on Valuation of Public Utilities*, made to the American Society of Civil Engineers, October 28, 1916, *Proceedings*, vol. 42:

"So long as the company owner keeps a sum equivalent to the total investment at work for the public, either as property serving the public, or funds held in reserve for such property, no policy should be followed in estimating depreciation that will reduce the property to a value less than the investment. * * *" Page 1726.

"Estimates of the cost of reproduction should be based on the assumption that the identical

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property is to be *reproduced, rather than a substitute property" (page 1719), "although such a substitute property, much less costly than the existing plant, might furnish equal or better service, it is not reproduction of service, but of property, that is under consideration; and clearly the estimate should be of existing property created with public approval, rather than of a substituted property" (page 1772).

If the aim were to ascertain the value (in its ordinary sense) of the utility property, the enquiry would be, not what it would cost to reproduce the identical property, but what it would cost to establish a plant which could render the service, or in other words, at what cost could an equally efficient substitute be then produced. Surely the cost of an

²¹ In 1898, when *Smyth v. Ames* was decided, only one state—Massachusetts—had control by commission of the issue of securities by all public utility companies. (New Hampshire controlled security issues of railroads and street railways; Maine and New York controlled increase of capital stock by railroads; and Connecticut, the issue of bonds by railroads.) In 1923 at least 24 states and the District of Columbia controlled through commissions the issue of securities of public utility companies. Legislation for 1923 and 1922 (in part) has not been available. Other states may have legislated on the subject in 1923 or 1922.

In 1898 no state had control by commission of the accounting of all public utilities. Massachusetts controlled the accounting of gas, electric light, street railway, and railroad companies; Iowa, of railways and carriers; New York, Texas, and Vermont, of railroads only. In 1923 at least 36 states and the District of Columbia controlled through commissions the accounting of public utility companies.

In 1898, only one state—Massachusetts—exercised through a commission control of all public utilities. In 1923 such control is exercised in at least 39 states and the District of Columbia. This does not include those states exercising commission control over railroads and related utilities, such as street railways, express companies, and telephone and telegraph companies. These states number 47. The number of states having commission control of railroads in 1898 was 27. In 1922 every state except Delaware had commission control of railroads.

equally efficient substitute must be the maximum of the rate base, if prudent investment be rejected as the measure. The utilities seem to claim that the constitutional protection against confiscation guarantees them a return both upon unearned increment and upon the cost of property rendered valueless by obsolescence.

(262 U. S. 333)

RIDDLE v. DYCHE, Warden of the United States Penitentiary at Atlanta, Ga.

(Argued April 12, 1923. Decided May 21, 1923.)

No. 663.

1. Habeas corpus ⇨92(1)—That jury was composed of less than 12 men could not be urged in habeas corpus, where record recited lawful jury acted.

Where accused was convicted of felony, the record reciting that "a jury of good and lawful men" was duly impaneled, sworn, and charged, and the point that the jury which convicted accused was illegally constituted of less than 12 men was not saved in a bill of exceptions nor considered by the Court of Appeals, which affirmed the conviction on writ of error, the point that the jury was constituted of less than 12 men could not thereafter be raised by accused in habeas corpus proceeding, where the jurisdiction of the court of conviction was not disputed, as this would be an attempt collaterally to impeach the record, and accused's remedy was by writ of error.

2. Habeas corpus ⇨92(1)—Record of trial court imports absolute verity.

The writ of habeas corpus is not a proceeding in the original criminal prosecution, but an independent civil writ, in which the record of the trial court is not open to collateral attack, but imports absolute verity.

3. Habeas corpus ⇨92(1)—Court cannot inquire into facts inconsistent with record.

The power to inquire into facts outside the record, allowed under some circumstances, does not extend to such as are inconsistent with the record.

Appeal from the District Court of the United States for the Northern District of Georgia.

Petition by David H. Riddle for writ of habeas corpus, directed to James E. Dyche, Warden of the United States Penitentiary at Atlanta, Ga. Writ denied, and petitioner appeals. Affirmed.

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*Messrs. Henry E. Davis, of Washington, D. C., and William A. Denson, of Birmingham, Ala., for appellant.

Mr. Rufus S. Day, of Washington, D. C., for appellee,

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The appellant was convicted in the federal District Court for the Northern District of Alabama of a felony and sentenced to imprisonment. The record of the District Court recites that "a jury of good and lawful men" was duly impaneled, sworn and charged. After sentence appellant moved to amend the record entry to show that only 11 men sat as jurors in the case and offered testimony in support of the motion. The court rejected the proof on the ground that oral testimony was not admissible to modify or amend the record, and, first reciting that after hearing the evidence and arguments, being of opinion that the record of the judgment entry was as it should be, and did not need amendment, it denied the motion. Appellant then applied to this court for a writ of mandamus to require the District Judge to correct the record in the particulars just stated, setting forth in his petition the evidence offered and rejected. The writ was denied (*Ex parte Riddle*, 255 U. S. 450, 451, 41 Sup. Ct. 370, 371, 65 L. Ed. 725); this court saying:

"He [appellant] might have saved the point by an exception at the trial or by a bill of exceptions to the denial of his subsequent motion, setting forth whatever facts or offers of proof

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were material and then have brought a *writ of error. *Nalle v. Oyster*, 230 U. S. 165, 177. In such cases mandamus does not lie. Ordinarily, at least, it is not to be used when another statutory method has been provided for reviewing the action below, or to reverse a decision of record. *Ex parte Morgan*, 114 U. S. 174; *Ex parte Park Square Automobile Station*, 244 U. S. 412, 414. In this case the facts were more or less clearly admitted at the argument, but the record does not establish them, and the extent of agreement or dispute with regard to them does not change the remedy to be sought."

Appellant then took the case by writ of error to the Circuit Court of Appeals for the Fifth Circuit, *Riddle et al. v. United States*, 279 Fed. 216, where the judgment so far as it concerns appellant was affirmed.

The point was not saved in a bill of exceptions, and it was not considered by the Court of Appeals. After the rendition of the judgment by that court, appellant sued out a writ of habeas corpus in the District Court for the Northern Division of the Northern District of Georgia, seeking release from imprisonment on the ground that the jury which convicted him was illegally constituted of less than 12 men. That court, on the return of the appellee and after hearing, discharged the writ and remanded appellant to custody, from which order the case comes here by appeal.

[1, 2] That the trial court had jurisdiction to try and punish the appellant for the offense with which he was charged is not disputed. The attempt is collaterally to im-

peach the record, showing upon its face that a lawful jury was duly impaneled, sworn, and charged. Appellant's remedy, as suggested in the mandamus proceeding, was by writ of error. He did not avail himself of it, and, whatever may have been the cause or excuse for not doing so, habeas corpus cannot be used as a substitute. *Frank v. Mangum*, 237 U. S. 309, 326, 35 Sup. Ct. 582, 59 L. Ed. 969, and cases cited; *In re Lennon*, 166 U. S. 548, 552, 17 Sup. Ct. 658, 41 L. Ed. 1110; *In re Coy*, 127 U. S. 731, 758-759, 8

^{*336}Sup. Ct. 1263, 32 L. Ed. 274. The *writ of habeas corpus is not a proceeding in the original criminal prosecution, but an independent civil suit (*Ex parte Tom Tong*, 108 U. S. 556, 559, 2 Sup. Ct. 871, 27 L. Ed. 826), in which the record of the trial court is not open to collateral attack, but imports absolute verity. See *Ex parte Tobias Watkins*, 3 Pet. 193, 202-203, 207, 7 L. Ed. 650; *In re Lennon*, supra; *Grignon's Lessee v. Astor et al.*, 2 How. 319, 340-342, 11 L. Ed. 283; *Matter of Gregory*, 219 U. S. 210, 213-214, 218, 31 Sup. Ct. 143, 55 L. Ed. 184; 2 *Black on Judgments*, § 625; 1 *Black on Judgments*, § 254.

[3] The power to inquire into facts outside the record, allowed under some circumstances (*In re Mayfield*, 141 U. S. 107, 116, 11 Sup. Ct. 939, 35 L. Ed. 635), cannot be extended to such as are inconsistent with the record.

The *Frank Case* relied upon by appellant, does not decide otherwise. The language quoted (237 U. S. 331, 35 Sup. Ct. 589, 59 L. Ed. 969), to the effect that the court may "look behind and beyond the record * * * to a sufficient extent to test the jurisdiction of the * * * court" and "inquire into jurisdictional facts, whether they appear upon the record or not," was not meant to abrogate the rule established by prior decisions that the record may not be contradicted collaterally, at least where, as here, jurisdiction of the cause or parties is not involved, and this is demonstrated by the cases cited in support of the statement. In *Cuddy, Petitioner*, 131 U. S. 280, 286, 9 Sup. Ct. 703, 33 L. Ed. 154, the court, sustaining the propriety of the inquiry there permitted, said: "Such evidence would not have contradicted the record." In the *Mayfield Case*, supra, it was said that the inquiry might involve "an examination of facts outside of, but not inconsistent with, the record." 141 U. S. 116, 11 Sup. Ct. 939, 35 L. Ed. 635. Nor is there anything to the contrary in the other two cases cited.

The court below was right in ruling that it was without authority to review or set aside the action of the trial court, for, as this court said in *Sargeant et al. v. State Bank of Indiana*, 12 How. 371, 385 (13 L. Ed. 1028):

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"* * * Whatever may be *the powers of a superior court, in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not acting in the exercise of appellate power."

The order of the District Court, denying the writ, is

Affirmed.

(262 U. S. 312)

DAVIS, Director General of Railroads, v. FARMERS' CO-OP. EQUITY CO.

(Argued April 17, 18, 1923. Decided May 21, 1923.)

No. 270.

1. Commerce ⇐81—Statute making soliciting agent for foreign carrier an agent to receive service of summons held interference with commerce.

Gen. St. Minn. 1913, § 7735, providing that any foreign corporation's agent, soliciting freight and passenger traffic, may be served with summons for the corporation, construed by the highest court in Minnesota as not being limited to suits arising out of business transacted within Minnesota, and as including suits where plaintiff is not and never has been a citizen of Minnesota, held unconstitutional, as unreasonably burdening interstate commerce; solicitation of traffic by railroads, in states remote from their line, being a recognized part of the business of interstate transportation.

2. Evidence ⇐5(2)—Judicial notice taken of volume of damage claims against interstate carriers.

That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers—are matters of common knowledge.

3. Commerce ⇐81—That corporation's business is entirely interstate does not render it immune from state process.

The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary processes of the courts of a state, for the requirements of effective administration of justice are paramount.

In Error to the Supreme Court of the State of Minnesota.

Action by the Farmers' Co-operative Equity Company against James C. Davis, Director General of Railroads. Judgment for plaintiff was affirmed by the Supreme Court

of Minnesota (150 Minn. 534, 186 N. W. 130), and defendant brings error. Reversed.

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*Messrs. Gardiner Lathrop and Homer W. Davis, both of Chicago, Ill., and William T. Farley and Thomas F. Quinn, both of St. Paul, Minn., for plaintiff in error.

Mr. Morton Barrows, of St. Paul, Minn., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

A statute of Minnesota (Laws 1913, c. 218, p. 274; General Statutes 1913, § 7735) provides that:

"Any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its

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lines outside of this state, may be served *with summons by delivering a copy thereof to such agent."

Whether this statute, as construed and applied, violates the federal Constitution, is the only question for decision.

The Atchison, Topeka & Santa Fé Railway Company is a Kansas corporation engaged in interstate transportation. It does not own or operate any railroad in Minnesota; but it maintains there an agent for solicitation of traffic. In April, 1920, suit was brought by another Kansas corporation in a court of Minnesota against the Director General of Railroads, as agent, on a cause of action arising under federal control. Service was made pursuant to the Minnesota statute.¹ The recovery sought was for loss of grain shipped under a bill of lading issued by the carrier in Kansas for transportation over its line from one point in that state to another. So far as appears the transaction was in no way connected with Minnesota or with the soliciting agency located there. Defendant appeared specially, claimed that, as to it, the statute authorizing service violated the due process and equal protection clauses of the Fourteenth Amendment, as well as the commerce clause, and moved to dismiss the suit for want of jurisdiction. The motion was denied. After appropriate proceeding, the trial court entered final judgment for plaintiff, its judgment was affirmed by the Supreme Court of Minnesota (150 Minn. 534, 186 N. W. 130), and the case is here on writ of error under section 237 of the Judicial Code (Comp. St. § 1214).

¹ The alleged cause of action having arisen during federal control, the action was brought pursuant to section 206 (a) of Transportation Act Feb. 28, 1920, c. 91, 41 Stat. 458, 461, against the Director General, as Agent. A contract had been made with the carrier for the conduct of litigation arising out of operation during federal control. Hence, under section 206 (b) process could be served upon the agent of the company "if such agent * * * is authorized by law to be served with process in proceedings brought against such carrier." The question of the validity of the service is thus the same as if suit had been brought against the company on such a cause of action arising after federal control had terminated.

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[1] *Solicitation of traffic by railroads, in states remote from their lines, is a recognized part of the business of interstate transportation. *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391. As construed by the highest court of Minnesota, this statute compels every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the state. Jurisdiction is not limited to suits arising out of business transacted within Minnesota. Compare *Mitchell Furniture Co. v. Selden Breck Co.*, 257 U. S. 213, 42 Sup. Ct. 84, 66 L. Ed. 201; *Missouri Pacific R. R. Co. v. Clarendon Boat Oar Co., Inc.*, 257 U. S. 533, 42 Sup. Ct. 210, 66 L. Ed. 354; *Chipman, Limited, v. Thomas B. Jeffery Co.*, 251 U. S. 373, 40 Sup. Ct. 172, 64 L. Ed. 314. It is asserted, whatever the nature of the cause of action, wherever it may have arisen, and although the plaintiff is not, and never has been, a resident of the state. *Armstrong Co. v. New York Central R. R. Co.*, 129 Minn. 104, 151 N. W. 917, L. R. A. 1916E, 232, Ann. Cas. 1916E, 335; *Langergren v. Pennsylvania R. R. Co.*, 130 Minn. 35, 152 N. W. 1102; *Rishmiller v. Denver & Rio Grande R. R. Co.*, 134 Minn. 261, 159 N. W. 272; *Merchants' Elevator Co. v. Chesapeake & Ohio Ry. Co.*, 147 Minn. 188, 179 N. W. 734; *Callaghan v. Union Pacific R. R. Co.*, 148 Minn. 482, 182 N. W. 1004. This condition imposes upon interstate commerce a serious and unreasonable burden, which renders the statute obnoxious to the commerce clause. Compare *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 35 Sup. Ct. 57, 59 L. Ed. 193.

[2] That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers—these are matters of common knowledge. Facts, of which we, also, take judicial notice, indi-

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cate that the burden upon interstate *carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious.² During federal control absences of employees incident to such litigation were found, by the Director General, to interfere

² A message, dated February 2, 1923, of the Governor of Minnesota to its Legislature, recites that a recent examination of the calendars of the district courts in 67 of the 87 counties of the state disclosed that in those counties there were then pending 1,023 personal injury cases in which nonresident plaintiffs seek damages aggregating nearly \$26,000,000 from foreign railroad corporations which do not operate any line within Minnesota.

so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18A) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & Vicksburg Railway Co. v. Journey*, 257 U. S. 111, 42 Sup. Ct. 6, 66 L. Ed. 154. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war.

[3] The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary process of the courts of a state. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479. The requirements of orderly, effective administration of justice are paramount. In *Kane v. New Jersey*, 242 U. S. 160, 167, 37 Sup. Ct. 30, 61 L. Ed. 222, a statute was sustained which required non-resident owners of motor vehicles to appoint a state official as agent upon whom process might be served in suits arising from their use within the state, because the burden thereby imposed upon interstate commerce was held to be a reasonable requirement for the protection of the public. It may be that a statute like that here assailed would be valid, although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered

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*upon within the state,³ or if the plaintiff was, when it arose, a resident of the state.⁴ These questions are not before us, and we express no opinion upon them. But orderly effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintain-

ing adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to ensure to carriers efficiently operated a fair return on property devoted to the public use. See *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. Co.*, 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086; *The New England Divisions Case*, 261 U. S. 184, 43 Sup. Ct. 270, 67 L. Ed. —. Avoidance of waste, in interstate transportation, as well as maintenance of service, have become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce.

The case at bar resembles, in its facts, but is not identical with, *Missouri, Kansas & Texas Ry. Co. v. Reynolds*, 255 U. S. 565, 41 Sup. Ct. 446, 65 L. Ed. 788, and *St. Louis Southwestern Ry. Co. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77. In the former, the validity of a similar Massachusetts statute was sustained

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in a per *curiam* opinion. In the latter, jurisdiction was upheld in the absence of a statute concerning solicitation. But in both cases the only constitutional objection asserted was violation of the due process clause. See *Reynolds v. Missouri, Kansas & Texas Ry. Co.*, 224 Mass. 379, 113 N. E. 413; *Id.*, 228 Mass. 584, 117 N. E. 913. Since we hold that the Minnesota statute as construed and applied violates the commerce clause, we have no occasion to consider whether it also violates the Fourteenth Amendment.⁵

Reversed.

Mr. Justice BUTLER took no part in the consideration or decision of this case.

³ Compare *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479; "Jurisdiction over Nonresidents Doing Business within a State," by Austin W. Scott, 32 Harv. Law Rev. 871, 887.

⁴ Compare *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143; *Maxwell v. Bugbee*, 250 U. S. 525, 537, 40 Sup. Ct. 2, 63 L. Ed. 1124; *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 40 Sup. Ct. 402, 64 L. Ed. 713; *Kenney v. Supreme Lodge*, 252 U. S. 411, 40 Sup. Ct. 371, 64 L. Ed. 633, 10 A. L. R. 716.

⁵ Compare *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; *Rosenberg Brothers & Co. v. Curtis Brown Co.*, 260 U. S. 516, 43 Sup. Ct. 170, 67 L. Ed. —; *Bank of America v. Whitney Central National Bank*, 261 U. S. 171, 43 Sup. Ct. 311, 67 L. Ed. —. Also *Connecticut Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Lumbermen's Insurance Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; *Old Wayne Life Association v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345; *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782; *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610.

(262 U. S. 352)

(43 Sup.Ct.)

CAMPBELL v. CITY OF OLNEY.

(Argued April 20, 1923. Decided May 21, 1923.)

No. 266.

1. Courts  **394(18)**—Supreme Court will not review state court's application of local laws, as respects sidewalk assessment.

As respects the validity of sidewalk assessment, a judgment of the state court sustaining the validity of the assessment proceedings necessarily determined that the state laws were complied with, so that on writ of error to the Supreme Court the state court's application of local laws will not be reviewed in the Supreme Court, unless a federal right is involved.

2. Constitutional law  **290(3)**—Sidewalk assessment held not denial of due process.

As respects validity of sidewalk assessment, where property owner was given 20 days' notice of such assessment, but failed to appear or make objection, or bring suit to set it aside or correct it, his claim, first set up as a defense in suit to enforce the assessment, that the city had not complied with statutory requirements, and that its acts and conduct in making the assessment constituted a taking of his property without due process of law, in violation of the Fourteenth Amendment, was not even colorable.

In Error to the County Court of Young County, Texas.

Suit by the City of Olney against W. T. Campbell. Judgment for the city, and defendant brings error. Writ of error dismissed.

Mr. A. H. Carrigan, of Wichita Falls, Tex., for plaintiff in error.

Mr. W. B. Jaynes, of Washington, D. C., for defendant in error.

Mr. Justice BUTLER delivered the opinion of the Court.

A statute of Texas (R. S. 1911, c. 11, arts. 1006-1007) empowered the city of Olney to lay sidewalks and to assess the cost against abutting property and owners. The city ordered the construction of sidewalks in front of four lots owned by plaintiff in error. An ordinance was passed making the cost of sidewalks a lien against abutting property, and providing for 20 days' notice to the owner, before charging such cost personally against him or as a lien upon his property.

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Plaintiff in *error was given notice in compliance with the statute and ordinance. He failed to appear or make objection to the assessment.

The statute provides that any property owner against whom or whose property such assessment has been made may within 20 days bring suit in any court having jurisdiction to set aside or correct the same or any proceeding with reference thereto, on

account of any error or invalidity therein; but thereafter he may not question the validity of such proceeding or assessment. No suit was brought by the plaintiff in error. The city issued its assessment certificate, declaring the cost of the sidewalks, \$89.32, a charge against him and against the lots.

The statute further provides that if any such certificate shall recite that the proceedings have been regularly had, and that all prerequisites to the fixing of the assessment lien and personal liability have been complied with, it shall be prima facie evidence of the facts so recited. The certificate contained these recitals. Plaintiff in error failed to pay, and the city brought suit in justice court. He answered in substance that the city had no ordinance authorizing the assessment, that it had not complied with the statute, and was therefore without authority to invoke it, and that its acts and conduct in making the assessment constituted a taking of his property without due process of law in violation of the Fourteenth Amendment. He contended that there should have been a specific ordinance concerning this sidewalk and assessment.

The justice of the peace gave judgment in favor of plaintiff in error. The city appealed to the county court. At the trial, it offered the assessment certificate in evidence and rested. Plaintiff in error offered to prove that no ordinance had been passed relative to the laying of this particular sidewalk, that he received the notice to appear, and went to the meeting place of the city council, and that the council had adjourned. He did

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not offer *to prove any fact excusing his failure to appear before adjournment, or that he was denied a hearing. The county court found for the city. Its order denying a motion for a new trial recites that it is the highest appellate court to which the cause can be taken in the state of Texas because the amount involved is less than \$100. The county judge allowed a writ of error bringing the case here.

[1, 2] The judgment of that court necessarily determines that the state laws were complied with. Unless a federal right is involved, the state court's application of local laws will not be reviewed here. *Hallinger v. Davis*, 146 U. S. 314, 319, 13 Sup. Ct. 105, 36 L. Ed. 986; *Peters v. Broward*, 222 U. S. 483, 492, 32 Sup. Ct. 122, 56 L. Ed. 278; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 234, 26 Sup. Ct. 232, 50 L. Ed. 451; *Wade v. Travis County*, 174 U. S. 499, 508, 19 Sup. Ct. 715, 43 L. Ed. 1060; *Osborne v. Florida*, 164 U. S. 650, 654, 17 Sup. Ct. 214, 41 L. Ed. 586; *Bardon v. Land & River Improvement Co.*, 157 U. S. 327, 331, 15 Sup. Ct. 650, 39 L. Ed. 719; *Missouri v. Lewis*, 101 U. S. 22, 32-33, 25 L. Ed. 989. Plaintiff in error had opportunity to be heard before the city council and was allowed a reasonable time after the assess-

ment to bring suit to set it aside or to correct it or any proceeding with reference thereto. He failed to avail himself of the rights so given him by state laws. Their validity was not drawn in question. His claim that he was denied due process of law is not even colorable. *Valley Farms Co. v. County of Westchester*, 261 U. S. 155, 43 Sup. Ct. 261, 67 L. Ed. —, decided February 19, 1923; *Withnell v. Ruecking Construction Co.*, 249 U. S. 63, 69, 39 Sup. Ct. 200, 63 L. Ed. 479; *Hibben v. Smith*, 191 U. S. 310, 321, 24 Sup. Ct. 88, 48 L. Ed. 195 et seq.; *French v. Barber Asphalt Co.*, 181 U. S. 324, 334, 344, 21 Sup. Ct. 625, 45 L. Ed. 879, and cases cited. There is no federal question in the case.

The writ of error is dismissed.

(262 U. S. 265)

STEVENS v. ARNOLD et al.

(Argued May 2, 1923. Decided May 21, 1923.)

No. 200.

1. Judgment $\S$ 828(3)—Decree in state court in suit to quiet title held conclusive as to right of recovery.

Where complainant in a suit to quiet title in the state court had waived by amended bill his claim to the property in controversy under the laws of accretion, the decrees rendered by the state court dismissing his bill, because his title under the deeds held by him was invalid, is conclusive in a subsequent suit against the same defendant, brought in the federal court to quiet his title under the laws of accretion.

2. Judgment $\S$ 828(3)—Decree of state court denying recovery in suit to quiet title held not conclusive on defendant's title.

Where a state court had dismissed a bill to quiet title and refused to amend its remittitur, so as to establish the defendant's right set up by him, the decree was not conclusive as to defendant's right, and he can present his cross-bill to have his title quieted in a subsequent suit by the same plaintiff to quiet title.

3. Navigable waters $\S$ 44(3)—Conveyance by state held not to give right to accretions in front of lands of another.

A grant from the state to defendant's predecessors in title of land flowed by tidewaters at the date of the deed does not give the grantee the right to the accretions formed within the boundaries of the grant in front of the lands of plaintiff; the common-law right of accretion, which is a right as against the state as well as against its grantees, having been adopted by the state.

4. Navigable waters $\S$ 44(3)—Extension of street in straight line held proper division of accretion.

Where streets had extended in a straight line, according to a plan adopted in 1852, across land which was subsequently destroyed by erosion or avulsion, the owners of the upland on

opposite sides of the street were entitled to accretion on their respective sides of the street, and their lines will not be spread outward like a fan, though the shore line was convex.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Suit to quiet title by Samuel F. Nirdlinger against Henry E. Stevens, Jr., in which Arthur S. Arnold and others, as executors, were substituted as plaintiffs after the death of the original plaintiff. A decree for plaintiffs (262 Fed. 591) was affirmed by the Circuit Court of Appeals (273 Fed. 1022), and defendant brings certiorari. Decree reversed, and bill and cross-bill dismissed.

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*Messrs. Harvey F. Carr, of Camden, N. J., and Jackson H. Ralston, Jr., for petitioner.
Mr. Robert H. McCarter, of Newark, N. J., for respondents.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill to quiet title to land in Atlantic City, New Jersey, brought primarily at lease under a statute of that state. 4 Compiled Stat. p. 5399 (P. L. 1870, p. 20). The suit was begun by Samuel F. Nirdlinger and now is maintained by his executors and trustees (the respondents). He owned a parcel lying to the east of New Hampshire Avenue, which runs north and south, and to the north of Oriental Avenue which crosses the other avenue at right angles. The defendant owns an adjoining parcel on the other side of New Hampshire Avenue and the land in controversy is a triangular tract having its apex in the southwestern corner of the com-

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plainants' lot *and spreading south of Oriental Avenue and east of New Hampshire Avenue to the sea. It has been formed by accretion in recent years. The defendant claims title by a former adjudication and by a riparian grant from the State. The District Court entered a decree for Nirdlinger after an elaborate discussion, 262 Fed. 591, and its opinion was adopted and the decree affirmed by the Circuit Court of Appeals, 273 Fed. 1022.

[1] The former adjudication relied upon by the defendant was in a suit in the State Court brought against him under the same statute for the same purpose as the present one, by Nirdlinger and the Dewey Land Company from which Nirdlinger afterwards purchased a part of his land. The statute allows a person in peaceable possession of lands, claiming to own the same, whose title is disputed, to bring a suit in chancery against any person claiming an interest, calling upon him to set forth his title. After the issues are tried the decree is to settle the rights of all parties and to be conclusive.

The complainants in the chancery suit alleged possession and claimed ownership, at first by accretion but by amendment by virtue of two deeds only. The defendant, as here, set up his riparian grant and a claim by accretion. The Chancellor held that the grant from the State could not be impeached collaterally and dismissed the bill. The Court of Errors and Appeals held this to be error but affirmed the decree on the ground that the complainants showed no title; that the deeds did not give the right claimed and that "all claim by accretion is waived." *Dewey Land Co. v. Stevens*, 83 N. J. Eq. 314, 316, 90 Atl. 1040; *Id.*, 83 N. J. Eq. 656, 91 Atl. 934. It would have been intelligible if the Court had held that the complainants' statement of title was immaterial and that it was enough that they showed possession and a claim of ownership. But it being established that, notwithstanding the claim, if the title disclosed is defective the bill must be dismissed, we think that

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until the *Court of Errors and Appeals decides otherwise it must be assumed that the decree is conclusive between the parties that at that time the complainants did not own the land. We cannot imagine that the statute contemplated a series of suits based on coexisting titles produced one after another, and especially when the one now relied upon was waived in the earlier case. We assume that the usual rule applies, and that if the claim to own must be justified, all justifications then existing are in issue. It follows that the plaintiffs' bill must be dismissed.

[2] But plainly the claim of the defendant was not established in the former suit. That appears from the nature of the decree, from the opinion of the Court of Errors and Appeals, and from the admitted fact that it subsequently refused to amend its remittitur so as to establish the defendant's right. See also *Dewey Land Co. v. Stevens*, 85 N. J. Eq. 374, 96 Atl. 362. Therefore the defendant took a proper step and did not waive the benefit of the former decree when in the present case he made a counterclaim and asked that his rights be adjudicated to be paramount. Upon this matter the discussion of the District Court was adequate and convincing, so that the unsatisfactory result will be that neither party can get a declaration of title and the complainants will be left to stand upon their possession alone.

[3] The first ground of the defendant's claim is a grant from the State to the defendant's predecessors in title of land flowed by tide-water at the date of the deed, June 28, 1900, which included the strip in controversy. There seems to be no doubt from the decision of the Court of Errors and Appeals that this grant put an end to the right of the complainants to build wharves or otherwise

to encroach upon the granted land, that being regarded as merely a license, revoked by the grant. The defendant contends that the effect was greater still, and relies upon a statement in the decision referred to, that:

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"If the land was formerly fast land [as this was said to have been], and the title was lost by erosion, it became the property of the State, not merely as long as it remained under water, but, if the State made a riparian grant, absolutely."

This form of statement remained unchanged notwithstanding the criticism in a concurring opinion by White, J., 83 N. J. Eq. 656, 91 Atl. 934. But we agree with the District Court that it means no more than we have stated, and is shown to mean no more not only by the authority cited but by the following words in the opinion:

"The title lost by erosion was then lost forever, unless it was regained by accretion, and the right of accretion was the compensation of the former owner, for his loss."

We presume from this language that in New Jersey as elsewhere by the common law the right of accretion is not like the permissive right to use land still under water, but is a right as against the State as well as its grantees, when as here the grantees have not filled in the land. In some countries that inherit the Roman law the rule may be different. *Ker v. Couden*, 223 U. S. 268, 32 Sup. Ct. 284, 56 L. Ed. 432. We conclude that the conveyance by the State did not give the defendant a title to land added by accretion to the complainants' premises, and that it does not matter that this conveyance was by metes and bounds. The boundaries however indicated were good until changed by the gradual work of the ocean and then were modified in accordance with what we believe to be the common law. *Banks v. Ogden*, 2 Wall. 57, 17 L. Ed. 818.

[4] The defendant's other contention is that as the former seashore was convex the dividing lines should spread outward like a fan, and not continue the north and south divisions indicated by the extension of New Hampshire Avenue to the present or recent high water mark. Without going into the details elaborated by the District Court we agree that since a plan was made in 1852

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*showing New Hampshire Avenue as extending farther south even than at present the existing street system was adopted and recognized New Hampshire Avenue as the dividing line as well for accretions as for the fixed land. The result is that both the bill and the cross-bill must be dismissed.

Decree reversed.

Bill and cross-bill dismissed.

(262 U. S. 355)

McCARTHY, United States Marshal, v. ARNDSTEIN.¹

(Argued April 11, 1923. Decided May 21, 1923.)

No. 404.

1. Bankruptcy ◊242(2)—Upon examination, bankrupt may refuse to answer incriminating questions, where he has not admitted guilt or disclosed incriminating facts.

In the involuntary examination of a bankrupt, since he is practically in the position of witness under cross-examination, the rule applies that, where the previous disclosure by a witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony, whenever it may fairly tend to incriminate him.

2. Habeas corpus ◊113(5½)—Questions not raised below not considered on appeal.

On appeal from order sustaining writ of habeas corpus and discharging from custody petitioner, who had been imprisoned for contempt for refusal to answer, as incriminating, questions on his examination as a bankrupt, appellant could not successfully contend that in many instances the questions which the petitioner refused to answer were of such character that the answers would not have incriminated him, where no such reason for denying the writ was set up in the return thereto, or brought to the attention of the trial court.

Appeal from the District Court of the United States for the Southern District of New York.

Petition by Jules W. Arndstein for writ of habeas corpus to be directed to Thomas D. McCarthy, United States Marshal for the Southern District of New York. From an order sustaining the writ and discharging petitioner from custody, the Marshal appeals. Affirmed.

Messrs. Saul S. Myers and Walter H. Pollak, both of New York City, for appellant.

Mr. Wm. J. Fallon, of White Plains, N. Y., for appellee.

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*Mr. Justice SANFORD delivered the opinion of the Court.

This is an appeal from an order of the District Court sustaining a writ of habeas corpus and discharging the appellee from custody. It involves the same proceeding which was before this Court at an earlier stage in *Arndstein v. McCarthy*, 254 U. S. 71, 41 Sup. Ct. 26, 65 L. Ed. 138 and Id. 254 U. S. 379, 41 Sup. Ct. 136, 65 L. Ed. 314.

Arndstein, having been adjudicated an involuntary bankrupt and called before a Special Commissioner for examination as to his assets under Section 21a of the Bankruptcy Act (Comp. St. § 9605), refused to answer

447 of the questions which were asked him, asserting his constitutional privilege upon the ground that to do so might tend to degrade and incriminate him. The district judge, having "no doubt that the answers might furnish information which would render him liable to prosecutions in the federal courts for concealment of assets," denied a motion to punish him for contempt. After his examination, however, Arndstein filed, without objection, sworn schedules of his assets and liabilities, showing only one item of property, namely, a bank deposit of \$18,000. Thereupon, the district judge, being of opinion that Arndstein thus asserted not only that he had this bank deposit but also that he had no other property and had thereby become subject to examination as to his property, ordered him to answer 426 of the former questions. Being recalled for further examination he again refused to answer them, upon the same ground as before. He was then adjudged to be guilty of contempt of court and committed to the custody of the Marshal for confinement in jail so long as he persisted in his refusal to answer.

He thereupon presented to the District Court a petition for a writ of habeas corpus, alleging that he was restrained of his liberty

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without due process and in violation of the Federal Constitution. This petition was held to be insufficient, and the writ was refused. Upon an appeal by Arndstein this court held that as the schedules did not amount to an admission of guilt or furnish clear proof of crime, they did not constitute a waiver of his right to stop short whenever he could fairly claim that to answer might tend to incriminate him; and the order of the District Court was accordingly reversed and the cause remanded for further proceedings in conformity with the opinion. *Arndstein v. McCarthy*, supra, 254 U. S. 72, 73, 41 Sup. Ct. 26, 65 L. Ed. 138. In a supplemental memorandum (254 U. S. 379, 41 Sup. Ct. 136, 65 L. Ed. 314) it was added that this decision only required the District Court to issue the writ and proceed as usual, and that if proper reasons existed for holding Arndstein not shown by the petition they might be set up in the return for consideration.

Thereafter the District Court, in accordance with the mandate of this court, vacated its former order and issued the writ of habeas corpus; to which the Marshal made return, exhibiting a transcript of the entire proceedings before the Commissioner. Aside from general denials of the illegality of Arndstein's commitment the only ground set up in the return as a reason for holding him was that, after being notified by the Commissioner of his privilege, he had, before refusing to answer the questions in issue, testified of his own accord, without

¹ Rehearing granted 263 U. S. —, 44 Sup. Ct. 33, 68 L. Ed. —.

invoking any privilege, to the very matters with which these questions were concerned, thereby waiving his privilege upon further examination concerning them. Upon a hearing on the petition and return, the District Court was of opinion that, although in certain answers made without objection Arndstein had denied that he had any stocks or bonds in his possession or under his control at any time during the preceding year, the conclusion to be drawn from the decision of this court in reference to the schedules was that his denials or partial disclosures as a witness did not terminate his privilege so

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as to deprive him of the right to *refuse to testify further about his property, and that he was at liberty to cease disclosures, even though some had been made, whenever there was just ground to believe the answers might tend to incriminate him; and it accordingly sustained the writ and discharged him from custody. The Marshal, by reason of the constitutional question involved, has appealed directly to this Court. Jud. Code, § 208 (Comp. St. § 997); Boske v. Comingore, 177 U. S. 459, 465, 20 Sup. Ct. 701, 44 L. Ed. 846; Collins v. Miller, 252 U. S. 364, 365, 371, 40 Sup. Ct. 347, 64 L. Ed. 616; Arndstein v. McCarthy, supra, 254 U. S. 72, 41 Sup. Ct. 26, 65 L. Ed. 138.

We find no error in the order of the District Court:

[1] 1. The opinion of this court upon the former appeal was not based upon the ground, as the Marshal in effect contends, that schedules filed by a bankrupt are so essentially different from evidence given by him that, whatever their disclosures, they cannot constitute a waiver of his privilege against incrimination when he is called for compulsory examination under the Bankruptcy Act. On the contrary, the sworn schedules were, impliedly at least, assimilated to evidence given by the bankrupt as a witness, the ground upon which they were held not to have waived his privilege against subsequent incrimination being thus stated (254 U. S. 72, 41 Sup. Ct. 26, 65 L. Ed. 138):

"The schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him. See *Brown v. Walker*, 161 U. S. 591, 597; *Foster v. People*, 18 Michigan, 266, 274; *People v. Forbes*, 143 N. Y. 219, 230; *Regina v. Garbett*, 2 C. & K. 474, 495."

The four cases thus cited related to testimony given by witnesses and the limit upon their right to stop disclosures. In *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, this court said that "if the witness himself elects to waive his privilege * * *

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and discloses his criminal connections, he is not permitted to *stop, but must go on and

make a full disclosure"; in *Foster v. People*, 18 Mich. 266, the court, while holding that a witness who has voluntarily admitted his guilt of a criminal offense is not protected from further disclosures on the same subject, said that if he has not actually admitted incriminating facts, he "may unquestionably stop short at any point, and determine that he will go no further in that direction"; in *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303, it was held that a witness by answering questions exonerating himself in general terms from all connection with a criminal transaction, does not thereby waive his right to remain silent when it is thereafter sought to draw from him circumstances which might form another link in the chain of facts capable of being used to his peril; and in *Regina v. Garbett*, it was held that it makes no difference in the right of a witness to protection from incriminating himself that he has already answered in part, he "being entitled to claim the privilege at any stage of the inquiry."

In short, it is apparent not only from the language of the former opinion but from its citations that this court applied to the non-incriminating schedules the rule in the cases cited, namely, that where the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him. And although there is some conflict of authority as to the application of this rule, we see no reason for departing from its recognition in the former opinion, and think that it is the sound rule which should be applied to the involuntary examination of a bankrupt where he is practically in the position of a witness under cross-examination. And since we find that none of the answers which had been voluntarily given by Arndstein, either by way of denials or partial disclosures, amounted to an admission or showing

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of guilt, we are of *opinion that he was entitled to decline to answer further questions when so to do might tend to incriminate him.

[2] 2. The Marshal also contends that in many instances the questions which Arndstein refused to answer were plainly of such a character that the answers could not have incriminated him, and that his whole testimony shows that he was not making his claim of privilege in good faith, but largely in obedience to suggestions of his counsel, who in some instances claimed the privilege for him. It is, however, a sufficient answer to this contention that no such reasons for denying the writ were set up in the Marshal's return, or, so far as it appears, brought to the attention of the District Court or ruled upon by it. And in such case we are not called upon, on appeal, to examine, as with a microscope, the multitudinous ques-

tions in issue, involved in an unduly protracted examination, containing many vain and futile repetitions, much of which does not appear to have had any relation to a discovery of assets of the bankrupt but was of such character as to suggest that the underlying purpose was the discovery of evidence to support the charge of grand larceny for which Arndstein had been indicted in the State court; or to determine as original questions in this court, matters not in issue under the pleadings in the District Court or determined by that court.

Furthermore, the district judge, in ruling in the bankruptcy proceedings on the first motion to punish Arndstein for contempt, had, as shown, specifically stated that he had no doubt that answers to these questions might furnish incriminating information. There was clearly no abuse of discretion in this ruling which would justify us in reviewing it under the writ of habeas corpus. And it may be added, that on the first appeal this court also stated that it was "impossible to say from mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been an-

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*swered with entire impunity." Arndstein v. McCarthy, supra, 254 U. S. 72, 41 Sup. Ct. 26, 65 L. Ed. 138.

The order of the District Court sustaining the writ and discharging Arndstein from custody is accordingly
Affirmed.

(262 U. S. 337)

L. VOGELSTEIN & CO. Inc., v. UNITED STATES.

(Argued March 5, 6, 1923. Decided May 21, 1923.)

No. 269.

1. War ☞14—Findings held to show amount paid was market price.

In suit against the government for just compensation for copper claimed to have been taken pursuant to mandatory orders, findings of the Court of Claims held to show that the price paid was the market price uniformly prevailing during the period in question, and not merely a flat price fixed by the government.

2. Courts ☞389—Claimant held bound by finding of Court of Claims as to market value.

In suit in the Court of Claims for compensation for copper claimed to have been taken under mandatory orders, the finding that the price paid was the market price is binding on the claimant on appeal to the Supreme Court, when not impaired, but supported and confirmed, by other findings.

3. War ☞14—Market value held measure of compensation, though less than cost.

The market value of copper requisitioned by the government and taken on mandatory

orders under Act June 3, 1916, §§ 120, 123 (Comp. St. §§ 3115g, 3110a), was the measure of the owner's compensation, though it had paid more for the copper on long-time purchase contracts.

Appeal from the Court of Claims.

Suit by L. Vogelstein & Co., Inc., against the United States. From a judgment for the United States (56 Ct. Cl. 362), claimant appeals. Motion to remand denied, and judgment affirmed.

Messrs. A. G. Reeves, of New York City, F. D. M. McKenney, of Washington, D. C., and Russell H. Robbins, of New York City, for appellant.

Mr. Alfred A. Wheat, of New York City, for the United States.

Mr. Justice BUTLER delivered the opinion of the Court.

Between September 28, 1917, and February 1, 1918, the United States obtained from appellant 12,542,857 pounds of copper and

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paid 23½ cents per pound therefor. By its petition, appellant asks judgment for \$424,196.54, being 3.381977 cents per pound, in addition to the price paid. The Court of Claims made findings of fact, and as a conclusion of law held that appellant was not entitled to recover, and dismissed the petition. From that judgment this appeal is taken.

The Court of Claims found that the market price of copper was 23½ cents per pound. The United States insists that payment of the market price was just compensation. The appellant claims that there was no express contract of sale, that the copper was taken pursuant to mandatory orders, and that it did not waive its right to just compensation. It submits that the finding of the Court of Claims that after September 20, 1917, the market price of copper was 23½ cents per pound, must be read as referring to a mere flat price fixed by the United States, and that it does not mean the market price as fixed by supply and demand and other elements in normal trading in copper. It asserts that the necessary costs of the copper to it was 26.881977 cents per pound, and demands that price.

[1, 2] It appears from the findings that appellant purchased ores, minerals, and metals, had them smelted and refined, and sold the refined products. It was not a mine owner, operator, producer, or refiner. On September 20, 1917, at close of business, it had on hand 43,851,042 pounds of copper. It had purchased 34,687,579 pounds as unrefined copper under long-term contracts, and 9,163,463 pounds as refined copper in the open market. The average cost to appellant was 26.881977 cents per pound. Out of the stock then on hand, it had sold 31,308,183 pounds at 26.-

34389 cents per pound. There remained 12,542,857 pounds.

It further appears that, some time before September 21, 1917, an agreement was made by the War Industries Board with copper

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producers, fixing a price of 23½ cents *per pound for copper, and this agreement was approved by the President on that date. September 28, 1917, Vogelstein, who controlled appellant, attended a meeting of copper producers and government representatives, and placed in nomination the persons who were chosen at that meeting as members of a committee to act for the copper producers in carrying out the agreement of September 21st, and to co-operate with government representatives in securing performance of the agreement and to take the necessary measures to that end. The United Metals Selling Company was the sales agent for copper producers, and the plan adopted for obtaining the copper for the United States was for the War and Navy Departments to send orders and shipping directions to the Selling Company. The orders were sent to the producers' committee, which returned them to the Selling Company with the name of the producer or dealer on whom the orders should be made. Thereupon the Selling Company placed its own order with the producer or dealer named, requesting the shipment to be made, and stating the price to be paid as 23½ cents per pound. The Selling Company from time to time, beginning April 6, 1917, made a number of contracts for the furnishing of copper to the United States. The first two, respectively dated April 6 and April 21, covered 45,100,000 pounds at 16.6739 cents per pound. Later contracts covered 297,826,734 pounds at 23½ cents per pound. Between September 28, 1917, and February 1, 1918, the period in which appellant's copper here involved was obtained, about 283,000,000 pounds were furnished the United States under these contracts. In appellant's petition it is stated that since September 21, 1917, it sold and delivered to the United States at least 25,000,000 pounds of copper, which cost it substantially 23½ cents per pound, the price it received from the United States. Appellant's contention that there was no market price other than that fixed by the fiat of

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*the United States is without support. The price so found uniformly prevailed during the period in question. Appellant co-operated with others having copper to sell in putting into effect and maintaining that price. The finding of the Court of Claims is plain and cannot be read as referring to a mere fiat price. It is not impaired, but is supported and confirmed, by other findings. The appellant is bound by it.

[3] It contends that when the price was fixed at 23½ cents per pound, it unavoidably had on hand the 12,542,857 pounds of copper

in question; that this copper was requisitioned and taken upon mandatory orders pursuant to sections 120 and 123 of an Act approved June 3, 1916 (39 Stat. 213, 215 [Comp. St. §§ 3115g, 3110a]), and that it protested against the price. It moves to remand the case with directions to find facts with reference to these claims. Assuming all these matters of fact in favor of appellant and considering the case as if they had been so found by the Court of Claims, the United States' contention that appellant has received just compensation must be sustained. The market price was paid. The market value of the copper taken at the time it was taken measures the owner's compensation. *Seaboard Air Line Railway Co. v. United States*, 261 U. S. 299, 43 Sup. Ct. 354, 67 L. Ed. —, decided March 5, 1923; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 80, 81, 32 Sup. Ct. 667, 57 L. Ed. 1063; *Boom Co. v. Patterson*, 98 U. S. 403, 407, 25 L. Ed. 206; *United States v. New River Collieries Co. (C. C. A.)* 276 Fed. 690, affirmed this day 262 U. S. 341, 43 Sup. Ct. 565, 67 L. Ed. —. The higher prices, if any, paid by appellant for the copper it was compelled to take on long-time purchase contracts, is not evidence of the value of the copper at the time it was obtained by the United States. The United States is under no obligation to make good the loss. Appellant would be entitled to the gain, if it had purchased at less than the market price at the time of taking.

The motion to remand is denied, and the judgment appealed from is affirmed.

(262 U. S. 341)

UNITED STATES v. NEW RIVER COLLIERIES CO.

(Argued March 7, 8, 1923. Decided May 21, 1923.)

No. 316.

1. War — 14 — Constitutional provision for just compensation not suspended by the war.

The war, or the conditions which followed it, did not suspend or affect the provision of Const. U. S. Amend. 5, for just compensation for property taken for public use.

2. War — 14 — Owner entitled to full money equivalent of property taken by government.

The owner of coal taken by the government under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), was entitled to the full money equivalent of the property taken, and to be put in as good position pecuniarily as it would have occupied, if its property had not been taken.

3. Constitutional law — 67 — Ascertainment of compensation for property taken is judicial function.

The ascertainment of compensation for property taken by the government under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann.

Supp. 1919, § 3115½ii), is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard.

4. War ☞14—Market price is measure of compensation for property taken by government; "just compensation."

When private property is taken by the government for public use, and there is a market price prevailing at the time and place of the taking, such price is "just compensation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Just Compensation.]

5. War ☞14—Cost of property taken or owner's profit or loss immaterial, when there was market value.

When there were market prices prevailing at the time and place coal was taken by the government under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), the owner's cost, profit, or loss did not tend to prove market price or value, and were immaterial.

6. War ☞14—Contract prices properly excluded in fixing compensation.

In suit for compensation for coal taken by the government under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), prices of coal in contracts for future deliveries were properly excluded, as having no weight, as against current market prices for spot coal, and having no tendency to prove what such market prices were.

7. War ☞14—Claimant entitled to market price of export coal, when coal could have been sold for export.

Where, at time and place coal was taken by the government under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), there was a free market for export coal, and the coal could have been sold in such market, the owner was entitled to the market price of export coal, notwithstanding lower market prices of coal for domestic use.

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Suit by the New River Collieries Company against the United States. Judgment for claimant (276 Fed. 690), and the United States brings error. Affirmed.

The Attorney General and Mr. Assistant Attorney General Riter, for the United States.

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*Mr. Ira Jewell Williams, of Philadelphia, Pa., for defendant in error.

Mr. Justice BUTLER delivered the opinion of the Court.

On various dates between September 17, 1919, and February 1, 1921, at Hampton Roads, Va., the United States requisitioned from defendant in error upwards of 60,000 tons of bituminous coal for use of the Navy. The taking was under section 10 of the Lever

Act. 40 Stat. 276 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii.) The President, acting through the Navy Department, fixed certain prices as just compensation. These were not satisfactory to the owner. The United States paid 75 per cent. of the amount fixed, or, under stipulation of the parties is to be considered as having paid it, in accordance with the act. The owner sued in the United States District Court for the District of New Jersey for a sum which added to the 75 per cent. would make just compensation. Three actions were consolidated and tried as one. There was no controversy as to the quantity or quality of the coal taken. Judgment was entered in accordance with the verdict of a jury, fixing prices in excess of those allowed by the President. The government took the case to the Circuit Court of Appeals, and to review its judgment, affirming that of the District Court, brings the case here on writ of error.

When the coal was taken, there was at Hampton Roads a market for coal for export and also a domestic market. The business of the defendant in error was chiefly in the export trade. During the period in question, it produced about 907,000 tons and sold nearly two-thirds of it for export. Many producers shipped coal there, which, with the coal of defendant in error, went into a common pool. There was a strong demand for

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export coal. There were many buyers and export prices fluctuated. About 36,000,000 tons were sold in the open market. Supply and demand were controlling factors, affecting market prices which prevailed in both the export and domestic markets. The prices for export coal were considerably higher than for domestic coal. If the coal had not been taken by the United States, it could have been sold by the owner at export market prices. The market prices for export coal were shown by a number of witnesses of long experience and familiar with the market, by excerpts from leading trade journals, and by a statement of prices actually received by defendant in error for export coal during that period. On that point the United States offered no opposing evidence. The court held market prices for export coal constituted just compensation, and left to the jury the ascertainment thereof.

The United States contends that the court erred in refusing, under the circumstances disclosed, to allow it to introduce evidence of the "real" value of the coal as distinguished from its market value, and in holding that spot export prices controlled in determining just compensation, and further that, even if such market prices are taken, it was error to exclude evidence of domestic prices.

[1-4] Section 10 of the Lever Act, in obedience to the Fifth Amendment, provides for just compensation. The war, or the condi-

tions which followed it, did not suspend or affect these provisions. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 88, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045.¹ The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied, if its property had not been taken. *Seaboard Air Line Railway Co. v. United States*, 261 U. S. 299, 43 Sup. Ct. 354, 67 L. Ed. —, decided March 5, 1923, and cases cited. The ascertainment

of compensation is a ^{*344}judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, 13 Sup. Ct. 622, 37 L. Ed. 463. Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. *L. Vogelstein & Co., Inc. v. United States*, 262 U. S. 337, 43 Sup. Ct. 564, 67 L. Ed. —, decided this day; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 80, 81, 33 Sup. Ct. 667, 57 L. Ed. 1063; *Boom Co. v. Patterson*, 98 U. S. 403, 407, 25 L. Ed. 206. More would be unjust to the United States, and less would deny the owner what he is entitled to.

[5] The United States admits that market value is usually the basis for ascertaining the pecuniary equivalent, but suggests that sometimes an article has no market price, and that in such case "proof of real value" is admissible, and that therefore "market value" and "just compensation" are not necessarily synonymous. The court below excluded evidence offered by the United States to show the owner's cost of production and a reasonable profit. This ruling was right, because it was shown beyond controversy that there were market prices prevailing when and where the coal was taken. The United States had the right to take the coal on payment of these prices; the owner was not entitled to more, and could not be required to take less. The owner's cost, profit, or loss did not tend to prove market price or value at the time of taking, and was therefore immaterial.

[6] The United States offered evidence of prices specified for domestic coal in contracts for future deliveries (current at the time of the taking), as distinguished from prices for spot coal; i. e., coal for immediate delivery. These contract prices were rightly excluded. They could be given no weight as against current market prices, and would have no tendency to prove what such market prices were.

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*The facts bring this case within the rule

¹ See, also, *C. G. Blake Co. v. United States* (D. C.) 275 Fed. 861.

stated by the Circuit Court of Appeals (276 Fed. 690, at page 692):

"If it be an article commonly traded in on a market, and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value, and likewise the measure of just compensation for its requisition."

The lower courts rightly held that market prices prevailing at the times and place of the taking constitute just compensation.

[7] Nor was it error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that, if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking.

The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. These facts indicate a free market. The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices.²

The judgment of the Circuit Court of Appeals is affirmed.

(262 U. S. 234)

GRAHAM v. DUPONT.

(Argued April 30, 1923. Decided May 21, 1923.)

No. 846.

I. Internal revenue —Injunction against tax held not authorized, because suit to recover would be barred by statute.

That suit to recover income tax would be barred under Revenue Act 1918, § 252 (Comp. St. Ann. Supp. 1919, § 6336¹/₂uu), re-enacted in the Revenue Act of 1921, does not render inapplicable Rev. St. § 3224 (Comp. St. § 5947), prohibiting suits to restrain the assess-

² Cf. *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195, 30 Sup. Ct. 459, 54 L. Ed. 725; *Monongahela Navigation Company v. United States*, 148 U. S. 312, 326, 13 Sup. Ct. 622, 37 L. Ed. 463; *Five Tracts of Land v. United States*, 101 Fed. 661, 665, 41 C. C. A. 580; *New York v. Sage*, 239 U. S. 57, 61, 36 Sup. Ct. 25, 60 L. Ed. 143.

ment or collection of any tax, where, if complainant had paid the tax when it was assessed, he would have had two years in which to make claim for refund and sue to recover back the amount paid.

2. Internal revenue ⚡28—Injunction against income tax held not authorized because delay in payment was due to fact that complainant was waiting for Commissioner's decision.

Rev. St. § 3224 (Comp. St. § 5947), prohibiting suits to restrain the assessment or collection of taxes, is not rendered inapplicable because complainant's delay in paying the tax until his right to sue to recover it back was barred was due to the fact that he was waiting for action by the Commissioner of Internal Revenue on his claim for abatement, where the Commissioner's delay in passing on the claim until the decision of a test case was due to agreement of the parties.

3. Internal revenue ⚡27(1) — Claim for abatement held not to prevent payment of income tax.

One against whom an income tax assessment was made in December, 1919, for the year 1915, was not prevented from paying the assessment by his claim for abatement thereof.

4. Internal revenue ⚡38—Statute held to authorize payment of tax and suit to recover, and raising of objections to the tax therein.

Under Act March 4, 1923, amending Revenue Act 1921, § 252, and Rev. St. § 3226, as amended by Revenue Act 1921, one against whom an income tax was assessed in 1919, based on stock received by him in 1915 on reorganization of a corporation may now pay the tax, sue to recover it back, and in such suit raise questions as to value of the stock, the amount of the tax, and question whether the assessment was barred, because not made within three years.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

Suit by Alfred I. Dupont against Harry T. Graham, former Collector of Internal Revenue. A decree granting a temporary injunction (283 Fed. 300) was affirmed by the Circuit Court of Appeals (284 Fed. 1017), and defendant brings certiorari. Reversed and remanded, with directions.

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*This is a proceeding by certiorari to review the action of the Circuit Court of Appeals of the Third Circuit in affirming on appeal a temporary injunction granted by the District Court of Delaware restraining the then Collector of Internal Revenue for the District of Delaware from levying a dstraint against the property of the complainant, Alfred I. Dupont, to collect the sum of \$1,576,015.06 assessed against him by the Commissioner of Internal Revenue.

In a reorganization of a Dupont Powder

Company of New Jersey and the organization of a new Dupont Powder Company of Delaware to take over many of the assets of the old company, the complainant in the year 1915 received 75,534 shares of the common stock of the Delaware company of the par value of \$100 each. The transaction was the subject of consideration by this court in *United States v. Phellis*, 257 U. S. 156, 42 Sup. Ct. 63, 66 L. Ed. 180, where it was determined that shares in the Delaware company received by stockholders of the New Jersey company, as the complainant received his, at the rate of two in the Delaware company in exchange for one in the New Jersey company, was a separation of past accumulation of profits from the capital of the New Jersey company and a distribution to the stockholders, and thus constituted taxable income under the Income Tax Law of 1913 (38 Stat. 114).

The complainant filed a return and an

amended return *²³⁶ in March, 1916, of his income for the year 1915, in which he did not include these shares. In November, 1917, the department began an investigation into the liability of the complainant to pay an income tax on his shares of stock in the Delaware company and finally ordered an assessment of \$1,576,015.06. The complainant was notified of this assessment made December 31, 1919. He replied the next day that as his return for 1915 was filed before March 15, 1916, and as the law required any assessment for additional amount to be made within three years, and that period had expired, the assessment and demand for payment were illegal. On February 2, 1920, a hearing was granted to counsel for complainant by the Commissioner of Internal Revenue.

On March 8, 1920, complainant filed a claim for the abatement of the assessment of \$1,576,051.06 as void, because made after the limitation of three years had expired, and because the tax was on something that was not income under the law.

Thereafter by agreement between the stockholders similarly situated, one stockholder, Phellis, paid the tax due under a similar assessment and brought suit in the Court of Claims to recover it. Counsel for the complainant herein took part in the argument of that case. The Court of Claims gave judgment against the United States, but on appeal the judgment was reversed. The opinion of the court was handed down November 21, 1921. All claims for abatement had been held and not decided by the Commissioner under an agreement with the counsel in the Phellis Case. Thereafter the Commissioner rejected complainant's claim for abatement. The bill of complainant was filed January 30, 1922. The District Court granted the temporary injunction. The Circuit Court of Appeals on appeal affirmed the temporary

Injunction for the reasons stated in the opinion of the District Court.

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***Mr. Solicitor General Beck, of Washington, D. C., for petitioner.**

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***Mr. Wm. A. Glasgow, Jr., of Philadelphia, Pa., for respondent.**

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***Mr. Chief Justice TAFT delivered the opinion of the Court.**

Section 3224, Revised Statutes (Comp. St. § 5947), provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In *Cheatham v. United States*, 92 U. S. 85, 88, 23 L. Ed. 561; *State Railroad*

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Taxes, *92 U. S. 575, 613, 23 L. Ed. 663, and in *Snyder v. Marks*, 109 U. S. 189, 193, 3 Sup. Ct. 157, 27 L. Ed. 901, it was said that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures not judicial, to collect them, with appeals to specified tribunals and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares by paragraph 3224 that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assessment and claim that it is valid. This view has been approved in *Shelton v. Plate*, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273, in *Pittsburg Ry. v. Board of Public Works*, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354, in *Pacific Whaling Co. v. United States*, 187 U. S. 447, 451, 452, 23 Sup. Ct. 154, 47 L. Ed. 253, in *Dodge v. Osborn*, 240 U. S. 118, 121, 36 Sup. Ct. 275, 60 L. Ed. 557, and in *Bailey, Collector, v. George*, 259 U. S. 16, 42 Sup. Ct. 419, 66 L. Ed. 816.

The District Court recognized the sweep of these decisions in respect of the contention of the complainant that the assessment of this tax and the threatened distraint to collect it were barred by limitations under the statute, and was of opinion that as a rule such attacks upon the validity of the tax could only be heard and considered after the tax had been paid in a suit to recover it back. In this view we fully concur.

[1] The District Court, however, thought that an exception to the operation of section 3224 must arise when it appeared, as it held it did appear here, that no provision of law existed by which if the taxpayer when he filed his bill for an injunction had paid the tax assessed, he could bring a suit to recover it back because it would be barred by the statutory limitation of time in which such a suit could be brought.

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***The court based its conclusion on section 252 of the Revenue Act of 1918 (40 Stat. 1085, c. 18 [Comp. St. Ann. Supp. 1919, § 6336 $\frac{1}{2}$ uu]), re-enacted in the Revenue Act of 1921 (42 Stat. pt. 1, p. 268, c. 136), which reads as follows:**

"If upon examination of any return of income made pursuant to * * * the Act of October 3, 1913, * * * it appears that an amount of income * * * tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228, R. S., the amount of the excess shall be credited against any income * * * taxes, or installments thereof, then due from the tax payer under any other return, and any balance of such excess shall be immediately refunded to the tax payer: Provided, that no such credit or refund shall be allowed or made after five years from the date when the return was due unless before the expiration of such five years a claim therefor is filed by the tax payer."

The return was due March 15, 1916. The assessment was made December 31, 1919. The complainant might then have paid the tax and would have had two years in which to make his claim, and, if rejected, to sue to recover it back if, as he now submits, section 252 limited his right to pay and sue to recover. Under such a construction and application of section 252, suit must have been brought on or before March 15, 1921. This is what Phellis did (*United States v. Phellis*, 257 U. S. 156, 42 Sup. Ct. 63, 66 L. Ed. 180), and there was no question raised as to his right to bring the suit in the Court of Claims to recover back the tax paid by him, if it had proved to be illegally assessed and collected. Certainly complainant could not, by delaying his payment until his right to sue to recover it back expired, make a case so extraordinary and entirely exceptional as to render section 3224, Revised Statutes, inapplicable.

[2, 3] If it be said that he was waiting for the Commissioner to act on his claim for abatement of the assessment, it is enough to say that the Commissioner's delay until after the decision of the Phellis Case in November,

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1921, was ***due to agreement by the parties.** Nor was he prevented from paying the assessment by his claim for abatement.

The cases complainant's counsel rely on do not apply. The cases of *Lipke v. Lederer*, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. Ed. 1061, and *Regal Drug Corporation v. Wardell*, 260 U. S. 386, 43 Sup. Ct. 152, 67 L. Ed. —, decided December 11, 1922, were not cases of enjoining taxes at all. They were illegal penalties in the nature of punishment for a criminal offense. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, and *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414, were suits by stockholders against

corporations to restrain the corporations from paying taxes alleged to be unconstitutional. *Hill v. Wallace*, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. Ed. 822, was in part a suit like the foregoing. It was a bill filed by members of the Chicago Board of Trade to prevent the governing board from applying to the Secretary of Agriculture to have the Board of Trade designated as a "contract market" under the Future Trading Act (42 Stat. 187), on the ground that the act was unconstitutional and its operation would impair the value of the board to its members. Without such designation, no member could have sold grain for future delivery without paying a prohibitive tax, and if he sold without paying the tax, he was subjected to heavy criminal penalties. To pay such a tax on each of the many thousands of transactions on the board, and to sue to recover them back, would have been utterly impracticable. It would have blocked the entire future grain business of the country and would have seriously injured, not only the members of the board, but also the producing and consuming public. This phase of the situation was so clear that the government in effect consented to the temporary injunction. See *Hill v. Wallace*, 257 U. S. 310, 42 Sup. Ct. 168, 66 L. Ed. 253, Id., 257 U. S. 615, 42 Sup. Ct. 96, 66 L. Ed. 398. Under these extraordinary and most exceptional circumstances, it was held that section 3224 was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the pur-

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pose of regulating the future grain *business with all the unnecessary and disastrous consequences its enforcement would entail if the act was unconstitutional. *Hill v. Wallace* should, in fact, be classed with *Lipke v. Lederer*, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. Ed. 1061, as a penalty in the form of a tax. Certainly we have no such case here.

[4] This conclusion renders it unnecessary for us to consider whether section 252 of the Revenue Act of 1921, in connection with section 3226, Revised Statutes, as amended by the same Revenue Act of 1921 (42 Stat. 314, § 1318), barred complainant's right to pay the tax and sue to recover it back at the time of filing his bill, as held by the District Court. It is certain that by the amendments to section 252 and section 3226, Revised Statutes, by the Act of March 4, 1923 (Public No. 527), the complainant is given the right now to pay the tax, and sue to recover it back, and in such a suit to raise the questions as to the value of the stock and the amount of the resulting tax and also as to the bar of time against the assessment which he attempted to raise in the bill.

The decree of the Circuit Court of Appeals is reversed, and the case is remanded to the District Court, with directions to dissolve the temporary injunction and to dismiss the bill.

CURTIS, COLLINS & HOLBROOK CO. v. UNITED STATES, and twenty-three other cases.

(Argued April 9 and 10, 1923. Decided May 21, 1923.)

Nos. 341-364.

Public lands ¶138—That agent interested in securing as many land titles as possible held not to create adverse interest, precluding imputation to principal of agent's knowledge of defects in titles.

Where the manager and vice president of a corporation, owning only a one-sixth interest therein, was the sole actor for the company in procuring fraudulent patents under Timber and Stone Act (Comp. St. §§ 4671-4673), the company was charged with his knowledge of the fraud; the fact that, the more titles he got, the more profit he would make out of the agency, not constituting adverse interest, precluding application of the rule of imputation of agent's knowledge, for the company could not retain the fruits of his employment and repudiate his agency and knowledge.

Appeals from the Circuit Court of Appeals for the Ninth Circuit.

Suits by the United States against the Curtis, Collins & Holbrook Company. Certain decrees for defendant were reversed and remanded by the Circuit Court of Appeals (*United States v. Cooksey*, 275 Fed. 670), and in each of said suits defendant appeals. Decrees affirmed.

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*In November, 1912, the United States filed 79 bills in the District Court of the United States for the Northern District of California, seeking to set aside patents for land in the Susanville land district in California, issued by it under the Timber and Stone Act (Act Cong. June 3, 1878, 20 Stat. 89, as amended by Act Aug. 4, 1892, 27 Stat. 348, c. 375, § 2 [Comp. St. §§ 4671-4673]), to various patentees, and by them conveyed to one Gregory, and by him to the Curtis, Collins & Holbrook Company, a corporation of California, on the ground that the patents had been obtained by fraud. The entries were filed and the patents were issued in the last six months of the year 1902, and shortly thereafter. The cases were consolidated into groups, and were referred to a master, who reported at length, finding that, as to the 79 patents, only 24 had been obtained in fraud

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of the United *States and in violation of the statute, but that, as to all of these, the Curtis, Collins & Holbrook Company was a bona fide purchaser for value without notice of the fraud. The District Court sustained the findings of the master and dismissed the bills. The United States then prosecuted appeals as to the 24 patents whose issue had been found by the master to have been obtained by fraud, to reverse the finding by the master

and the District Court that the Curtis, Collins & Holbrook Company was a bona fide purchaser without notice of the fraud. The Circuit Court of Appeals of the Ninth Circuit, to which the appeals were taken, found with the government on this issue, reversed the decree of the District Court in the 24 cases, and remanded them, with direction to cancel the patents. The Curtis, Collins & Holbrook Company has now prosecuted appeals to this court in all these 24 cases, under section 241 of the Judicial Code (Comp. St. § 1218). The parties, as the master did below, selected as a typical case of the 24 cases in which fraud was found, the patent issued to one Edward L. Cooksey. That has been argued in this court, with the understanding that the other 23 cases are to abide the decree in this, because the facts, so far as notice of the fraud is concerned, are substantially the same.

In 1901 persons owning lands within the limits of the national forests could convey them to the United States and select in lieu thereof, and secure title by patent to, timber lands belonging to the United States outside of the forest reservations. One Tuman and C. H. Holbrook agreed to seek capitalists and induce them to purchase lands in forest reservations and exchange them for timber land outside. Tuman was a cruiser, who had prepared a list of desirable lieu lands which could be selected. In December, 1901, Holbrook made a contract with Curtis and Collins by which he agreed to sell to them at \$7.50 an acre 42,000 acres of timber land in

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California—described in a schedule—title to which Holbrook was to obtain by conveying to the United States lands of the same amount in national forest reservations. The forest reservation lands were to be conveyed to Thompson, trustee, by the owners, who were to be paid, upon request of Holbrook and on an attorney's certificate of title, not exceeding \$5 an acre, to be paid by the Bank of California out of a fund of \$200,000 deposited with it by Curtis and Collins. The trustee was then to make application for the lieu lands described in the list, and when he had acquired title he was, upon notice from Holbrook that he had been paid, to convey to Curtis and Collins or to anyone to whom they directed. After the title to the whole amount had been acquired Holbrook was to receive the balance of the price for the lands amounting to more than \$115,000, partly in cash and promissory notes and in 789 shares of stock in a corporation of California to be formed with 5,000 shares, of \$100 par value each, to which the lands were to be conveyed. Curtis and Collins were to receive 3,156 shares, 1,844 shares remaining in the treasury, out of which Holbrook's shares were to be taken. Holbrook was to be a director and vice president and general manager. If Holbrook could not secure the whole

of the 42,000 acres from the forest reserve rights, he was given the right to obtain it through any other legal means or source.

Holbrook and his son, with Tuman's assistance, procured the whole 42,000 acres in lieu of forest reservation lands. Holbrook reported to Curtis and Collins that forest reservation lands had become scarce and expensive, and suggested that there were valuable timber lands which could be secured under the Timber and Stone Act, *ubi supra*. Under this law, land belonging to the United States valued chiefly for timber or stone, and unfit for cultivation, in quantities not exceeding 160 acres, could be sold to a citizen of the United States at a minimum

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*price of \$2.50 an acre. But any person seeking such land was required to file with the register of the proper district a written statement, under oath, in duplicate, setting forth a number of necessary facts concerning the land and also—

“that he has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself.”

Curtis and Collins accepted Holbrook's suggestion as to the Timber and Stone Act, and it was orally agreed that about 30,000 acres should be thus acquired and that Holbrook was to be paid \$10.00 an acre. The entries in this and the other 23 cases were procured by agents of Tuman, who made entries under an agreement to convey the lands to any one he might direct, he paying all the expenses and \$100 for each entry, and the entrymen making false oaths in violation of the statute. The land thus entered was conveyed by the entrymen to one Gregory whose name was used with his consent as trustee by Tuman and Holbrook. Gregory neither paid nor received any money, and merely acted as a conduit for the titles. All the stone and timber entries were filed in the last six months of 1902, and the deeds to Gregory were made soon after proof by the entrymen, but were not recorded until 1904. The Curtis, Collins & Holbrook Company was organized in accord with the terms of the original contract, August 14, 1902, the incorporators being J. G. Curtis and his son, D. G. Curtis, T. D. Collins and his son, E. S. Collins, Charles H. Holbrook and his

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son, Charles H. Holbrook, Jr., and Irving *F. Moulton. Gregory conveyed to this corporation the interests conveyed to him by the entrymen at different times up to 1904, but none of the deeds to the corporation was recorded until October, 1909, and some were not recorded until 1910 and 1911.

Curtis and Collins lived in Pennsylvania, but they, together with Tuman and Holbrook, went out to look at the lands in 1902, after the contract was made. D. G. Curtis, Jr., who was treasurer of the company, also frequently went upon the lands. Young Curtis testified that he talked much with Holbrook, who managed the company and did everything in connection with the acquisition of these lands by it, and that they all had the utmost confidence in his getting them good titles.

Tuman and Holbrook fell out as to the division of the profit between them. Collins, Sr., effected a compromise, whereby Tuman received 200 shares in the company and \$10,000 cash, and after this litigation was begun Collins paid Tuman \$750 a share for this stock, although it was twice what it was worth, as Collins admitted. Tuman was a witness, and testified that he told Holbrook what he had done in procuring the entries to be made and in paying expenses and the \$100 apiece to the entrymen, and there was evidence strongly tending to show that the money used to pay these expenses came from an account in a San Francisco bank, opened by Holbrook in the name of Collins and Holbrook, upon which checks were drawn in favor of an account in Holbrook's name in a bank at Susanville upon which Tuman drew checks for this work. There was no evidence that Collins knew of the San Francisco account in the name of Collins and Holbrook. There was evidence that in 1904 and 1906 land office agents were investigating the validity of entries made as to other lands suspected of having been sold in advance to the Curtis, Collins & Holbrook Company, and that Tuman, Holbrook, and Collins talked

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over *the matter, and that Collins agreed they were lost, and "that was all there was to it."

Messrs. Charles A. Shurtleff and R. B. Gaylord, both of San Francisco, Cal., for appellant.

Mr. S. W. Williams, of Washington, D. C., for appellee.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The Circuit Court of Appeals attached importance to the conduct of Collins toward Tuman and the compromise made between him and Holbrook, to his willingness to abandon other titles secured by Holbrook when questioned, and to the long delay in recording the deeds to the company (*Linn & Lane Timber Co. v. United States*, 236 U. S. 574, 576, 35 Sup. Ct. 440, 59 L. Ed. 725), as suspicious circumstances indicating a consciousness on the part of the capitalists in the company that the titles of the company to the lands here in question were vulnerable because of the practices of Holbrook

and Tuman. Without minimizing the significance of these circumstances, we put our concurrence in the decree of the Circuit Court of Appeals on the other ground stated by that court.

While the contract of December, 1901, called it a sale of 42,000 acres of forest reservation lieu lands by Holbrook to Curtis and Collins, we think that, in the light of all the circumstances, it was rather a contract of agency and joint adventure, by which Holbrook was to procure the land for his principals at a stipulated profit for himself, they to furnish the money with which he could make the purchases for them. Even

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if the written contract *would not bear this construction, the practical construction by the parties justifies it; and this is especially true of the subsequent oral contract under which the additional 30,000 acres of stone and timber land was to be purchased. The title to the land was never put in Holbrook, or in Curtis and Collins. Through a naked trustee, it was conveyed directly from the entrymen to the company. The whole procedure under the Timber and Stone Act was intrusted by Curtis and Collins to the initiation and execution of Holbrook as the manager and vice president of the company, in which Curtis and Collins had three-fifths interest, and Holbrook had one-sixth. The only safeguard imposed was that a reputable attorney was to pass on the paper title. The company was in being and under the active management of Holbrook when these entries were being made and final proof submitted. Holbrook knew of the fraud practiced on the government in making the entries, because Tuman says that he told him, and the circumstances as to the payment of money for expenses and bonuses out of moneys furnished by Holbrook confirms his complicity in it.

Under these circumstances, we do not think the company can be treated as a bona fide purchaser. It is charged with Holbrook's knowledge, because he was the sole actor for the company in procuring the fraudulent patents. It sufficiently appears that young Curtis, the treasurer of the company, and Curtis and Collins, the capitalists, understood the difference there was between the procedure and limitations attending the acquisition of title to lands under the Forest Reservation Act and under the Timber and Stone Act and that they depended wholly on Holbrook to secure a good title under the latter act.

The general rule is that a principal is charged with the knowledge of the agent acquired by the agent in the course of the principal's business. Here the business was

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*the acquisition of land patented by the government under the Timber and Stone Act. The company and all its stockholders were charged with notice of any facts impairing the titles, of which, in securing them, Hol-

brook was advised. In other words, the company, in taking over the titles, took them cum onere. *Hovey v. Blanchard*, 13 N. H. 145; *Warren v. Dixon*, 74 N. H. 355, 68 Atl. 193; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 273, 17 N. E. 496, 9 Am. St. Rep. 698; *Bank of New Milford v. Town of Milford*, 36 Conn. 93, 101; *Holden v. New York & Erie Bank*, 72 N. Y. 286, 294; *Bank v. Dunbar*, 118 Ill. 625, 632, 9 N. E. 186; *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827, 848, 36 S. E. 256; *Wilson v. Pauly*, 72 Fed. 129, 135, 18 C. C. A. 475; *Mechem on Agency* (2d Ed.) vol. 2, § 1818.

Appellants seek to avoid the application of this principle by asserting an exception to it when the agent's attitude is one adverse in interest to that of the principal, because of which it cannot be inferred that the agent would communicate the facts against his own interest to his principal. The case relied on to establish this exception is that of *American National Bank v. Miller*, 229 U. S. 517, 33 Sup. Ct. 883, 57 L. Ed. 1310. In that case one who was president of a bank at Macon, Ga., owed his own bank \$3,000, and paid it by a check on a Nashville bank, in which he was a depositor, but which he owed \$50,000. The Nashville bank received the check from the Macon bank for collection, and then credited the Macon bank with the amount and send a letter advising the Macon bank. The president of the Macon bank was insolvent, and a petition of involuntary bankruptcy was filed against him the day his check was credited by the Nashville bank. The Nashville bank sought to charge off the credit to the Macon bank on the ground that that bank was chargeable with notice of its president's insolvency. We held that such knowledge could not be imputed to the Macon bank merely because the president knew it, for the reason that it was not to

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be *inferred that he would communicate such knowledge to his own bank.

We do not think the case applicable here. The president of the Macon bank was engaged in something in which his interest was plainly independent of any agency of his on behalf of his bank. His payment of his note was his own business, and not the bank's as his principal. In the case at bar, Holbrook was the sole agent acting for the company in securing titles to land for it. It is true that, the more titles he got, the more profit he would make out of the agency, and we may assume that, as between him and the company, in securing fraudulent titles for the company, he was violating his instructions; but he and the company were in a common adventure, and, if the company insists on retaining the fruits of that adventure, it must be charged with the knowl-

edge of the agent through whom the fruits came. The interest of Collins, Curtis and Holbrook in the acquisition of the titles was common. Curtis and Collins knew exactly how far Holbrook's interest was adverse to theirs, but trusted him in the joint enterprise notwithstanding. The adverse interests as between them in sharing the fruits of the common business cannot enable the company to retain its share and repudiate the agent with all he knew. This view is sustained by the authorities above cited, it was taken by the Circuit Court of Appeals, and we concur in it.

Appellant relies on the cases of the United States v. Detroit Timber & Lumber Co., 200 U. S. 322, 26 Sup. Ct. 282, 50 L. Ed. 499, and United States v. Clark, 200 U. S. 601, 26 Sup. Ct. 340, 50 L. Ed. 613, to justify the plea of bona fide purchase in this case. The facts in those cases were different from the facts in the case before us. In the Detroit Company Case, there was no question of agency at all. It was the purchase by one company from another and it was sought to charge the purchasing company with knowledge of the ven-

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dor's violations of the statute by *assuming that if the purchaser had looked into its books it might have inferred something irregular. The court held that there was nothing to put the purchaser on such an inquiry. In the Clark Case, Clark bought outright from Cobban by direct warranty deeds lands patented under the Timber and Stone Act. It did appear that Cobban had negotiations with Clark before Cobban acquired title to some of the land, and it further appeared that Clark lent money to Cobban, secured by mortgage on land and timber owned by Cobban, to enable him to buy additional land. But this court and the two lower courts held that Clark and Cobban dealt at arm's length. We found expressly that the claim that Cobban was Clark's agent broke down.

These two cases were seemingly relied upon by the master and the District Court to show that the defense of bona fide purchaser is not an affirmative defense, the burden of sustaining which is on the defendant; but such a construction of those cases is refuted by the express ruling of this court in *Wright-Blodgett Co. v. United States*, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637.

We think the case before us comes within the class of cases of which *McCaskill Co. v. United States*, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; and *United States v. Kettenbach*, 208 Fed. 209, 125 C. C. A. 409, are instances.

Decree affirmed in this and the other 23 cases.

(262 U. S. 274)

In re DAVIS, Director General of Railroads.

(Argued on Return to Rule to Show Cause April 16, 1923. Decided May 21, 1923.)

No. 27, Original.

1. Mandamus $\hookrightarrow$ 43—Held not to lie where trial court has ruled on the matters presented on its determination.

Mandamus held not to lie at suit of Director General of Railroads to command trial court judges to dismiss libel by dredging company to recover damage to its scow by a railroad company's steam tug while under federal control; it appearing that the District Court, after hearing, ruled on the matters presented for its determination.

2. Prohibition $\hookrightarrow$ 3(3)—Held not to lie to prevent proceeding in admiralty, where any errors might be corrected by appeal.

Where an admiralty proceeding was instituted by a dredging company against the Director General of Railroads to recover damages to its scow by railroad company's steam tug while under federal control, involving questions of the Director General's liabilities and powers, held, that prohibition would not lie at suit of the Director General to prevent the trial court from proceeding, as it could not be said that such court was clearly without jurisdiction, and by appeal in the ordinary way possible errors could be corrected.

Petition by James C. Davis, Director General of Railroads, for writ of prohibition or mandamus, directed to judges of the District Court, Southern District of New York. Petition denied.

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*Mr. T. Catesby Jones, of New York City, for petitioner.

Mr. Mark Ash, of New York City, for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The petitioner seeks a writ of prohibition or mandamus commanding the judges of the District Court, Southern District of New York, not to take further steps in an admiralty proceeding instituted by the New Jersey Shipbuilding & Dredging Company to recover from him for damage inflicted upon its scow by the Lehigh Valley Railroad Company's steam tug Mahanoy while under federal control, or in the alternative to direct vacation of an interlocutory order theretofore entered and dismiss the libel. A rule to show cause issued out of this court and return has been made showing the relevant facts and circumstances.

[1] The District Court, after hearing, ruled upon the matters presented for its determination, and, under settled doctrine, we can find no occasion for mandamus. Ex parte Roe, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. Ed. 1217.

[2] Involved in the cause are questions touching the liability of the Director General of Railroads, as Agent designated by the President under the Transportation Act of 1920 (41 Stat. 456), for maritime torts com-

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mitted by vessels un*der federal control, his power to enter appearance by counsel without prior service of process, and whether in the same proceeding he may take different and antagonistic positions, first as the agent of one railroad system and then of another.

We cannot say the court below was clearly without jurisdiction to determine all the points presented. Moreover, by appeal in the ordinary way possible errors can be corrected, and there is no imperative reason for awarding a writ of prohibition. Ex parte Gordon, 104 U. S. 515, 26 L. Ed. 814; Ex parte Pennsylvania, 109 U. S. 174, 3 Sup. Ct. 84, 27 L. Ed. 894; In re Cooper, 143 U. S. 472, 495, 12 Sup. Ct. 453, 36 L. Ed. 232; In re Morrison, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60; In re New York & Porto Rico Steamship Co., 155 U. S. 523, 15 Sup. Ct. 183, 39 L. Ed. 246; Ex parte Chicago, R. I. & P. Ry. Co., 255 U. S. 273, 275, 280, 41 Sup. Ct. 288, 65 L. Ed. 631.

The rule to show cause is discharged, and the prayer of the petition is denied.

(262 U. S. 346)

INTERNATIONAL LIFE INS. CO. v. SHERMAN.

(Argued March 15, 1923. Decided May 21, 1923.)

No. 295.

Insurance $\hookrightarrow$ 50—Court held without jurisdiction, in approving proposed reorganization, to decree cancellation of certificates held by persons who had not appeared.

In a suit for a receivership for an insurance company and an administration of its assets, in which the court, instead of approving a sale of the assets, approved a plan of rehabilitation under which holders of annuity certificates were to make further payments thereon and surrender them in exchange for stock, the certificate holders who had appeared had no authority to represent those who did not appear, and against whom no relief had been asked, and the court had no jurisdiction to decree the cancellation of the certificates of those who had not appeared, unless they complied with such plan of rehabilitation, and as to them, the decree was a nullity.

In Error to the Supreme Court of Missouri.

Action by Adrian F. Sherman against the International Life Insurance Company. Judgment for plaintiff was affirmed by the Supreme Court of Missouri (291 Mo. 139, 236 S. W. 634), and defendant brings error and

petitions for a writ of certiorari. Writ of error dismissed, and writ of certiorari denied.

Messrs. Charles G. Revelle, of St. Louis, Mo., and A. L. Cooper, of Kansas City, Mo., for plaintiff in error.

Mr. Oscar S. Hill, of Kansas City, Mo., for defendant in error.

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*Mr. Justice BUTLER delivered the opinion of the Court.

This is an action brought by the defendant in error in the circuit court of Jackson county, Mo., for money paid by his assignors for annuity certificates issued by the Great Western Life Insurance Company, the predecessor of plaintiff in error. Judgment for \$47,463.90, with interest and costs, was affirmed in the state Supreme Court. That court allowed writ of error bringing the case here. A petition for writ of certiorari also has been presented. The federal question asserted is that the state court, in violation of the Constitution and acts of Congress defining the jurisdiction of federal courts, failed to give full faith and credit to certain provisions of a decree of the United States Circuit (now District) Court for the Western District of Missouri, set up in the answer, purporting to cancel and annul the annuity certificates. The defendant in error moves to dismiss the writ of error and opposes the granting of certiorari on the grounds, among others, that the United States court was without jurisdiction to decree the cancellation of the certificates assigned to defendant in error, and that the provisions of the decree relied on by plaintiff in error are void.

We are of opinion that the asserted federal right is so obviously devoid of merit and frivolous that the writ of error must be dismissed and certiorari denied.¹

In 1906 the Great Western Agency Company was incorporated under the laws of

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Colorado. In 1907 those *in control of that company caused the Great Western Life Insurance Company to be organized under the laws of Missouri, having a capital of \$100,000—1,000 shares. Eight shares were held in the names of the incorporators, and the

remaining 992 were held by them as trustees for the agency company. Desiring to raise more funds, the company issued so-called annuity certificates, which were sold at \$150 per "share." Each share obligated the company to pay an annuity, to be arrived at by dividing 500 into a sum based on 25 cents on each \$1,000 of insurance—with certain exceptions not necessary here to be set forth—written by the company during 50 years from its incorporation. In May, 1908, certain stockholders of the agency company filed a bill in the United States court against that company, the insurance company, and individuals controlling them, alleging mismanagement and improper use of the insurance company's property in fraud of their rights. It prayed that a receiver be appointed to take charge of and administer the assets of both companies for the benefit of those entitled thereto. A receiver was appointed and directed to sell the property of the insurance company. When the application of the receiver for confirmation of his acceptance of an offer came before the court, certain stockholders of the agency company and certificate holders appeared and asked a postponement. It was shown that some of the stockholders and certificate holders had undertaken to raise funds for the rehabilitation of the insurance company, that some money for this purpose had been contributed, and that there was assurance that enough would be raised to pay off the debts. Postponement was granted by an order which stated:

"F. M. Pearl and other stockholders of the Great Western Agency Company and other annuity certificate holders of the Great Western Life Insurance Company who are similarly situated, appearing by B. P. Waggoner and James W. Orr, * * *" etc.

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*The matter again came before the court, and its order recited:

"Now, on this 27th day of August, 1908, * * * came on further to be heard the objections and exceptions of F. M. Pearl and other stockholders of the Great Western Agency Company and annuity certificate holders of the Great Western Life Insurance Company to the confirmation of the sale of the assets. * * * A. F. Sherman appearing for himself, and certain other annuity certificate holders, * * * and all parties being before the court and being heard, and the court being fully informed and advised, it is considered, ordered, and decreed."

The decree approved the reorganization plan presented, and directed the return of all property to the company, immediate payment of approved death claims, and the giving of a bond to indemnify the receiver from such claims as might be presented and approved. The plan of rehabilitation was that annuity certificate holders should pay \$37.50 on each certificate, surrender the same for cancellation, and then receive stock of the insurance company of par value equal to

¹ Missouri Pacific R. R. Co. v. Clarendon Co., 257 U. S. 533, 42 Sup. Ct. 210, 66 L. Ed. 354; Piedmont Power & Light Co. v. Town of Graham, 253 U. S. 133, 40 Sup. Ct. 453, 64 L. Ed. 855; Toop v. Ulysses Land Co., 237 U. S. 580, 583, 35 Sup. Ct. 739, 59 L. Ed. 1127; Fay v. Crozier, 217 U. S. 455, 30 Sup. Ct. 568, 54 L. Ed. 837; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101. See, also, decisions per curiam: Nesmith v. Ohio, 257 U. S. 622, 42 Sup. Ct. 186, 66 L. Ed. 402; Pueblo of Laguna v. Candelaria, 257 U. S. 623, 42 Sup. Ct. 269, 66 L. Ed. 402; Harvey v. Union Traction Co., 257 U. S. 624, 42 Sup. Ct. 269, 66 L. Ed. 403; Winehill & Rosenthal v. Louisiana, 258 U. S. 605, 42 Sup. Ct. 313, 66 L. Ed. 786; Hartford Life Insurance Co. v. Johnson, 258 U. S. 612, 42 Sup. Ct. 462, 66 L. Ed. 790; Lindsey v. Allen, Attorney General, 258 U. S. 613, 42 Sup. Ct. 462, 66 L. Ed. 791.

one-half of the payment, and gave those who had not availed themselves of this privilege 20 days within which to do so, and declared those failing to make such payment and surrender their annuity certificates for cancellation—

"barred and estopped from making any claim of any kind whatsoever against said life insurance company or officers or stockholder thereof, or against any assets of said company, and such annuity certificates will then and thereby be fully canceled in law and in equity, and such annuity certificate holders will have no further rights, claims, or demands against said company, its officers, stockholders, assets, or property on account thereof."

The decree directed the sale by the receiver of the agency company of the 992 shares of stock of the insurance company to a trustee for those so contributing to *the rehabilitation of the insurance company; it fixed compensation of the receiver and his solicitors and provided for the payment thereof; it stated that the insurance company had deposited funds for carrying out the provisions of the decree and directed the same to be so used; bids submitted for the assets were rejected, and the decree continued:

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 " * * * That the jurisdiction of this court is fully retained, extended, and continued from time to time until this cause is finally concluded over all subjects-matter covered by any pleading now on file or that later on may be filed, and over all parties whose names are now on the record and such other party or parties as may later on be brought into court, or who may come into court by any pleading. And all such parties now to the record, including the said the Great Western Life Insurance Company, and all parties who may later on be made parties herein, shall be bound by such further orders and decrees as to the court may seem necessary and proper."

No further proceedings were had, and on November 29, 1912, an order was filed relinquishing jurisdiction and discontinuing the case.

The insurance company resumed business and continued until its merger with the plaintiff in error, December 7, 1912. By the articles of consolidation, the latter agreed to pay all debts, liabilities, and obligations of the former. The claims of the certificate holders were specifically referred to, and the plaintiff in error agreed to pay the annuities provided for in such certificates or refund

the amounts paid for them, if they should be held by the Supreme Court of Missouri to be valid obligations of the Great Western Company at the time of the merger. The state court found that the certificate holders who assigned to defendant in error were not original parties to the suit, that they did not subsequently intervene or appear in person or by counsel, that no relief was sought

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*against them by any party to the suit, and that the only relief sought by stockholders and annuity certificate holders, who proposed and supported the plan of rehabilitation, was to have the property returned to the insurance company upon payment of its debts. These findings are sustained by the evidence. The stockholders and certificate holders who did appear in that suit for the purpose of reorganizing the company had no authority or power to represent certificate holders who did not appear. There is nothing in the record to support the jurisdiction of the court to deal with or cancel the annuity certificates assigned to defendant in error. The assignors were denied a hearing upon the matters decreed against them.

The provisions of the decree, attempting to bar and estop certificate holders from making any claim against the insurance company, its officers, stockholders, or assets, and attempting to cancel their certificates and determine that they had no further rights, claims, or demands unless within the specified 20 days, they should pay in \$37.50 per share, and, upon surrender of their certificates take stock in the insurance company of par value of one-half the amount so paid, were without jurisdiction. The company could not thus be relieved of its obligations to non-consenting annuity certificate holders and have its property returned to it exempt from their claims. Their rights could not be so disposed of. As to them the decree was not a judicial determination, and the courts of Missouri were right in holding it to be a nullity. See *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215; *Windsor v. McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 914; *McVeigh v. United States*, 11 Wall. 259,² 20 L. Ed. 80.

Writ of error dismissed.

Writ of certiorari denied.

² Cf. *Reynolds v. Stockton*, 140 U. S. 254, 264, 11 Sup. Ct. 773, 35 L. Ed. 464; R. S. § 737; equity rules 47 and 48, in force in 1908.

(262 U. S. 325)

SOUTH UTAH MINES & SMELTERS v.
BEAVER COUNTY.(Argued and Submitted March 15, 1923.
Decided May 21, 1923.)

No. 321.

1. Trial $\S$ 390—Court, at same term at which oral general finding made, held authorized to make and enter special findings.

Under the rule that during the term the record is in the breast of the court and may be altered, the court at the term at which it gave its decision and a general finding orally, and directed judgment, had power to make and file special findings.

2. Taxation $\S$ 37—Legislature and taxing authorities have large, but not unbounded, latitude in determining multiple to be taken in valuing mines from annual proceeds pursuant to Constitution.

In fixing the value of mines for purpose of taxation at a multiple of the net annual proceeds, pursuant to Const. Utah, Amend. art. 13, $\S$ 4, the Legislature and taxing authorities have a good deal of latitude in selecting the multiple, but the power is not unbounded.

3. Constitutional law $\S$ 48—Construction of state statutes which will render them constitutional adopted, when they have not been construed by state courts.

When state statutes, which have not been construed by the state courts, if construed as applicable to the case under consideration, would be of doubtful constitutionality, and are susceptible of construction precluding their application, and such construction will resolve all doubt in favor of their constitutionality, it is the federal Supreme Court's duty to adopt it.

4. Taxation $\S$ 37—Rule as to valuation of metalliferous mines not to be extended.

The rule prescribed by Const. Utah, Amend. art. 13, $\S$ 4, and Laws 1919, c. 114, for valuation of metalliferous mines for taxation at multiple of the net annual proceeds is one of necessity, and should not be extended to cases clearly not within its reason.

5. Taxation $\S$ 63—Tailings not on mining claims not taxable under rule as to mines.

Tailings from concentrating mill on property separated from the mining claims, from which the ores were obtained, and having an ascertained and adjudicated value of their own, are not within Const. Utah, Amend. art. 13, $\S$ 4, and Laws 1919, c. 114, providing for valuation of metalliferous mines for taxation at a multiple of their annual proceeds.

6. Taxation $\S$ 79—Tailings from mill taxable to mill owner, notwithstanding agreement with another for their reduction on royalty.

Agreement with owner of concentrating mill for treatment and reduction of tailings from the mill on a royalty of 10 per cent. was not a sale, and the ownership of the tailings for purpose of taxation remained in the mill owner, pending the process of reduction.

7. Taxation $\S$ 63—Proceeds from tailings from concentrating mill held not proceeds of mine.

Within Const. Utah, Amend. art. 13, $\S$ 4, and Laws 1919, c. 114, providing for valuation of metalliferous mines for taxation at a multiple of net annual proceeds during the preceding year, proceeds of tailings from concentrating mill are not proceeds of the mining claims, from which the ores were taken several years before.

In Error to the District Court of the United States for the District of Utah.

Action by the South Utah Mines & Smelters against Beaver County. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

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*Messrs. C. C. Parsons and E. O. Leatherwood, both of Salt Lake City, Utah, for plaintiff in error.

Messrs. Harvey H. Cluff and Wm. A. Hilton, both of Salt Lake City, Utah, for defendant in error.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is an action brought by the plaintiff in error (plaintiff below) against the defendant in error (defendant below) in the federal District Court for the District of Utah to recover a tax alleged to have been illegally imposed by the state taxing authorities and paid under protest. The plaintiff is a mining corporation organized and existing under the laws of Maine, and since 1909 has owned mining property in Beaver county, Utah, consisting of mining claims, a concentrating mill, now obsolete and largely dismantled, and other property incident thereto. The property was continuously operated until August, 1914. The ores were copper-bearing and upon extraction were transported to the mill and there crushed and concentrated; the resulting concentrates being shipped and sold to smelters at some distance away. As a result of the concentrating operations refuse material, still retaining small quantities of copper and other metals, was deposited near

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the concentrating mill as *tailings. This deposit was begun by plaintiff's predecessor as early as May, 1903, and from then until August, 1914, approximately 900,000 tons of tailings were accumulated upon desert land owned by plaintiff, nonmineral in character, and located about three miles from its mining claims. At the time of the accumulation of these tailings there was no known process by which the small percentage of metals which they contained could be profitably recovered. In August, 1914, plaintiff stopped work on its mining claims and has never since resumed. The court below expressly found that at the date last mentioned all ores which could be profitably mined under

processes then or since known had been taken out, and that plaintiff's mine, excluding the tailings, had never since been of any value; that plaintiff had never abandoned its property, but had maintained its title and paid and discharged all taxes assessed against it; and that, on January 1, 1919, the said tailings deposit was of the value of \$20,000.

In January, 1914, plaintiff made an agreement with the Utah Leasing Company for the treatment and reduction of this deposit upon a royalty of 10 per cent. The leasing company took possession of the tailings, constructed reduction works, using in connection therewith some of the plaintiff's improvements on its mining property, and, as a result of its operations, recovered from the tailings in the year 1918 the net amount of \$120,547, 10 per cent. only of which was paid over to the plaintiff, under the terms of the agreement. The taxing authorities, claiming to act under the state constitution and laws, multiplied the amount thus recovered by 3 and fixed the value of plaintiff's mining property for the year 1919 for taxing purposes at the multiple thereof, viz. \$361,641. The defendant thereupon assessed and collected from plaintiff \$6,907.24 as a tax

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against plaintiff's *mining property for the year 1919, based upon a valuation computed in the manner just stated.

The Constitution of Utah declares (sections 2 and 3, article 13) that all property in the state shall be taxed in proportion to its value, and requires the Legislature to provide a uniform and equal rate of assessment and taxation of all property according to its value in money, and prescribe such regulations as shall secure a just valuation for the taxation of all property, so that every person and corporation shall pay a tax in proportion to such value. By an amendment to section 4, article 13, adopted in 1918, it is provided that all metalliferous mines or mining claims, in addition to an arbitrary valuation of \$5 per acre, shall be assessed "at a value based on some multiple or sub-multiple of the net annual proceeds thereof. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons, shall be assessed at their full value."

The Legislature, at its session in 1919, enacted a statute in pursuance of this constitutional provision, providing that metalliferous mines or mining claims shall be assessed, in addition to the \$5 per acre, upon a value to be determined by taking the multiple of three times the net annual proceeds thereof. Other mines and valuable mineral deposits are to be assessed at their full value. The words "net annual proceeds" are defined to be the net proceeds realized during the preceding calendar year from the sale, or conversion into money or its equivalent, of all ores extracted by the owner, lessee, con-

tractor or other person working upon or operating the property during or previous to the year for which the assessment is made, including all dumps and tailings, after making certain deductions. Session Laws 1919, c. 114, § 5864.

Upon the facts stated and under these constitutional and statutory provisions, the lower court upheld the validity of the tax.

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*The plaintiff contended in the court below that the tailings deposit was neither a mine nor a part of a mine, but a thing separate and apart from its mining claims, constituting a "valuable mineral deposit" and taxable as such upon the value and not a multiple thereof; that the agreement with the leasing company was a sale of the deposit, which thereupon ceased to be assessable as its property, or the basis for assessment of its worked out and worthless mine; that since 1914 its mining claims, having become valueless and yielding no net proceeds, were not taxable; that the tax assessed was therefore in contravention of section 3, article 13, of the Constitution of Utah, requiring a uniform and equal rate of assessment of property according to its value in money, so that every person and corporation should pay a tax in proportion to such value; and also was in contravention of the clauses of the Fourteenth Amendment to the Constitution of the United States in respect of due process and equal protection of the laws. The court below denied these contentions and sustained the tax and the case comes here for review upon writ of error.

[1] The defendant has submitted a motion to dismiss the writ of error and of this we first dispose. The ground of the motion is that the case was tried by the court without a jury; that no exceptions were taken during the trial and no request for special findings or a declaration of law made during the progress of the trial; that the court gave its decision and a general finding orally and directed judgment for the defendant, which was duly entered; that nearly three months later, on motion of plaintiff, and against defendant's objection, the court made and filed special findings of fact. The defendant challenges the power of the court to make these special findings and insists that they should be disregarded, in which event nothing substantial would be left for review.

All of the proceedings, including the special findings, happened at the same term.

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The rule is that during the *term the record is "in the breast of the court" and may be altered during that time in its discretion as justice may require. *Goddard v. Ordway*, 101 U. S. 745, 752, 25 L. Ed. 1040; *Ayres v. Wiswall*, 112 U. S. 187, 190, 5 Sup. Ct. 90, 28 L. Ed. 693; *Doss et al. v. Tyack et al.*, 14 How. 297, 312, 14 L. Ed. 428; *Barrell v. Tilton*, 119 U. S. 637, 643, 7 Sup. Ct. 332, 30 L. Ed. 511; *Basset v. United States*, 9 Wall 38, 41, 19 L. Ed. 548.

That rule is applicable here and the motion to dismiss is accordingly denied.

[2,3] The state constitution plainly contemplates that all property irrespective of its character, shall be taxed "according to its value in money." The provision with reference to the taxation of metalliferous mines does not mean to depart from this rule, but recognizes that their value cannot be determined in the ordinary way, since the ores which constitute the wealth of such property are hidden in the earth and, as a general thing, disclosure of their extent and character must await extraction. The Constitution, therefore, provides, not for disregarding value in the assessment of taxes upon mines, but for arriving at it in a special manner—that is, by a measurement proportioned to the net annual proceeds derived from the property. The value of property bears a relation to the income which it affords. If it be property whose production is uniform and of indefinite duration the capitalization of the net income derived from it at the going rate of interest, in the absence of a more certain method, will furnish a reasonable measure of the value. The life of a mine, however, is limited. The extraction of ores from year to year constitutes a constant drain upon the capital, which, in course of time, will be exhausted. It follows that a given multiple of the net annual proceeds which may be a fair measure of value in the early part of a mine's development, will become excessive as the stage of exhaustion approaches. The constitutional provision, therefore, at best, will produce only approximate equality. Undoubtedly in fixing the

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multiple of *the net annual proceeds upon which the value of metalliferous mines is to be calculated a good deal of latitude must be allowed the Legislature and the taxing authorities, but the power is not unbounded. Without attempting to delimit the boundaries—a matter primarily for the state courts—it is sufficient for present purposes to say that in our opinion they have been clearly exceeded in the instant case. The net proceeds here involved arose from a lot of refuse material, which, long prior to the imposition of the tax, had been severed from the mining claims, removed to a distance, submitted to the process of reduction and stored upon lands separate and apart from the claims. Moreover, but one-tenth of the amount of these net proceeds was realized by the owner of the mining claims. To treble the total of these proceeds for the purpose of basing thereon an altogether fictitious value for a mine worked out and worthless years before the adoption of the statutory provisions supposed to confer the authority to do so, results in such flagrant and palpable injustice as would cast the most serious doubt upon the constitutionality of such provisions if thus construed. See *Dane v. Jackson*, 256 U. S. 589, 598, 41 Sup. Ct. 566, 65 L. Ed.

1107; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614-615, 19 Sup. Ct. 553, 43 L. Ed. 823. These statutory provisions, so far as we are informed, have not received the consideration of the state courts, and we will not assume in advance of such consideration, that they will be so construed as to produce that result. See *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546, 34 Sup. Ct. 359, 58 L. Ed. 713; *Missouri, Kansas & Texas Ry. Co. v. Cade*, 233 U. S. 642, 650, 34 Sup. Ct. 678, 58 L. Ed. 1135. Clearly they are susceptible of a construction which will preclude their application to the case now under consideration and, as that construction will resolve all doubt in favor of their constitutionality, it is our duty to adopt it. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 546, 34 Sup. Ct. 359, 58 L. Ed. 713; *St. Louis Southwestern Ry. v. Arkansas*, 235 U. S. 350, 369, 35 Sup. Ct. 99, 59 L. Ed. 265; *Arkansas Natural Gas Co. v. Arkansas Railroad Commission*, 261 U. S. 379, 43 Sup. Ct. 387, 67 L. Ed. —, decided March 19, 1923.

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[4-6] *The rule prescribed for the valuation of metalliferous mines, as we have already indicated, is one of necessity, and should not be extended to cases clearly not within the reason of the rule. The tailings, severed and removed from the mining claims, changed in character, placed on other and separate lands and having an ascertained and adjudicated value of their own, in our opinion, constituted a unit of property entirely apart from the mine from which they had been taken. See *Forbes v. Gracey*, 94 U. S. 762, 765, 24 L. Ed. 313. We think the agreement with the leasing company was not a sale of these tailings, but that the ownership, pending the process of reduction, remained in plaintiff. The plaintiff, therefore, was subject to taxation upon their value, but not as a mine, since that implies something capable of being mined which this loose and homogeneous deposit obviously was not.

While the taxing authorities cannot be held to an inflexible rule of equality, even in respect of properties in the same classification where their nature is such as to practically preclude the application of such a rule, it does not follow that all distinctions are to be ignored and indubitably dissimilar and readily distinguishable things treated as though they were the same. It may well be that the taxable value of mines differing in extent of development or in degree of exhaustion and relatively of different actual values, must, from the practical necessities of the case, be subjected to the same rule of measurement, although it may work inequality to some extent. But the difference between a mine from which ore is still being or still may be extracted and net income derived, and one conceded to be an empty shell, with no present or prospective value whatsoever, is so obvious that the imposition of a tax upon the basis of their being, nevertheless, one and

the same cannot be sustained with due regard for either law or logic.

[7] How far the state statute defining the net annual proceeds to be considered in meas-

uring the value of a mine, *properly includes those derived from dumps and tailings placed and remaining upon the mining claims or connected with a going mine, we do not determine; but we do hold that the proceeds from the tailings in question, under the facts here disclosed, are not included within its terms. The court below should have so construed the statute and rendered judgment for the plaintiff. See *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390-391, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 507, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88. This disposition of the case makes it unnecessary to adjudicate the questions raised under the Fourteenth Amendment.

The judgment of the District Court is reversed, and the case remanded for further proceedings in conformity with this opinion. Reversed.

(262 U. S. 200)

WORK, Secretary of the Interior, et al. v. UNITED STATES ex rel. McALESTER-EDWARDS COAL CO.

(Argued April 12, 1923. Decided May 21, 1923.)

No. 258.

1. Indians §15(1)—Lessee of mineral lands held entitled to purchase surface at "the appraised value" under earlier act.

Act Feb. 8, 1918, provides for the sale of coal and asphalt deposits in mineral lands of the Choctaw and Chickasaw Indians and gives lessees a preferential right to buy such deposits, and also a preferential right to buy the portion of the surface reserved for their mining operations under Act Feb. 19, 1912, at "the appraised value." *Held*, that the appraisalment referred to is that made under the act of 1912, and not a new appraisalment, and a lessee has the right to buy the reserved surface at the value at which it was appraised under the act of 1912, especially as the use of the definite article, instead of "an," indicates that an appraisalment specifically provided for is meant.

[Ed. Note.—For other definitions, see Words and Phrases, Appraised Value.]

2. Mandamus §85—Secretary of the Interior held not given uncontrollable discretion to construe statute.

Act Feb. 8, 1918, § 4, which provides that lessees of coal and asphalt deposits of mineral lands of Choctaw and Chickasaw Indians shall have a preferential right to purchase the portion of the surface reserved for their mining operations at the appraised value, does not give the Secretary of the Interior final discretion uncontrollable by mandamus, to construe

the statute and determine or define the lessee's preferential right, especially in view of section 7.

Error to the Court of Appeals of the District of Columbia.

Mandamus by the United States, on relation of the McAlester-Edwards Coal Company against Hubert Work, Secretary of the Interior, and others. Judgment dismissing the petition was reversed by the Court of Appeals of the District of Columbia (51 App. D. C. 171, 277 Fed. 573), and defendants bring error. Affirmed.

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*The relator, the McAlester-Edwards Coal Company, filed a petition in the Supreme Court of the District of Columbia, asking for a writ of mandamus to require the Secretary of the Interior and the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation to accept \$10,360.06, the balance of the purchase price of \$12,651.82 (\$2,291.76 having already been tendered and accepted) tendered by the coal company in payment for certain surface lands to which under the Act of Congress of February 8, 1918 (40 Stat. 433, c. 12, § 4), it claimed a preferential right of purchase, and to require the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation to issue a patent to the coal company for the same and the Secretary of the Interior to approve it.

The answer of the defendants below admitted all the material facts alleged in the petition, but denied the right of the coal company to the mandamus on the ground that the construction put upon the act of 1918 by the Secretary of the Interior, in the exercise of the discretion vested in him by the statute, did not give to the relator, the coal company, the preferential right asserted. The Supreme Court of the District overruled a demurrer to the answer, and, the relator not pleading further, the petition was dismissed. On review in the Court of Appeals, the judgment of the District Supreme Court was reversed on the ground that the demurrer should have been sustained and the writ asked for should have issued. The cause was remanded to have the writ issue.

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*The coal company is owner by assignment of a lease approved by the Secretary of the Interior of coal lands in Pittsburg county, Oklahoma, belonging to the Choctaw and Chickasaw Nations, executed in July, 1899, and running for 30 years. This lease permitted the lessee to use the surface of the land covered by the lease for the purpose of developing its coal mine. The Act of February 19, 1912 (37 Stat. 67, c. 46), authorized the Secretary of the Interior to sell the surface leased and unleased of the segregated mineral land of the Choctaws and Chicka-

saws, reserved under previous laws, to include the entire estate of the Indians therein except the coal and asphalt reserved. The Secretary was required in the first section, quoted in the margin, ¹ to classify and

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have appraised the *surface so to be sold. The second section, also quoted in the margin,² gave a preferential right for 60 days to any coal or asphalt lessee to purchase at the appraised value, the surface of the land covered by his mining lease, not exceeding 5 per cent. of the whole surface, which the Secretary might extend to 10 per cent., upon waiver of right by the lessee to use any

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more of the surface, but *allowed the Secretary in case of a lessee's failing to purchase to reserve to him as much of the surface as the Secretary might deem proper for his mining uses and development.

Pursuant to this act, the Secretary classified and appraised the surface of the land which included that covered by the lease of the coal company. The coal company, how-

¹ That the Secretary of the Interior is hereby authorized to sell at not less than the appraised price, to be fixed as hereinafter provided, the surface, leased and unleased, of the lands of the Choctaw and Chickasaw Nations in Oklahoma segregated and reserved by order of the Secretary of the Interior dated March twenty-fourth, nineteen hundred and three, authorized by the act approved July first, nineteen hundred and two. The surface herein referred to shall include the entire estate save the coal and asphalt reserved. Before offering such surface for sale the Secretary of the Interior, under such regulations as he may prescribe, shall cause the same to be classified and appraised by three appraisers, to be appointed by the President, at a compensation to be fixed by him, not to exceed for salary and expenses for each appraiser the sum of fifteen dollars per day for the time actually engaged in making such classification and appraisal. The classification and appraisal of the surface shall be by tracts, according to the government survey of said lands, except that lands which are especially valuable by reason of proximity to towns or cities may, in the discretion of the Secretary of the Interior, be subdivided into lots or tracts containing not less than one acre. In appraising said surface the value of any improvements thereon belonging to the Choctaw and Chickasaw Nations, except such improvements as have been placed on coal or asphalt lands leased for mining purposes, shall be taken into consideration. The surface shall be classified as agricultural, grazing, or as suitable for town lots. The classification and appraisal provided for herein shall be completed within six months from the date of the passage of this act, shall be sworn to by the appraisers, and shall become effective when approved by the Secretary of the Interior: Provided, that in the proceedings and deliberation of said appraisers in the process of said appraisal and in the approval thereof the Choctaw and Chickasaw Nations may present for consideration facts, figures, and arguments bearing upon the value of said property.

² Sec. 2. That after such classification and appraisal has been made each holder of a coal or asphalt lease shall have a right for sixty days, after notice in writing, to purchase, at the appraised value and upon the terms and conditions hereinafter prescribed, a sufficient amount of the surface of the land covered by his lease to embrace improvements actually used in present mining operations or necessary for future operations up to five per centum of such surface, the number, location, and extent of the tracts to be thus purchased to be

ever, did not avail itself of the right to purchase but under the authority of the latter part of the section accepted a reservation by the Secretary of a certain part of the surface for its mining operations.

The purpose of the Act of February 8, 1918 (40 Stat. 433), already referred to, is shown by its title "An act providing for the sale of the coal and asphalt deposits in the segregated mineral land in the Choctaw and Chickasaw Nations Oklahoma." Before offering the coal and asphalt deposits for sale, the Secretary was to cause them to be appraised, under such regulations as he should prescribe. All deposits sold were to be subject to the rights of existing lessees, and section 4 contained a provision that any lessee of mining rights should have the preferential right to buy them at the highest price offered for them at public auction—at not less than the appraisal—and that after the appraisal of the mining rights and within 90 days thereof such lessee should have the preferential right to buy the surface rights reserved to him by the Secretary as such lessee "at the appraised value."

The relator bought the mining rights and then within due time undertook to exercise its preferential right to buy the surface rights reserved to it by the Secretary under the Act of 1912, and made a payment on account of \$2,291.76, on the basis of the appraisal under the Act of 1912, which was accepted by the Superintendent of the Five Civilized Tribes and approved by the Secretary of the Interior, and retained for fourteen months. When this became known to

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the Choctaw and Chickasaw Nations, their representatives protested and insisted that there must be a new appraisal under the Act of 1918. There was a hearing before the Secretary who reversed his first ruling and held that the relator was entitled to purchase such surface lands only under an appraisal made subsequently to the Act

approved by the Secretary of the Interior: Provided, that the Secretary of the Interior may, in his discretion, enlarge the amount of land to be purchased by any such lessee to not more than ten per centum of such surface: Provided further, that such purchase shall be taken and held as a waiver by the purchaser of any and all rights to appropriate to his use any other part of the surface of such land, except for the purpose of future operations, prospecting, and for ingress and egress, as hereinafter reserved: Provided further, that if any lessee shall fail to apply to purchase under the provisions of this section within the time specified the Secretary of the Interior may, in his discretion, with the consent of the lessee, designate and reserve from sale such tract or tracts as he may deem proper and necessary to embrace improvements actually used in present mining operations, or necessary for future operations, under any existing lease, and dispose of the remaining portion of the surface within such lease free and clear of any claim by the lessee, except for the purposes of future operations, prospecting, and for ingress and egress, as hereinafter reserved.

of 1918, and that the money paid under the appraisalment of 1912 should be returned to the relator. An appraisalment was then ordered by the Secretary under regulations issued by him, at which the price for the surface in respect to which the relator had sought to exercise a preferential right was fixed at \$20,482.60, instead of \$9,050.53, which had been the appraisalment under the Act of 1912.

The Attorney General and Mr. H. L. Underwood, of Washington, D. C., for plaintiffs in error.

Messrs. George M. Porter, of McAlester, Okl., and Conrad H. Syme, of Washington, D. C., for defendant in error.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

Two questions are to be decided in this case. The first is under what appraisalment the preferential right conferred on the relator by the fourth section of the Act of 1918 to purchase the surface previously reserved to it by the Secretary of the Interior, was to be exercised. Should it have been under that of the Act of 1912, or under that ordered by the Secretary after the Act of 1918? The second question is whether the construction necessary to determine the first

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question is vested by the statute in *the legal discretion of the Secretary which it is not within the power of the Supreme Court of the District by mandamus to control.

[1] First. We have no doubt that the appraisalment referred to in the fourth section of the Act of 1918 under which the preferential right was to be exercised was that provided for in the Act of 1912. It will be observed that the Act of 1912 provided for the sale of the surface lands covering the coal and asphalt deposits of the Choctaws and Chickasaws, and elaborate provisions were made for the appraisalment of them. A board of appraisers was to be appointed by the President of the United States, regulations were to be made by the Secretary for the appraisalment, and minute requirements were set forth in the first section as to the different classes of such surface lands. More than that, six months' time was allowed for it and \$50,000 was appropriated out of the treasury of the Nations to complete the appraisalment and sale. By the second section it was attempted to protect the lessees of the minerals in retaining enough surface land to enjoy their leases by giving them short time options to purchase certain percentages of the whole surface and if they did not purchase, by an agreed reservation without purchase of what the Secretary might deem necessary. The object of this legislation was the appraisalment, offering, sale and disposition of the surface of the mineral land. The Act of 1918 was enacted not to

sell the surface. That had been all disposed of except these agreed reservations by the Secretary specifically provided for in the Act of 1912. The later act was to sell outright the coal and asphalt deposits, much of which had been leased until 1929, subject to such leases. That was its chief purpose. Everything else was incidental. As part of this chief purpose, it provided elaborately for an appraisalment of the mineral deposits, just as the Act of 1912 had provided for the ap-

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praisalment of the surface *land. There is nothing in the Act of 1918 as to the appraisal of the reserved surface land except in the words italicized in the following paragraph, taken from Section 4:

"Any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisalment of the minerals, as herein provided, to purchase at *the appraised value* any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior."

This paragraph is in the middle of section 4, a section devoted to saving the rights of the lessees of the coal and asphalt deposits from impairment by the sale of such deposits contemplated by the act. It was entirely natural, as such reservation of the surface had been made to preserve the mining opportunities of the lessees under the Act of 1912, that now that it was hoped that the lessees would buy the leased deposits outright under the act, as we may judge from the provision giving them preferential rights to do so contained in the same section, provision should also be made to secure them permanent ownership of that which the Secretary had deemed necessary for their mining under the leases. These privileges extended to the lessees show clearly that this act is in pari materia with all the previous legislation concerning these mineral lands, both as to surface and deposits, and especially with the Act of 1912 as to the surface. This is confirmed by the proviso in section 4 that:

"Nothing herein contained shall be construed as limiting or curtailing the rights of any lessee or owner of mineral deposits from acquiring additional surface lands for mining operations as provided by the Act of Congress of February 19, 1912."

There is nothing in the Act of 1918 expressly or impliedly authorizing the Secre-

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tary to order a reappraisalment of the surface land. There is no appropriation for the purpose.

If by the words quoted from section 4 of the act it was intended to authorize a new appraisalment of the surface reservations, the language would not have been "*the*" appraisalment but "*an*" appraisalment. The use of the definite article means an appraisalment specifically provided for. Such an ap-

praisement of the minerals was provided for in the Act of 1918 and this is mentioned in the same sentence in which "the appraisalment" of the surface land is referred to. Construing the Acts of 1912 and 1918 together, the appraisalment can only refer to that so elaborately provided for in 1912.

[2] Second. We think that the preferential right of relator conferred by section 4 of the Act of 1918 was not to be left to the legal discretion of the Secretary in the construction of that act. There are no words to qualify that which the lessee has as a right granted by the statute, or to vest in the Secretary the final discretion to determine or define that right.

Section 7 of the Act of 1918 provides that when the full purchase price for any property sold hereunder is paid, the chief executives of the two tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser an appropriate patent conveying to the purchaser the property so sold. This is language of command, and brings the case within *Lane v. Hoglund*, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. Ed. 1066, and the many cases cited there, and in which this court quotes from its opinion in *Roberts v. United States*, 176 U. S. 221, 231, 20 Sup. Ct. 376, 379 (44 L. Ed. 443) as follows:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not neces-

sarily and in all cases *make the duty of the officer * * * other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial although depending upon a statute which requires, in some degree, a construction of its language by the officer."

See, also, *Work v. United States ex rel. Mosier*, 261 U. S. 352, 43 Sup. Ct. 389, 67 L. Ed. —, decided March 19, 1923.

The decree of the Court of Appeals of the District of Columbia is
Affirmed.

(262 U. S. 318)

NASHVILLE, C. & ST. L. RY. et al. v.
STATE OF TENNESSEE et al.

UNITED STATES v. SAME.

(Argued April 11 and 12, 1923. Decided
May 21, 1923.)

Nos. 396, 429.

I. Carriers §32(1) — Only unreasonable discriminations are unlawful.

While every rate which gives preference or advantage to certain persons, commodities, lo-

calities, or traffic is discriminatory, only such discrimination as is unreasonable, undue, or unjust is unlawful, under Interstate Commerce Act, §§ 2, 3 (Comp. St. §§ 8564, 8565).

2. Commerce §95—Whether preference or discrimination is unreasonable is ordinarily for Commission as question of fact.

Whether preference or discrimination is undue, unreasonable, or unjust, under Interstate Commerce Act, §§ 2, 3 (Comp. St. §§ 8564, 8565), is ordinarily left to the Interstate Commerce Commission for decision, and the determination is to be made as a question of fact on the matters proved in the particular case.

3. Carriers §32(1)—Preference ordinarily harmless may become undue under special circumstances.

Preferential treatment of a class of traffic, ordinarily harmless may become undue, because, under the special circumstances, it results in prejudice, or disadvantage to some other person, commodity, or locality, or to interstate commerce.

4. Statutes §205—Section of Interstate Commerce Act to be read with the whole act, and with regard to its purpose.

Interstate Commerce Act, § 22, as amended by Act March 2, 1889, § 9 (Comp. St. § 8595), providing that nothing therein shall prevent carriage, free or at reduced rates, for state or municipal governments, etc., must be read in connection with the rest of the act, and interpreted with due regard to its manifest purpose.

5. Carriers §32(1)—Carrier cannot, and cannot be compelled to, prejudice interstate commerce by preferential rate in favor of state.

Interstate Commerce Act, § 22, as amended by Act March 2, 1889, § 9 (Comp. St. § 8595), providing that nothing therein shall prevent carriage at reduced rates for state governments, etc., was intended to settle beyond doubt that such preferential treatment was not necessarily prohibited, but does not authorize carrier to subject interstate commerce to undue prejudice, or the state to compel it to do so, as by granting lower rate on road material to state government, when this will give all governmental business to single quarry, to prejudice of others within or without the state.

6. Carriers §32(1)—Statute confers no new right, but merely preserves existing right, as to preferential rate.

Interstate Commerce Act, § 22, as amended by Act March 2, 1889, § 9 (Comp. St. § 8595), providing that nothing therein shall prevent carriage, at reduced rates, for state or municipal governments, etc., confers no right on any shipper or traveler, and no new right on the carrier, but only preserves the right theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases.

7. Commerce §95—Commission's finding conclusive, when evidence on which based not introduced.

In suit to set aside order of Interstate Commerce Commission increasing intrastate

rate on shipments of stone and gravel consigned to state and municipal authorities to the level of the interstate rates, the Commission's finding of undue discrimination is conclusive, when the evidence on which it acted was not introduced.

Appeals from the District Court of the United States for the Middle District of Tennessee.

Suit by the State of Tennessee and others against the United States, in which the Nashville, Chattanooga & St. Louis Railway and others intervened as defendants. From a decree in favor of the State of Tennessee (284 Fed. 371), defendant and the interveners separately appeal. Reversed.

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*Mr. Blackburn Esterline, of Washington, D. C., for the United States.

Mr. J. Carter Fort, of Washington, D. C., for Interstate Commerce Commission.

Mr. Wm. H. Swiggart, Jr., of Nashville, Tenn., for appellees.

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*Messrs. Fitzgerald Hall, of Nashville, Tenn., Charles N. Burch, of Memphis, Tenn., and John B. Keeble, of Nashville, Tenn., for Nashville, C. & St. L. Ry.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Section 22 of the Act to Regulate Commerce, as amended by Act of March 2, 1889, c. 382, § 9, 25 Stat. 855, 862 (Comp. St. § 8595), provides, among other things:

"That nothing in this act shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat. * * *"¹

Whether this section should be construed as denying to the Interstate Commerce Commission power to prohibit such reduced rates, even where they result in unjust discrimination or in undue prejudice to interstate commerce is the main question for decision.

On July 29, 1920, the Interstate Commerce Commission authorized a general increase, throughout Southern territory, of 25 per cent. in interstate freight rates. Ex parte 74, Increased Rates, 1920, 58 Interst. Com. Com'n R. 220. Thereafter the Railroad and Public Utilities Commission of Tennessee authorized, for that state, a like increase of intrastate rates. But the following articles (among others) were excluded from this increase: Carload shipments of stone and gravel when for use in building public highways and consigned to federal, state, county, and municipal authorities or their bona fide agents. To remove the exception, carrier applied to the Interstate Commerce Commis-

sion, claiming that the exception produced illegal discrimination against interstate commerce and an undue prejudice *to persons and localities engaged in such commerce. The Commission found such discrimination; and ordered that the intrastate rates on these commodities, also, be increased to the level of the interstate rates. Tennessee Rates and Charges, 63 Interst. Com. Com'n R. 160, 172.

On October 21, 1921, the state of Tennessee and its commission brought, in the federal court for the Middle District of Tennessee, this suit against the United States to have the order set aside. The Interstate Commerce Commission, the Nashville, Chattanooga & St. Louis Railway, and two other interstate carriers intervened as defendants. The case was heard by three judges under the Act of October 22, 1913, c. 32, 38 Stat. 220 (Comp. St. § 998). A final decree was entered, declaring the order void, and enjoining its enforcement. 284 Fed. 371. The case is here on two appeals. No. 396 is that of the carriers; No. 429, that of the United States and the Interstate Commerce Commission.

Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 42 Sup. Ct. 232, 22 A. L. R. 1086, 66 L. Ed. 371, had been decided by this court before entry of the judgment appealed from. But the District Court considered that case inapplicable, and held that, by reason of section 22, the Interstate Commerce Commission is "without jurisdiction to forbid the railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight"; that the section "excludes this particular traffic from the rate structure which the Commission is authorized to erect and control; in still other words, there is freedom of discrimination."

The argument is, in substance, this: An order of the Interstate Commerce Commission, increasing intrastate rates to the level of interstate rates, must rest upon a finding of illegal preference resulting from the relation of intrastate to interstate rates. Preference to governmental shippers is expressly permitted by section 22 of the act. Hence a grant of such preference cannot be held

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to be unjust or *unreasonable under sections 2 and 3 (Comp. St. §§ 8564, 8565). There was no finding that these lower intrastate rates resulted in failure of the intrastate traffic to yield its proper share of the earnings of the carriers. Consequently the order of the Commission is void.² The argument is, in our opinion, unsound.

¹ The first line of section 22, as originally enacted (24 Stat. 379, 387), read, "That nothing in this act shall apply to the carriage," etc.

² The order of the Interstate Commerce Commission was declared void "to the extent that the rates therein ordered to be established * * * apply to such transportation, for the United States, state or municipal governments, of stone and gravel, the title to which has passed to the government or is vested in it at the point of the origin of its transportation."

[1-3] Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory; for such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by sections 2 and 3) only that discrimination which is unreasonable, undue, or unjust. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 219, 220, 16 Sup. Ct. 666, 40 L. Ed. 940; *Manufacturers Railroad Co. v. United States*, 246 U. S. 457, 481, 38 Sup. Ct. 383, 62 L. Ed. 831. Whether a preference or discrimination is undue, unreasonable, or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case. *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 170, 18 Sup. Ct. 45, 42 L. Ed. 414. The Commission may conclude that the preference given is not unreasonable, undue or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity, or class of traffic. On the other hand, preferential treatment of a class, ordinarily harmless, may become undue, because, under the special circumstances, it results in prejudice, or disadvantage to some other person, commodity, or locality, or to interstate commerce.

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[4-6] *Section 22 must in this matter, as in others, be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose. *Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506, 511, 32 Sup. Ct. 114, 56 L. Ed. 288.³ Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument, by which the carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the state was empowered to compel the carriers so to do. The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act. By so doing, it preserves the right of the carrier theretofore enjoyed of granting, in its

discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier.

[7] The grant of a lower rate on road material to a government, engaged in highway construction, may benefit the government without subjecting to prejudice any person, locality or class of traffic. But a lower rate may result in giving to a single quarry within the state all of the governmental business, so that competing quarries and localities within or without the state, or interstate traffic, would be prejudiced. That such undue discrimination does, and will, result from the order of the Tennessee Commission was expressly found by the Interstate Com-

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merce Commission. Its findings are necessarily conclusive, since the evidence on which it acted was not introduced in this suit. *Louisiana & Pine Bluff Railway Co. v. United States*, 257 U. S. 114, 42 Sup. Ct. 25, 66 L. Ed. 156.

There is nothing in *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U. S. 263, 278, 12 Sup. Ct. 844, 36 L. Ed. 699, *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, or *Pennsylvania R. R. Co. v. Towers*, 245 U. S. 6, 38 Sup. Ct. 2, 62 L. Ed. 117, *L. R. A. 1918C, 475*, inconsistent with the views expressed above. The decisions made by the Interstate Commerce Commission are in substantial harmony with them.⁴

Reversed.

Mr. Justice SANFORD took no part in the consideration or decision of these cases.

⁴ Section 22 has been construed by the Commission as conferring upon carriers such permission to furnish transportation at reduced rates or free, in certain cases; as not conferring upon any shipper or traveler a right to such transportation; and, ordinarily, as not conferring upon the Commission power to establish such exceptions to the normal rates and fares. *Sprigg v. B. & O. R. R. Co.*, 3 Interst. Com. Com'n, 443; *Field v. Southern Ry. Co.*, 13 Interst. Com. Com'n, 298; *Metropolitan Paving Brick Co. v. Ann Arbor R. R. Co.*, 17 Interst. Com. Com'n, 197, 204; *Eschner v. Pennsylvania R. Co.*, 18 Interst. Com. Com'n, 60, 63; *Dairymen's Supply Co. v. Pennsylvania R. R. Co.*, 28 Interst. Com. Com'n, 406; *United States v. Union Pacific R. R. Co.*, 28 Interst. Com. Com'n, 518, 524. See, also, *C. B. Havens & Co. v. Chicago & Northwestern Ry. Co.*, 20 Interst. Com. Com'n, 156. Compare *Cator v. Southern Pacific Co.*, 6 Interst. Com. Com'n, 113; *Commutation Rate Case*, 21 Interst. Com. Com'n, 423, 437; *United States v. Alabama & Vicksburg Ry. Co.*, 40 Interst. Com. Com'n, 405. Conference rulings provide, as to some reduced rates under section 22, that they must be filed and posted with the Commission, and as to others that they need not be. See Conference Rulings, Issued Nov. 1, 1917, Nos. 33, 36, 208e, 218, 244, 311, 452.

³ See, also, *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 446, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 129, 130, 35 Sup. Ct. 494, 59 L. Ed. 867; *Illinois Central R. R. Co. v. Mulberry Hill Co.*, 238 U. S. 275, 282, 35 Sup. Ct. 760, 59 L. Ed. 1306.

(262 U. S. 258)

TULSIDAS et al. v. INSULAR COLLECTOR OF CUSTOMS.

(Submitted May 2, 1923. Decided May 21, 1923.)

No. 77.

1. Aliens ⇐54—Decision of officers under the immigration statute reviewable only for abuse of discretion.

Under the express provisions of Immigration Act Feb. 5, 1917, § 17 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼ii), the decision of a board of special inquiry is final, when affirmed on administrative appeal, and is reviewable on habeas corpus only when the administrative officers have manifestly abused the power and discretion conferred on them.

2. Aliens ⇐54—Compliance with section 6 of Immigration Act as to certificate as merchants not sole evidence for admission.

In proceedings to determine right of aliens to admission under Immigration Act Feb. 5, 1917, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), as being merchants, a ruling affirming deportation of the aliens on the ground that, granting that they were merchants, they did not present as proof of the fact the certificate issued under Act May 6, 1882, § 6, as amended by Act July 5, 1884 (Comp. St. § 4293), as the sole evidence permissible to establish an alien's exemption from the prohibition of the immigration law, held not supportable.

3. Aliens ⇐46—"Merchant" defined.

Under Immigration Act Feb. 5, 1917, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), an applicant for admission as a "merchant" must be such at the time of his application; that is, a merchant in his own country, and not merely intending to become a merchant in the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Merchant.]

4. Aliens ⇐46—"Merchant" and "salesman" or "manager" distinct.

Under Immigration Act Feb. 5, 1917, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), there is a clear distinction between a "merchant" and a "salesman" or "manager"; a merchant being the owner of the business, and a salesman or manager a servant of it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manager; Second Series, Salesman.]

On Writ of Certiorari to the Supreme Court of the Philippine Islands.

Petition by Dharandas Tulsidas and others for writ of habeas corpus, directed to the Insular Collector of Customs. The Supreme Court of the Philippine Islands revoked the granting of the writ, and petitioners bring certiorari. Affirmed.

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*Mr. Adam C. Carson, of New York City, for petitioners.

Messrs. Grant T. Trent and Logan N. Rock, both of Washington, D. C., for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

Petition in habeas corpus in which petitioners pray to be delivered from the custody of the Insular Collector of Customs, by whom they aver that they are detained for deportation from Manila, at which place they are entitled to land and remain under the Immigration Act of February 5, 1917 (39 Stat. 874 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼a et seq.]), being merchants. 1

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*Petitioners arrived at Manila, September 26, 1919, and were taken before a board of special inquiry formed by the insular collector of customs, constituted of three officers of the bureau of customs, duly designated and qualified to serve on such board at the port of Manila in accordance with law, to determine whether petitioners should be allowed to land, or should be deported.

The right of petitioners to land was considered by the board separately and decided separately, but for convenience we have considered their applications and the proceedings thereon as joint, and therefore it is only necessary, in representation of the applications and the proceedings, to say that the board after consideration of the applications and the testimony given in support thereof, decided as to Tulsidas that it appeared that he had no business in India, and none in the Philippines, that his passport showed that he was only a salesman, and that it was clear that he was "not a merchant within the meaning of the immigration law, and therefore not an exempt and entitled to land." He was refused landing.

The board also refused landing to Lekhraj and Sukhrani, deciding that they were salesmen—not industrial partners, as they claimed to be, of Wassiamall Assomall & Co., but salesmen in that store. The board further decided that they had no business of their own, and that industrial partners were not

1 "That the following classes of aliens shall be excluded from admission into the United States: * * * Unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the continent of Asia, * * * or who are natives of any country, province, or dependence situate on the continent of Asia, * * * and no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States. The provisions next foregoing, however, shall not apply to persons of the following status or occupations: * * * Merchants; * * * but such persons * * * who fail to maintain in the United States a status or occupation placing them within the excepted classes shall be deemed to be in the United States contrary to law, and shall be subject to deportation as provided in section 19 of this act." Section 3 (section 4289¼b).

merchants within the meaning of the immigration law.

From the decisions of the board, petitioners prosecuted appeals to the insular collector of customs and it appearing to him, as he

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said, that the decisions of the *board, were "reasonable and proper," in that petitioners, being natives of India, failed to show that they belonged to any of the exempted classes under the provisions of section 3 of the Immigration Act of February 5, 1917, he refused them landing and ordered that they be "returned to their port of embarkation in accordance with law."

It will be observed, therefore, that the officers on whom was imposed the duty of administering the immigration law and passing upon the right of an alien applicant to admission into the United States decided that the petitioners were of the class excluded from admission, and refused them landing.

In question of the legality of that ruling, proceedings were instituted in the court of first instance by a petition for habeas corpus. To the petition, the Attorney General of the islands, as representatives of the insular collector of customs, and in his official capacity, opposed the decision rendered by the board of special inquiry and the insular collector of customs, and denied the allegations of the petition, "except as same may be admitted in, or appear to be true from, the proceedings of the immigration officials in the case."

The court of first instance reversed the rulings of the immigration officials and "definitely ordered that the petitioners be placed at liberty."

The court assigned especially probative force to the partnership agreement introduced in the case, "the genuineness of which" the court said was not questioned, according to which the court further said, "the petitioners were admitted as industrial partners of said partnership, the first having a right to 15 per cent. of the profits, the second 10 per cent., and the third 5 per cent." And the court was of the view that "industrial partners" were as much merchants as "capitalist partners."

The Supreme Court of the Philippine Islands to which the case was appealed, re-

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voked the granting of the writ *of habeas corpus, and ordered and decreed that the judgment of the department of customs ordering deportation of petitioners be affirmed.

The court based its decision on two grounds:

(1) Granting that appellees (petitioners) are merchants, they did not present as proof of the fact the certificate issued under section 6 of the Act of Congress of May 6, 1882, as amended by section 6 of the Act of July 5, 1884 (Comp. St. § 4293), which, it is provided, shall be the sole evidence permissible to establish the exemption of an alien from the prohibition of the immigration law. (2) The court considered that independent of the re-

quirement, appellees (petitioners) had failed to show that they were merchants in the country from which they had come, and that was necessary because the law did "not contemplate that aliens who claim to belong to an exempted class, or aliens otherwise prohibited from entering the United States, shall be permitted to enter the territory of the United States to become merchants." And the court construed the partnership agreement as creating a condition or status after landing in Manila,² and concluded that:

"There is absolutely nothing in the record

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which shows that the depart*ment of customs abused its powers, authority or discretion in the slightest degree."

[1] The conclusion has pertinent significance, for counsel admit that "under the express provisions of the statute (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289½ii), the decision of a board of special inquiry, such as that now under consideration is final when affirmed on administrative appeal," and only to be reviewed upon habeas corpus when the administrative officers have manifestly abused the power and discretion conferred upon them.

It would seem, therefore, as if something more is necessary to justify review than the basis of a dispute. The law is in administration of a policy which, while it confers a privilege, is concerned to preserve it from abuse, and therefore has appointed officers to determine the conditions of it, and speedily determine them, and on practical considerations, not to subject them to litigious controversies, and disputable, if not finical, distinctions. Keeping in mind the admonition of this, we pass to the consideration of the rulings of the officials and the courts.

* The partnership agreement recites that it is made the "19th day of September," 1919, between certain parties who are named "to be known as the capitalist partners, parties of the first part" and the petitioners and other parties, "to be known as industrial partners, parties of the second part,

"Witnesseth: That said parties have agreed, and by these presents do agree, to associate themselves as copartners for the purpose of carrying on the business of buying and selling goods, wares, merchandise and commodities and such commission business as may appertain to the same in the Philippine Islands to the faithful performance of which they mutually bind and engage themselves each to the other, his executors and administrators:

"1. That the principal place of business and domicile of this copartnership shall be Manila, or at such other place as the business now conducted at said location may hereinafter be transferred by mutual consent, and this contract shall relate to this particular store and business only.

"2. That the business of this copartnership shall be conducted under the firm name of 'Wassiamall, Assomall & Co.'

"3. That the direction, control, and management of this partnership is vested solely and exclusively in the parties of the first part, who are hereby granted full power and authority to appoint such manager or managers from the industrial partners as they may deem necessary or proper for the management of the store above mentioned."

[2, 3] In the ruling of the Supreme Court that a "section 6 certificate," as the court and counsel call it, is the prescribed evidence for admission under the immigration law, we do not concur, but in the ruling of the court that an applicant for admission as a merchant must be such at the time of his application we do concur.

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*The law defines the classes of aliens which shall be excluded from admission to the United States, but provides that the exclusion shall not apply to persons having the "status or occupations" of "merchants." This means, necessarily, having the "status" at the time admission is sought, not a status to come, or to be established. If the latter, what indulgence of time is to be given for its attainment, and how is detriment to the policy of the law while the status is attaining to be prevented, and how terminate the indulgence and the detriment, and execute the law? There can be no answer to those questions consistent with the denial that the status of merchant must exist at the time of application for admission.

The petitioners testified, and upon considering the testimony, we encounter some anomalies—*anomalies* that strain belief in its truth, certainly repel from acceptance—pretensions which are based upon the confusion of established distinctions between occupations. We have seen the assertion is that petitioners are industrial partners, and as such Lekhraj testified he was absent from Manila over 3 years, but was an industrial partner in the store of Wassiamall Assomall & Co., during that time—he "only took a rest." Sukhrani put his absence at 16 months. At the time of his testimony, he said he was "a salesman," but was to become manager.

May we not wonder, in some disbelief, how a salesman or manager, whether his compensation be a salary or a percentage of profits, could have been indulged in absences of such duration?

[4] The confounding of occupations—that of salesman or manager with that of merchant—cannot be accepted. A merchant is the owner of the business; a salesman or manager, a servant of it; and especially so under the immigration law. The policy of the law must be kept in mind. It is careful to distinguish between the status of a

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merchant and those below that status. A merchant is fixed in it and made constant to it by his financial interest, a salesman or manager is but an employee, however else he may be denominated, and may withdraw from his employment at any moment of time and become a competitor in the ranks of labor, using the word in the sense the law implies. So particular is the law in regard to

its distinctions and policy that if a merchant descends from his status he shall be "deemed to be within the United States contrary to law and shall be subject to deportation." And induced, no doubt, by such consideration as well as the distinction in occupations, the insular officials adjudged that petitioners were not merchants, so adjudged from their knowledge of the conditions obtaining in the Philippines, so adjudged from contact with petitioners, and in estimate of their pretensions. And, necessarily, we should not view the spoken word, nor even the partnership agreement produced in support of the spoken word separate from that contact and that estimate. And in accepting the adjudication, we do not share the alarm of counsel that it will result in admitting only petty tradesmen, in excluding "the managing partners and directors of great mercantile enterprises." We think, rather, it will leave the administration of the law, where the law intends it should be left, to the attention of officers made alert to attempts at evasion of it, and instructed by experience of the fabrications which will be made to accomplish evasion.

Counsel themselves seem conscious of the exaggeration which made managers and industrial partners of petitioners in a great enterprise, made especially such of a boy 19 years of age. As to him (Tulsidas) counsel say, though asserting his right to admission, that "there is substantial ground for a contention" that—

"The writ [habeas corpus] should not issue because of the lack of sufficient affirmative evidence in the record in support

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of his claim that he is a merchant, and as such entitled to admission to American territory."

And further:

"As a newcomer to the islands, something more than his own uncorroborated statements as to his status in the country from which he came may fairly and reasonably have been required of him."

We concur with counsel as to Tulsidas, and extend the requirement to the other petitioners, and hold that instead, as counsel urge, the insular officers should have sought confirmation or denial of petitioners' testimony, they, the petitioners, should have produced something more than their own statements of their status as merchants. It was for them to establish their exemption from the prohibition of the law; for them to satisfy the insular officials charged with the administration of the law. If they left their exemption in doubt and dispute, they cannot complain of a decision against it.

Judgment affirmed.

(262 U. S. 226)

WAGNER ELECTRIC MFG. CO. v. LYNDON et al.

(Submitted on Motion to Dismiss April 30, 1923. Decided May 21, 1923.)

No. 738.

1. Courts $\S$ 405(5)—Where bill was dismissed on ground of no substantial federal question, only appeal was to Supreme Court.

Where bill was dismissed by the District Court on the ground of no jurisdiction, in that there was no substantial federal question, the only appeal from the decree of dismissal allowed by law was to the Supreme Court, under Judicial Code, $\S$ 238 (Comp. St. $\S$ 1215), and an appeal to the Circuit Court of Appeals should have been dismissed.

2. Courts $\S$ 382(1)—Supreme Court will not remand case erroneously taken to Circuit Court of Appeals, merely to have it transferred back to Supreme Court, but treat it as appealed from District Court.

Where an appeal should have been taken to the Supreme Court, but was erroneously taken to the Circuit Court of Appeals, from whose decision appeal was then taken to the Supreme Court, *held*, that since, if the Supreme Court should reverse the decree of the Circuit Court of Appeals, such reversal would necessarily be accompanied with a direction to that court to transfer the case to the Supreme Court under Act Sept. 14, 1922, the Supreme Court, instead of remanding the case to have it transferred back, would treat the case as before it by appeal from the District Court, and dispose of it as would have been done, had the Circuit Court of Appeals formally transferred it to the Supreme Court.

3. Courts $\S$ 282(3)—Bill collaterally attacking judgment of state court held not to present constitutional question, giving federal court jurisdiction.

Where, in an action against a corporation in a state court for patent royalties, verdict was directed for plaintiff, and the corporation, after unsuccessful appeal, paid the judgment and costs to the sheriff levying execution, and at once brought a bill in the United States District Court against plaintiff and the sheriff to enjoin the sheriff's paying the money to plaintiff, *held*, that the bill could not be supported as presenting a case arising under the Constitution of the United States, on the ground that the state court's directing a verdict for plaintiff without evidence to warrant such action deprived the defendant corporation of its property without due process of law and denied it the equal protection of the laws, for, in a collateral attack on the validity of a state court judgment, a federal court cannot examine the evidence to see whether a direction by the court to a jury to find a verdict was justified by evidence.

4. Jury $\S$ 34(3)—Direction of verdict does not deprive of right to jury trial.

Direction of verdict for plaintiff does not deprive defendant of the right to trial by jury.

5. Constitutional law $\S$ 313—Deprivation of jury trial does not deny due process.

The deprivation of a right to trial by jury in a state court does not deny the parties due process, under the federal Constitution.

6. Constitutional law $\S$ 249, 316—Irregularity in review held not denial of equal protection or due process.

Where, on defendant's appeal in a case in the Missouri state court, review was given by four judges, a division of the Supreme Court of that state, and an opinion affirming the judgment was rendered by three of them, constituting the quorum, the mere fact that the fourth did not hear the oral argument, but wrote the opinion on the printed arguments, was at most an irregularity not affecting the validity of the judgment, and was not a deprivation of property without due process or denial to defendant of equal protection of the laws.

7. Constitutional law $\S$ 249, 316—Courts $\S$ 282(3)—Refusal of division of state Supreme Court to transfer appeal to court en banc held not denial of due process or equal protection.

That a division of the state Supreme Court refused to transfer an appeal to be heard by that court en banc, as required by the law of that state when a federal question is involved, did not deprive the appellant of its property without due process, or to deny it the equal protection of the laws; the question of the right to transfer being a question of state law, on which federal courts are bound to accept the decision of the state court.

8. Costs $\S$ 260(5)—Penalty for appeal for delay imposed.

Where, in an action against a corporation in the state court for patent royalties, verdict was directed for plaintiff, and the corporation, after unsuccessful appeal, paid the judgment and costs to the sheriff levying execution, and at once brought a bill in the United States District Court against plaintiff and the sheriff, to enjoin the sheriff's paying the money to plaintiff, and the bill and the appeal from its dismissal to the Circuit Court of Appeals, and thence to the Supreme Court, were apparently for the purpose of delay, *held* that, under Rev. St. $\S$ 1010, 1012 (Comp. St. $\S$ 1671, 1673), and Supreme Court rule 23 (32 Sup. Ct. xi), the Supreme Court was authorized to and would impose damages for the delay, although the decree appealed from was not a money judgment.

9. Costs $\S$ 260(5)—Damages for delay may be imposed on dismissal of appeal for lack of jurisdiction.

Where a case is dismissed by the Supreme Court for lack of jurisdiction, because the grounds for appeal are frivolous, a penalty for delay under Rev. St. $\S$ 1010, 1012 (Comp. St. $\S$ 1671, 1673), and Supreme Court rule 23 (32 Sup. Ct. xi), may be imposed just as if on an affirmance.

10. Costs $\S$ 263—Penalty for \$1,500 for delay by appeal held not excessive.

Where, in an action against a corporation in the state court for patent royalties, ver-

dict was directed for plaintiff, and the corporation, after unsuccessful appeal, paid the judgment and costs, amounting to \$15,015.29, to the sheriff levying execution, and at once brought a bill in the United States District Court against plaintiff and the sheriff, to enjoin the sheriff's paying the money to plaintiff, and the bill and the appeal from its dismissal to the Circuit Court of Appeals, and thence to the Supreme Court, were apparently for the purpose of delay, *held*, that a penalty of \$1,500 was not excessive, and would be imposed.

Appeal from the Circuit Court of Appeals for the Eighth Circuit.

Suit by the Wagner Electric Manufacturing Company against Lamar Lyndon and another. Decree of dismissal was affirmed by the Circuit Court of Appeals (282 Fed. 219), and plaintiff appeals. Dismissed for lack of jurisdiction.

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*Mr. Charles A. Houts, of St. Louis, Mo., for appellant.

Messrs. Lawrence C. Kingsland and John D. Rippey, both of St. Louis, Mo., for appellees.

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*Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a motion to dismiss or affirm by the appellees in an appeal from the decree of the Circuit Court of Appeals of the Eighth Circuit.

The record discloses the following:

On May 10, 1917, the appellee Lamar Lyndon brought suit in the circuit court of the city of St. Louis, Mo., against the appellant, the Wagner Electric Manufacturing Company, to recover royalties on a patent owned by Lyndon, alleged to be due under a contract between the parties. A trial before a jury was had, in which evidence was introduced by both sides, and at the close of all the evidence, the court directed a verdict for the plaintiff, and judgment followed for \$12,029.50. The Wagner Company appealed from this judgment to the Supreme Court of Missouri, where it was duly assigned for hearing to Division No. 1 of that court under a provision of the Constitution of Missouri that the Supreme Court shall consist of seven judges and shall be divided into two divisions, one to consist of four judges, known as Division No. 1, a majority thereof to constitute a quorum, and its judgments as to causes and matters before it to have the force and effect of law. On January 21st, the appeal was argued before three of the judges of Division No. 1, and printed arguments were filed by both parties. Judgment was subsequently rendered by the four judges (Lyndon v. Wagner Electric Mfg. Co., 285 Mo. 77, 225 S. W. 711), the opinion being written and filed, with the concurrence of the other three judges, by Judge Woodson, of the Division. Judge Woodson had not

heard the oral argument. The Wagner Company filed a motion for rehearing, and a motion to transfer the cause to the court in banc, which were denied.

The Wagner Company then applied to this court for a writ of certiorari to review the

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judgment of the Missouri Supreme Court, which was denied in April, 1921. *Wagner v. Lyndon*, 256 U. S. 690, 41 Sup. Ct. 449, 65 L. Ed. 1173. Thereafter, on a mandate from the Supreme Court of Missouri, the state circuit court issued execution against the Wagner Company on the judgment. The sheriff made a levy on the real property of the Wagner Company, which filed a bill in the United States District Court for the Eastern District of Missouri, against Lyndon and the sheriff, seeking an injunction against their proceeding with the execution. Application for a preliminary injunction on this bill was denied by the District Court. The Wagner Company then paid the judgment and costs, amounting to \$15,015.29, to the sheriff, and at once brought the present bill in the United States District Court against Lyndon and the sheriff, seeking to hold the sheriff as trustee in his custody of the fund, and to enjoin him from paying the money to Lyndon, and Lyndon from receiving it. The jurisdiction was asserted on the ground that the case was one arising under the Constitution of the United States. The District Court heard the case and dismissed the bill. The Wagner Company then appealed to the Circuit Court of Appeals, which affirmed the decree of the District Court. 282 Fed. 219.

The grounds urged in behalf of the relief sought in the District Court, the Circuit Court of Appeals, and this court were, first, that the action of the circuit court of St. Louis, in directing a verdict for plaintiff without evidence to warrant such action, deprived the defendant, the Wagner Company, of its property without due process of law and denied it the equal protection of the laws; second, that the action of Division No. 1 of the Missouri Supreme Court in hearing the case on appeal with three judges and allowing a fourth, who did not hear the oral argument, to take part in the decision and write the opinion, and the refusal of Division No. 1 of the Supreme Court of Missouri to

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transfer the cause to be heard by the Supreme Court in banc, as required by the law of Missouri when a federal question is involved, deprived the Wagner Company of its property without due process of law and denied it the equal protection of the laws.

[1] Defendant Lyndon moved to dismiss the complaint because the court was without jurisdiction, there being no substantial federal question, and because the bill sought an injunction to stay proceedings in a state court contrary to section 265 of the Judicial Code (Comp. St. § 1242). The District Court dismissed the bill on the first ground. No

other questions were presented to the District Court. The only appeal from its decision allowed by law was therefore to this court under section 238 (Comp. St. § 1215), on the ground that the sole issues involved were those involving the application or construction of the Constitution or the jurisdiction of the District Court. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277-281, 21 Sup. Ct. 646, 45 L. Ed. 859; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 295, 22 Sup. Ct. 452, 46 L. Ed. 546; *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 73, 23 Sup. Ct. 604, 47 L. Ed. 712; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 458, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658; *Raton Water Works Co. v. City of Raton*, 249 U. S. 552, 553, 39 Sup. Ct. 384, 63 L. Ed. 768. Such a case could not be taken to the Circuit Court of Appeals, and, except for legislation enacted by Congress September 14, 1922, it would have been the duty of that court to dismiss it for want of jurisdiction. Except for that legislation, it would now be our duty to reverse the decree of that court, with direction to dismiss the appeal. *The Assessors v. Osborne*, 9 Wall. 567, 575, 19 L. Ed. 748; *Mansfield, etc., R. R. Co. v. Swan*, 111 U. S. 379, 388, 389, 4 Sup. Ct. 510, 28 L. Ed. 462; *Blacklock v. Small*, 127 U. S. 96, 105, 8 Sup. Ct. 1096, 32 L. Ed. 70; *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 73, 23 Sup. Ct. 604, 47 L. Ed. 712; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658. *The Carlo Poma*, 255 U. S. 219, 220, 221, 41 Sup. Ct. 309, 65 L. Ed. 594.

[2] The legislation of September 14, 1922, referred to (42 Stat. 837, c. 305), provides that, if an appeal or writ of error has been or shall be taken to, or issued out of, any

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*Circuit Court of Appeals in a case wherein such appeal or writ of error should have been taken to, or issued out of, the Supreme Court, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, where it shall be disposed of as if the appeal or writ of error had been properly taken.

The decree of affirmance in the Circuit Court of Appeals was entered on July 7, 1922, but a petition for rehearing was filed, and that petition was not denied until September 18, 1922, or four days after the passage of the foregoing act. Before the decree of affirmance became finally the act of the Circuit Court of Appeals, this law came into force, and, however that may be, it is in force now to govern us in the direction which we, in reversing the decree of affirmance, should give to that court. That direction should be to transfer the case to this court, to which it should have been brought

by direct appeal from the District Court, under section 238 of the Judicial Code.

The case is here on appeal allowed by a judge of the Circuit Court of Appeals. The case has been submitted to us on the motion to dismiss or affirm, which is a hearing on the merits. All parties have filed briefs. Is it necessary for us to go through the idle form of remanding it to the Circuit Court of Appeals, to enable that court to transfer it back to us for a second consideration? Certainly such unnecessary consumption of time and labor is not in the spirit of the Act of September 14, 1922. Having the case here, and having heard it on the merits, we think we may properly consider that done which ought to have been done, treat the case as here by appeal from the District Court, and dispose of it, as we would do if the Circuit Court of Appeals had formally transferred it to us.

[3-7] The only grounds urged by the appellant for a reversal of the decree dismissing the bill of complaint are frivolous and without merit. The first involves the proposition that in a collateral attack upon the validity of a

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judgment *in a state court, a federal court can examine the evidence to see whether a direction by the court to a jury to find a verdict was justified by the evidence. This would be to make such an attack serve the purpose of a writ of error. More than this, even if it were held that the direction deprived the defendant of the right of trial by jury (a holding shown to be erroneous by *Treat Manufacturing Co. v. Standard Co.*, 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853), still the deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the federal Constitution (*Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989; *Twinning v. New Jersey*, 211 U. S. 78, 110, 111, 29 Sup. Ct. 14, 53 L. Ed. 97; *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 217, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505). The second ground is equally unsubstantial. The machinery for review of the judgments of courts of first instance is wholly within the control of the state Legislature—*Missouri v. Lewis*, 101 U. S. 22, 30, 25 L. Ed. 989—and when the review by four judges is given, and an opinion is rendered by three of them, constituting the quorum, the mere fact that the fourth did not hear the oral argument, but wrote the opinion on the printed arguments, is at most an irregularity, which does not in the slightest degree affect the validity of the judgment. The contention that Wagner was entitled under the Missouri constitution to have the cause heard before a full court, because a federal question was involved, is wholly without merit, because the question of the right to transfer was a question of Missouri law, upon which we are bound to

accept the decision of the Missouri courts. *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989.

[8] We are asked by counsel for appellees to impose a penalty on the appellant for delay. The history of the case and the conduct of the Wagner Company leave no doubt that the litigation in the federal jurisdiction and the successive appeals have been prosecuted solely for delay. Have we power to impose damages in this case?

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*Section 1010 of the Revised Statutes (Comp. St. § 1671) provides as follows:

"Sec. 1010. Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion."

Section 1012 (Comp. St. § 1673) has the effect to make section 1010 applicable to appeals in equity. The second paragraph of the twenty-third rule of this court (32 Sup. Ct. xi) provides that:

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court and shall appear to have been sued out for delay, damages at a rate not exceeding 10 per cent. in addition to interest shall be awarded upon the amount of the judgment."

The third paragraph is:

"The same rule shall be applied to decrees for the payment of money in cases in equity unless otherwise ordered by the court."

An objection to allowing damages in the present case suggesting itself is that the decree appealed from was not a money judgment. It is true that this whole litigation in the federal jurisdiction has been initiated and carried on solely to secure the delay of the payment of a money judgment in the state court, but that is hardly within the exact terms of the twenty-third rule. Sections 1010 and 1012, Revised Statutes, are, however, not so restrictive, and they give this court power to impose just damages upon the affirmance of any judgment or decree, for delay. *Gibbs v. Diekma*, 131 U. S. Appendix clxxxvi.

[9] The case should be dismissed for lack of jurisdiction, because the grounds of appeal are frivolous. In a dismissal on this ground a penalty may be imposed, just as if upon an affirmance. *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 109, 33 Sup. Ct. 80, 57 L. Ed. 140.

[10] We think that damages of \$1,500 for delay are not excessive in this case. We

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therefore direct the dismissal *of the appeal, with damages of \$1,500 and the taxation of costs as upon an affirmance of the decree of the District Court.

WILLARD, SUTHERLAND & CO. v. UNITED STATES.

(262 U. S. 489)

(Argued May 2, 1923. Decided June 4, 1923.)

No. 209.

1. Contracts $\Leftrightarrow$ 10(4)—Contract held void for lack of consideration and mutuality, when government not bound as to amount of coal.

Where the Navy Department called for bids for furnishing 600,000 tons of coal, and the specifications provided that the contractor should furnish any quantity needed, and that the amount stated was only an estimate, and had no bearing on the quantity which the government might order, and that it was not obligated to order any specific quantity, and that bids on less than the entire quantity would be received, and these provisions were carried into a contract to furnish 10,000 tons, the government was not required to take, or limited to, any ascertainable quantity, and the contract was unenforceable for lack of consideration and mutuality.

2. Contracts $\Leftrightarrow$ 10(4) — Contract lacking in mutuality held valid and binding to extent to which it was performed.

Though contract with the government to furnish coal was unenforceable, because not binding the government with respect to the quantity to be taken, it became valid and binding to the extent that it was performed.

3. United States $\Leftrightarrow$ 70(1)—Contractor held deemed to have delivered additional tonnage of coal demanded by government voluntarily at contract price.

The government, under a contract for 10,000 tons of coal which provided that this was only an estimate, and that the contractor would be required to furnish any quantity needed, demanded that the contractor furnish 1,000 tons additional, and, though not directly declining the contractor's proposal that the right to recover the difference between the contract and market price, should be reserved, ordered an amount which included the additional 1,000 tons. Without further objection, the contractor delivered the coal ordered. *Held*, that the contractor must be deemed voluntarily to have accepted the order for the additional tonnage and to have furnished it at the price specified, notwithstanding its earlier protest, there being no duress or compulsory taking.

Appeal from the Court of Claims.

Suit by Willard, Sutherland & Co. against the United States. From a judgment for the United States (56 Ct. Cl. 413), the claimant appeals. Affirmed.

Messrs. Thomas R. Rutter, of New York City, and Gibbs L. Baker, of Washington, D. C., for appellant.

Mr. Rufus S. Day, of Washington, D. C., for the United States.

Mr. Justice BUTLER delivered the opinion of the Court.

This suit was brought to recover \$3,650.

being \$3.65 per ton for 1,000 tons of coal, furnished the Navy.^{*490} Appellant *claims that it is entitled to the market price at the time of delivery, \$6.50 per ton. The United States claims that appellant was bound by contract to furnish it for \$2.85 per ton. The Court of Claims made findings of fact, and concluded that appellant was not entitled to recover.

In the spring of 1916, the Navy Department, being desirous of making contracts for coal for the ensuing fiscal year ending June 30, 1917, issued its invitation for bids in the form of a schedule containing general specifications and conditions and printed forms of proposals for deliveries in stated quantities at 10 different ports or stations. Included therein was a form of proposal for the furnishing of 600,000 tons of coal to be delivered at Hampton Roads, Va. On one of these forms, appellant submitted its bid for coal of the kind and quality described:

"To be delivered * * * at such times and in such quantities as may be required during the fiscal year ending June 30, 1917, * * * 10,000 tons steaming coal * * * for delivery * * * Hampton Roads, Va., per ton \$2.85, * * * \$28,500."

The general specifications printed on the form contained the following provisions:

"Quantities Estimated.—It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quantities stated, the government not being obligated to order any specific quantity. The estimated quantities have been arrived at from records of previous purchases. While they represent the best information obtainable as to the quantities which will be required, * * * they are estimated only, and are not to be considered as having any bearing upon the quantity which the government may order under the contract."

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"Deliveries.—Deliveries to be made promptly, and in lots or quantities specified * * * on call and at the prices accepted by the Department. * * *

"Reservations.—The government reserves the right to reject any or all bids and in accepting any bids; * * * the right is also reserved to make such distribution of tonnage among the different bidders for suitable and acceptable coals for the naval service as will be considered to be for the best interests of the government."

"Notes.—Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications."

Appellant was notified of the acceptance of its proposal, and on June 5, 1916, a contract was made containing the portions of the bid and specifications above referred to. March 26, 1917, appellant was informed

by the department that the quantity estimated in its contract would be exceeded by ten per cent. Appellant answered that when it had furnished 10,000 tons, it would consider its obligation under the contract discharged, and that it was prepared to furnish the balance. The department cited the provisions of the contract as authority for requiring the additional tonnage, stated that the same requirement was made of other contractors, and expressed the hope that it would not be necessary to resort to extreme measures to accomplish compliance. Later the department informed appellant that the steamer Kennebec had been directed to coal with it, and that the quantity required was 2,180 tons. Appellant answered that the balance due under the contract was 560 tons, which it was ready to supply at any time, and that this amount was all that it was able to furnish. The department insisted that the full cargo assigned to the Kennebec

must be furnished.^{*492} Appellant reiterated its position. June 9, the department advised appellant that failure to supply the tonnage ordered would necessitate immediate purchase in the open market for its account. June 12 appellant replied that it had arranged to supply the Kennebec the full quantity required, and that it was "doing this under protest, which can be straightened out later." June 14 appellant wrote that it would agree to supply the 2,180 tons ordered, with the understanding that no further assignments would be made to it; that this was 1,620 tons more than it was obligated to deliver; that this excess would be furnished under protest, reserving the right to take the proper steps to recover the difference between the current market price and the contract price; it asked confirmation from the department and stated that on receipt thereof it would furnish the coal.

June 15 the department acknowledged appellant's letter of the 14th, but, as found by the Court of Claims, "not acceding to any proposition therein contained," directed appellant:

"Your company will please supply Kennebec with 1,560 tons coal, or such quantity as may be necessary to bring the total tonnage delivered by you under contract 26,492 up to total estimated quantity plus 10 per cent. or total 11,000 tons. Balance Kennebec cargo will be obtained elsewhere."

[1] 1. The language of the contract indicates that the parties intended and understood that, depending on its own choice, the department might call for more or less than 10,000 tons of coal. The forms of bid indicated a purpose to contract in advance for the year's supply and not to buy coal in the open market; they informed bidders that the stated quantities were estimated on the basis of previous purchases and were not to be taken as exact figures, and such forms were

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suitable to enable the department to award one contract for the total estimated quantity or to distribute its requirements among a number of producers as it might determine. Appellant's bid mentioned specifically 10,000 tons (which was only one-sixtieth of the estimated total for Hampton Roads). It provided that:

"It shall be distinctly understood and agreed that * * * the contractor will furnish any quantity of the coal specified (i. e., of the kind and quality specified) that may be needed * * * irrespective of the quantities stated, *the government not being obligated to order any specific quantity*," * * * and that the stated quantities "are estimated and are not to be considered as having any bearing upon the quantity which the government may order under the contract; * * * the right is also reserved to make such distribution of tonnage among the different bidders * * * as will be considered for the best interests of the government."

There is nothing in the writing which required the government to take, or limited its demand to, any ascertainable quantity. It must be held that, for lack of consideration and mutuality, the contract was not enforceable. *Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 81, 52 C. C. A. 25, 57 L. R. A. 696; *Fitzgerald v. First National Bank*, 114 Fed. 474, 478, 52 C. C. A. 276; *A. Santaella & Co. v. Otto F. Lange Co.*, 155 Fed. 719, 721 et seq., 84 C. C. A. 145; *Golden Cycle Mining Co. v. Rapson Coal Mining Co.*, 188 Fed. 179, 182, 183, 112 C. C. A. 95.

United States v. Purcell Envelope Co., 249 U. S. 313, 39 Sup. Ct. 300, 63 L. Ed. 620, is not inconsistent with the conclusion that the contract here was not enforceable. There, the making and acceptance of the bid consummated the contract, and it was construed to bind the company to furnish and the department to take the envelopes and wrappers specified which the department would need during the period covered by the contract.

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[2] 2. *While the contract at its inception was not enforceable, it became valid and

binding to the extent that it was performed. *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, 163, 24 Sup. Ct. 47, 48 L. Ed. 130; *Hartman v. Butterfield Lumber Co.*, 199 U. S. 335, 338, 26 Sup. Ct. 63, 50 L. Ed. 217; *United States v. Andrews*, 207 U. S. 229, 243, 28 Sup. Ct. 100, 52 L. Ed. 185.

[3] There was no duress or compulsory taking. The last order was given, as prior orders had been given, with reference to the contract. The failure of the department in the correspondence directly to decline the proposal made by appellant in its letter of June 14 has no significance in favor of appellant. The department did not accept or in any manner acquiesce. Immediately its order was given for 1,560 tons, making a total of 11,000 tons, the exact amount it claimed it was entitled to call for under the contract. The correspondence shows that the department declined to accept appellant's view and refused to entertain its requests or proposals to leave the matter of price open. Appellant failed further to object and delivered the coal. It is not important whether it was persuaded that the department's interpretation of the writing was correct or, to avoid controversy, decided to fill the order. Its earlier protest is of no avail (see *Savage v. United States*, 92 U. S. 382, 23 L. Ed. 660), and it must be held voluntarily to have accepted the order for the additional 1,000 tons, and to have furnished it at the price specified in the contract. *Charles Nelson Co. v. United States*, 261 U. S. 17, 43 Sup. Ct. 301, 67 L. Ed. —, decided February 19, 1923. By the conduct and performance of the parties, the contract was made definite and binding as to the 11,000 tons ordered and delivered according to its terms.¹

The judgment of the Court of Claims is affirmed.

¹ See *Insurance Co. v. Dutcher*, 95 U. S. 269, 273, 24 L. Ed. 410; *Toplift v. Toplift*, 122 U. S. 121, 131, 7 Sup. Ct. 1057, 30 L. Ed. 1110; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 118, 33 Sup. Ct. 967, 57 L. Ed. 1410; *Nelson v. Ohio*, 188 Fed. 620, 623, 112 C. C. A. 394; *Bunday v. Huntington*, 224 Fed. 847, 854, 140 C. C. A. 415; *Bransford v. Regal Shoe Co.*, 237 Fed. 67, 69, 150 C. C. A. 269.

(262 U. S. 495)

(43 Sup.Ct.)

**WILLIAM C. ATWATER & CO., Inc., v.
UNITED STATES.**

(Argued May 2, 1923. Decided June 4, 1923.)

No. 218.

**1. Contracts 10(4) — Contract lacking in
mutuality held valid and binding to extent to
which it was performed.**

Though contract with the government to furnish 200,000 tons of coal was unenforceable in its inception for lack of consideration and mutuality, because the government was not bound with respect to the quantity to be taken, it became valid and binding to the extent that it was performed.

**2. United States 70(1) — Contractor held to
have abandoned claim that it was not bound
to furnish additional coal, and to have ac-
quiesced in government's construction of con-
tract.**

Under contract to furnish the government 200,000 tons of coal, which provided that this was only an estimate, and that the contractor should furnish any quantity needed, the government demanded that the contractor furnish 20,000 tons additional. The contractor objected to furnishing the additional tonnage, but later limited its objection to a quantity which it claimed to have already furnished in excess of the amount required, under a clause relieving it, in case of car shortage, and billed all of the coal, except 8,219 tons at the contract price. *Held*, that it thereby abandoned its claim that it was not bound to furnish more than 200,000 tons, and acquiesced in the government's interpretation of the contract.

**3. United States 70(1) — Provision relieving
contractor in case of transportation shortage
held not to affect price of coal delivered.**

A provision in a contract to furnish coal to the government that the contractor would not be held responsible in case of interruption or shortage of transportation, but that its obligation would be canceled to an extent corresponding to the extent or duration of such interruption or shortage, only relieved the contractor from liability resulting from inability to fulfill the contract, and had no relation to the price to be paid for coal delivered.

**4. United States 73 — When government ad-
hered to its position, and contractor furnished
coal demanded, protest held of no avail.**

Where the government at all times adhered to its position that a contractor was bound to furnish 20,000 tons of coal in addition to the quantity specified in the contract at the contract price, and the contractor, though protesting against delivering a part of the additional quantity and against acceptance of contract price therefor, did deliver the quantity demanded, it must be deemed to have been ordered and delivered under the contract, and its protest was of no avail.

Appeal from the Court of Claims.

Suit by William C. Atwater & Co., Inc., against the United States. From a judgment

in favor of the United States (56 Ct. Cl. 459), claimant appeals. Affirmed.

Messrs. Thomas R. Rutter, of New York City, and Gibbs L. Baker, of Washington, D. C., for appellant.

Mr. Rufus S. Day, of Washington, D. C., for the United States.

Mr. Justice BUTLER delivered the opinion of the Court.

This suit was brought to recover \$73,964.48, being \$3.70 per ton for 19,990.4 tons of coal furnished the Navy. Appellant seeks to recover the market price at the time of delivery, \$6.50 per ton. The United States claims appellant was bound by contract to furnish it for \$2.80 a ton, and this has been paid. The Court of Claims made findings of fact and concluded that the appellant was not entitled to recover.

In the spring of 1916, the Navy Department, being desirous of making contracts for coal for the ensuing fiscal year, ending June 30, 1917, issued its invitations for bids. Appellant submitted a bid and was awarded a contract to furnish a part of the coal required at Hampton Roads, Va. The invitation,

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form of bid, specifications, and contract in this case are the same as in Willard, Sutherland & Co. v. United States, 262 U. S. 489, 43 Sup. Ct. 592, 67 L. Ed. —, decided this day, except that in this case the contract price was \$2.80 per ton, and the quantity specifically mentioned was 200,000 tons.

On March 26, 1917, appellant was informed by the department that the estimated quantity mentioned in its contract would be exceeded by about 10 per cent. Appellant stated that it had not bid on tonnage in excess of 200,000 tons, and called attention to the heavy curtailment of production at its mines due to shortage of cars and labor. The department cited the provisions of the contract as authority for requiring thereunder additional tonnage, stated that the same requirement was being made of other contractors, and that the contract price must apply to the total requirements during the fiscal year. Appellant then called attention to the provisions of note (b), printed in the margin,¹ giving relief in case of shortage of transportation, among other things, and submitted a statement as to the car supply, and

¹ "(b) Contractors will not be held responsible for fulfillment of their contracts during any war in which the United States may be engaged and which may affect them, or if prevented from doing so by strikes or combinations of miners, laborers, or boatmen, accidents at the mines, or interruption or shortage of transportation. In such cases the obligation to deliver coal under their contracts will be canceled to an extent corresponding to the extent or duration of such war, strikes, combinations, accidents, interruption, or shortage, and no liability shall be incurred by the contractors for damages resulting from their inability to fulfill their contracts on account of the aforementioned causes."

maintained that on that basis it was only obliged to deliver 148,357 tons up to April 1, 1917, whereas it had actually delivered to date 160,377 tons, an excess of 12,020 tons, and stated that the total of 220,000 above referred to was subject to the reduction of 12,020 tons, making the actual tonnage deliverable by it under its contract 207,980 tons. The department answered by letter and in-

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sisted that the *10 per cent. additional must be furnished under the contract, and said:

"It cannot be recognized that you are entitled to any relief on account of such shortage of equipment as may have been experienced, as, in this respect, the Navy is accorded preferential treatment and this department has not failed to obtain the cars required by its suppliers when requests for cars to move Navy tonnage have been received."

Appellant then limited its claim for reduction on account of shortage of cars to the period prior to January 1, 1917, and stated that on that basis:

"The total of 220,000 tons requisitioned by the Department under our contract is therefore subject to reduction to the extent of 8,219 tons, making the actual tonnage deliverable under the contract 211,781 tons."

April 26, 1917, the department again insisted on the delivery of the additional 10 per cent. May 22, 1917, acknowledging an order of 10,000 tons to be delivered between June 1, and June 10, the appellant stated that 204,430.19 tons had been delivered; that 2,650 tons were assigned to barges, making a total of 207,080.19 tons, and that the 10,000 tons would make a total of 217,080.19 tons, leaving 2,920 tons. June 2, 1917, appellant wired the department, saying:

"We beg to call attention to department's notice to us under date March twenty-sixth we would be required to deliver contract tonnage plus ten per cent. eighty-two hundred nineteen tons of which by reasons of short car supply we are delivering under protest. With completion of your requisition for ten thousand tons May twenty-first, two hundred and twenty thousand tons will have been delivered, being eighty-two hundred nineteen tons in ex-

cess of the tonnage required to complete contract."

Appellant delivered 219,990.4 tons of coal in all. It billed 211,771 tons at the contract price and 8,219 tons at \$6.25 per ton, and pro-

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tested against accepting the con*tract price therefor, claiming that on account of car shortage it was not bound to deliver it. The Court of Claims found that, when the excess over 200,000 was delivered, the market price was \$6.50 per ton, and that such tonnage—19,990.4—was worth in the market \$73,964.48 in excess of the contract price.

[1] On the authority of the Willard Case, supra, it is held that by the language of the contract it appears that the parties intended that the department might call for more or less than the 200,000 tons mentioned therein, and that because of lack of consideration and mutuality the contract at its inception was not enforceable, but that it became valid and binding to the extent that it was performed.

[2-4] On the facts found it must be held that appellant abandoned its claim that it was not bound to furnish more than the 200,000 tons, and acquiesced in the department's interpretation of the contract and accepted and performed its orders. By its billing the appellant conceded that the contract price applied to all except 8,219 tons. The provisions of note (b) have no relation to price. The purpose of that paragraph was to relieve the contractors from liability resulting from their inability to fulfill their contracts on account of causes mentioned therein. The department at all times adhered to its position both as to quantity and price. Appellant's protest against delivery of the 8,219 tons because of car shortage, and against acceptance of the contract price therefor was of no avail. When it sued, the demand made was not in accordance with the billing, and it claimed the market price for all coal delivered in excess of the estimated quantity mentioned in the contract. The case is presented on the same grounds as was the Willard Case, and it must be held that all of the 219,990.4 tons was ordered and delivered under the contract.

The judgment of the Court of Claims is affirmed.

(262 U. S. 447)

**COMMONWEALTH OF MASSACHUSETTS
v. MELLON, Secretary of the Treasury,
et al.**

FROTHINGHAM v. SAME.

(Argued May 3 and 4, 1923. Decided June 4, 1923.)

Nos. 24, Original, and 962.

1. Courts ⚡303(2) — Jurisdiction because state is party exists only when it is party to proceeding of judicial cognizance.

Const. art. 3, § 2, providing that judicial power extends to controversies between a state and citizens of another state, and that the Supreme Court has original jurisdiction when a state is a party, does not confer jurisdiction merely because a state is a party, but only where it is a party to a proceeding of judicial cognizance.

2. Injunction ⚡118(1)—Allegations in suit to enjoin enforcement of statute held to add nothing to attack on ground that it invaded reserved powers of state.

In suit by a state to enjoin enforcement of Act Cong. Nov. 23, 1921, on the ground that it is an attempt to legislate within the field of local powers exclusively reserved to the states, nothing is added to the effect of this assertion by allegations that the ulterior purpose was to induce the states to yield a portion of their sovereign rights, that the burden of the appropriations thereby provided for falls unequally on the several states, and that there is imposed on the states an illegal and unconstitutional option to yield a part of their reserved rights or lose their share of the moneys appropriated, as the burden falls on inhabitants and not on the states, and the state may refuse to yield its rights.

3. Constitutional law ⚡68(1) — Contention that act of Congress invades reserved rights of states held political, and not judicial.

The contention, in suit to enjoin enforcement of appropriation act of Congress, that it invades the reserved powers of the states, raises a political and not judicial question, and is a matter not admitting of the exercise of the judicial power.

4. Constitutional law ⚡46(1)—Court without authority to pass abstract opinions on constitutionality of acts of Congress.

The Supreme Court is without authority to pass abstract opinions on the constitutionality of acts of Congress claimed to invade the reserved powers of the states, when no rights of a state falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute.

5. States ⚡4—State may not sue to protect citizens from operation of United States statute.

A state cannot, as *parens patriæ*, institute judicial proceedings to protect its citizens, who are also citizens of the United States, from the operation of a statute of the United States, since, with respect to their relations to the

federal government, it, and not the state, represents them as *parens patriæ*.

6. United States ⚡91¾, New, vol. 18A Key-No. Series—Taxpayer may not sue to enjoin execution of appropriation act, because increasing taxes.

A taxpayer cannot sue to enjoin the execution of a federal appropriation act on the ground that it is invalid and will result in taxation for illegal purposes, as the administration of a statute likely to produce additional taxes is a matter of public, and not of individual, concern.

7. Constitutional law ⚡70(1) — Neither department of government may invade province of another, or control or restrain its action.

To the legislative department of the government has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the court, and the general rule is that neither department may invade the province of another, or control, direct, or restrain its action.

8. Constitutional law ⚡45—Court may not review and annul acts of Congress, but may disregard unconstitutional enactment preventing enforcement of legal right.

The courts have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional, but may only ascertain and declare the law when justification for some direct injury, suffered or threatened, presenting a justiciable issue, is made to rest on such an act, and have little more than the negative power to disregard an unconstitutional enactment standing in the way of enforcement of a legal right.

9. Constitutional law ⚡42—Party invoking power of courts to hold statute unconstitutional must show injury sustained or threatened.

A party invoking the power of the court with respect to an unconstitutional statute must show, not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury from its enforcement, and not merely that he suffers in some indefinite way in common with the public generally.

10. Injunction ⚡85(2)—Court cannot enjoin execution of statute, but only acts of officials notwithstanding the statute.

When case for preventive relief is presented by reason of unconstitutionality of statute, the court does not enjoin the execution of the statute, but the acts of officials, notwithstanding the statute.

11. Constitutional law ⚡70(1) — Injunction against enforcement of statute, not injuring plaintiff, would not be exercise of judicial power.

To enjoin officials of the executive department of the government from executing an act of Congress asserted to be unconstitutional, in absence of injury sustained or immediately threatened, would not be to decide a judicial

controversy, but to assume a position of authority over the governmental acts of another department.

Appeal from the Court of Appeals of the District of Columbia.

Original suit by the Commonwealth of Massachusetts against Andrew W. Mellon, Secretary of the Treasury, and others, and suit by Harriet A. Frothingham against Andrew W. Mellon, Secretary of the Treasury, and others. A decree dismissing the bill in the second suit was affirmed by the Court of Appeals of the District of Columbia (— App. D. C. —, 288 Fed. 252), and plaintiff appeals. First suit dismissed, and decree in the second suit affirmed.

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*Mr. Solicitor General Beck, of Washington, D. C., for Mellon and others.

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*Messrs. Alexander Lincoln and J. Weston Allen, both of Boston, Mass., for Massachusetts.

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*Messrs. Wm. L. Rawls and George Arnold Frick, both of Baltimore, Md., and William H. Lamar and Lucius Q. C. Lamar, both of Washington, D. C., for Frothingham.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

These cases were argued and will be considered and disposed of together. The first is an original suit in this court. The other was brought in the Supreme Court of the District of Columbia. That court dismissed the bill and its decree was affirmed by the District Court of Appeals. Thereupon the case

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was brought here by appeal. Both cases challenge the constitutionality of the Act of November 23, 1921, 42 Stat. 224, c. 135, commonly called the Maternity Act. Briefly, it provides for an initial appropriation and thereafter annual appropriations for a period of five years, to be apportioned among such of the several states as shall accept and comply with its provisions, for the purpose of co-operating with them to reduce maternal and infant mortality and protect the health of mothers and infants. It creates a bureau to administer the act in co-operation with state agencies, which are required to make such reports concerning their operations and expenditures as may be prescribed by the federal bureau. Whenever that bureau shall determine that funds have not been properly expended in respect of any state, payments may be withheld.

It is asserted that these appropriations are for purposes not national, but local to the states, and together with numerous similar appropriations constitute an effective means of inducing the states to yield a portion of their sovereign rights. It is further alleged that the burden of the appropriations provided by this act and similar legislation falls unequally upon the several states, and rests

largely upon the industrial states, such as Massachusetts; that the act is a usurpation of power not granted to Congress by the Constitution—an attempted exercise of the power of local self-government reserved to the states by the Tenth Amendment; and that the defendants are proceeding to carry the act into operation. In the Massachusetts Case it is alleged that the plaintiff's rights and powers as a sovereign state and the rights of its citizens have been invaded and usurped by these expenditures and acts, and that, although the state has not accepted the act, its constitutional rights are infringed by the passage thereof and the imposition upon the state of an illegal and unconstitutional option either to yield to the federal govern-

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ment a part of its reserved rights or *lose the share which it would otherwise be entitled to receive of the moneys appropriated. In the Frothingham Case plaintiff alleges that the effect of the statute will be to take her property, under the guise of taxation, without due process of law.

We have reached the conclusion that the cases must be disposed of for want of jurisdiction, without considering the merits of the constitutional questions.

In the first case, the state of Massachusetts presents no justiciable controversy, either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such interest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue.

[1] First. The state of Massachusetts in its own behalf, in effect, complains that the act in question invades the local concerns of the state, and is a usurpation of power, viz. the power of local self-government, reserved to the states.

Probably it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject. But we do not rest here. Under article 3, § 2, of the Constitution, the judicial power of this court extends "to controversies * * * between a state and citizens of another state" and the court has original jurisdiction "in all cases * * * in which a state shall be a party." The effect of this is not to confer jurisdiction upon the court merely because a state is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant. In *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 289, 8 Sup. Ct. 1370, 1373 (32 L. Ed. 239), Mr. Justice Gray, speaking for the court, said:

"As to 'controversies between a state and citizens of another state': The object of vest-

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ing in the courts of *the United States jurisdiction of suits by one state against the citizens

of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff state were compelled to resort to the courts of the state of which the defendants were citizens. *Federalist*, No. 80; Chief Justice Jay, in *Chisholm v. Georgia*, 2 Dall. 419, 475; Story on the Constitution, §§ 1638, 1682. The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all."

That was an action brought by the state of Wisconsin to enforce a judgment of one of its own courts for a penalty against a resident of another state, and, in pursuance of the doctrine announced by the language just quoted, this court declined to assume jurisdiction upon the ground that the courts of no country will execute the penal laws of another.

In an earlier case it was held that a proceeding by mandamus by one state to compel the Governor of another to surrender a fugitive from justice was not within the powers of the judicial department, since the duty of the Governor in the premises was in the nature of a moral rather than a legal obligation. *Kentucky v. Dennison*, 24 How. 66, 109, 16 L. Ed. 717. In *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656, this court declined to take jurisdiction of actions to enforce payment of the bonds of another state for the benefit of the assignors, citizens of the plaintiff states. In *Georgia v. Stanton*, 6 Wall. 50, 75, 18 L. Ed. 721, and kindred cases, to which we shall presently refer, jurisdiction was denied in respect of questions of a political or governmental character. On the other hand, jurisdiction was maintained in *Texas v.*

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White, 7 *Wall. 700, 19 L. Ed. 227, *The State of Florida v. Anderson*, 91 U. S. 667, 23 L. Ed. 290, and *Alabama v. Burr*, 115 U. S. 413, 6 Sup. Ct. 81, 29 L. Ed. 435, because proprietary rights were involved; in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488, because the right of dominion of the state over the air and soil within its dominion was affected; in *Missouri v. Holland*, 252 U. S. 416, 40 Sup. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984, because, as asserted, there was an invasion, by acts done and threatened, of the quasi sovereign right of the state to regulate the taking of wild game within its borders; and in other cases because boundaries were in dispute. It is not necessary to cite additional cases. The foregoing for present purposes sufficiently indicate the jurisdictional line of demarcation.

[2] What, then, is the nature of the right of the state here asserted and how is it affected by this statute? Reduced to its sim-

plest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the states. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the states to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several states; and that there is imposed upon the states an illegal and unconstitutional option either to yield to the federal government a part of their reserved rights or lose their share of the moneys appropriated. But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the states where they reside. Nor does the statute require the states to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

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[3] *In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.

In *Georgia v. Stanton*, supra, this court held that a bill to enjoin the Secretary of War, and other officers, from carrying into execution certain acts of Congress, which it was asserted would annul and abolish the existing state government and establish another and different one in its place, called for a judgment upon a political question and presented no case within the jurisdiction of the court. Mr. Justice Nelson, speaking for the court, said (6 Wall. 77, 18 L. Ed. 721):

"That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property, infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court."

In *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, an injunction was sought to pre-

vent certain acts of legislation from being carried into execution within the territory of the Cherokee Nation of Indians, the original jurisdiction of this court being invoked on the ground that plaintiff was a foreign nation. It was asserted that the acts in ques-

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*tion, if executed, would have the effect of subverting the tribal government and subjecting the Indians to the jurisdiction of the state of Georgia. It was held that the Cherokee Nation could not be regarded as a foreign nation, within the meaning of the Judiciary Act (1 Stat. 73), but Chief Justice Marshall, delivering the opinion for the majority, said, further (5 Pet. 20, 8 L. Ed. 25):

"That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be * * * doubtful. The mere question of right might perhaps be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may well be questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

And Mr. Justice Thompson, with whom Mr. Justice Story concurred, in the course of an opinion, said (6 Wall. 75, 18 L. Ed. 721):

"It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.

"This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here."

See, also, *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581; *Mississippi v. Johnson*, 4 Wall. 475, 500, 18 L. Ed. 437; *Pacific Telephone Co. v. Oregon*, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377; *Louisiana v. Texas*, 176 U. S. 1, 23, 20 Sup. Ct. 251, 44 L. Ed. 347; *Fairchild v. Hughes*, 258 U. S. 126, 42 Sup. Ct. 274, 66 L. Ed. 499.

[4] It follows that, in so far as the case depends upon the assertion of a right on the part of the state to sue in its own behalf, we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not

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rights of *person or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. No rights of the state falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute, and this court is as much without authority to pass abstract opinions upon the constitution-

ality of acts of Congress as it was held to be, in *Cherokee Nation v. Georgia*, supra, of state statutes. If an alleged attempt by congressional action to annul and abolish an existing state government "with all its constitutional powers and privileges," presents no justiciable issue, as was ruled in *Georgia v. Stanton*, supra, no reason can be suggested why it should be otherwise where the attempt goes no farther, as it is here alleged, than to propose to share with the state the field of state power.

[5] We come next to consider whether the suit may be maintained by the state as the representative of its citizens. To this the answer is not doubtful. We need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. Ordinarily, at least, the only way in which a state may afford protection to its citizens in such cases is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to the injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as *parens patriæ*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri v. Illinois* and *Chicago District*, 180 U. S. 208, 241, 21 Sup. Ct. 331, 45 L. Ed. 497), it is

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no *part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriæ*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

[6] Second. The attack upon the statute in the *Frothingham* Case is, generally, the same, but this plaintiff alleges, in addition that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law. The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this court. In cases where it was presented, the question has either been allowed to pass sub silentio or the determination of it expressly withheld. *Millard v. Roberts*, 202 U. S. 429, 438, 26 Sup. Ct. 674, 50 L. Ed. 1090; *Wilson v. Shaw*, 204 U. S. 24, 31, 27 Sup. Ct. 233, 51 L. Ed. 351; *Bradfield v. Roberts*, 175 U. S. 291, 295, 20 Sup. Ct. 121, 44 L. Ed. 168.

The case last cited came here from the Court of Appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore subject to the rule, frequently stated by this court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. *Roberts v. Bradfield*, 12 App. D. C. 453, 459, 460. The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court. *Crampton v. Zabriskie*, 101 U. S. 601, 609, 25 L. Ed. 1070. Nevertheless, there are

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decisions to the contrary. See, *for example, *Miller v. Grandy*, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. 4 *Dillon, Municipal Corporations* (5th Ed.) § 1580 et seq. But the relation of a taxpayer of the United States to the federal government is very different. His interest in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others, is comparatively minute and indeterminate, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right

to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the ex-

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penditure of moneys for nonfederal purposes have been enacted and carried into effect.

[7-11] The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we

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are asked to prevent. To *do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.

No. 24, Original, dismissed.

No. 962 affirmed.

(262 U. S. 366)

FIRST NAT. BANK OF SAN JOSE v. STATE OF CALIFORNIA et al.

(Submitted April 13, 1923. Decided June 4, 1923.)

No. 276.

I. Banks and banking ⚡233—States cannot control affairs of national bank in conflict with purpose of Congress.

National banks are instrumentalities of the federal government, and, though their contracts and dealings are subject to the operation of general, undiscriminating, state laws, which do not conflict with the letter or the general object and purposes of congressional legislation, any attempt by a state to define the duties or control the affairs of such bank, which conflicts with the laws of the United States, or frustrates the purposes of national legislation, or impairs the efficiency of the banks, is void.

2. Escheat ⚡8(1)—State cannot provide for escheat to it of deposits in national bank.

Code Civ. Proc. Cal. § 1273, and Bank Act, § 15, providing for escheat to the state of deposits in bank, where no entries or withdrawals have been made for 20 years and the whereabouts of the depositors are unknown, attempt to qualify agreements between national banks and their customers with respect to deposits which banks are authorized to receive, under Rev. St. § 5136 (Comp. St. § 9661), and are invalid.

In Error to the Supreme Court of the State of California.

Proceeding by the State of California and U. S. Webb, its Attorney General, against the First National Bank of San Jose, to escheat to the state a deposit in the bank. A judgment of escheat was affirmed by the state Supreme Court (State v. Anglo & London Paris Nat. Bank of San Francisco, 186 Cal. 746, 200 Pac. 612), and defendant brings error. Reversed.

Mr. S. F. Leib, of San Jose, Cal., for plaintiff in error.

Mr. U. S. Webb, Atty. Gen., of San Francisco, Cal., for defendants in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Section 1273, California Code of Civil Procedure, declares:

"All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest and which shall have remained unclaimed for more than 20 years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state."

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It further directs *the Attorney General to institute actions in the superior court for Sacramento county against banks and depositors to recover all such amounts—

"and if it be determined that the moneys deposited in any defendant bank or banks are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated to the state and commanding said bank or banks to forthwith deposit all such moneys with the state treasurer, to be received, invested, accounted for and paid out in the same manner and by the same officers as is provided in the case of other escheated property."

Section 15 of the Bank Act (St. 1909, p. 90) contains similar provisions.

In a proceeding under section 1273 the trial court gave judgment for the state against plaintiff in error for the amount credited upon its books to P. A. Campbell for more than 20 years, and this was affirmed by the Supreme Court. State v. Anglo & London Paris Nat. Bank of San Francisco, 186 Cal. 746, 200 Pac. 612. We are asked to hold that, so construed and applied, this section conflicts with the laws of the United States touching national banks and is therefore invalid.

The trial court found—

That for more than 20 years prior to the institution of this action there was on deposit with the said defendant bank to the credit of P. A. Campbell the sum of \$1,192.25; that for more than 20 years prior to the institution of this action the said P. A. Campbell has not made any deposit to the credit of said account, or withdrawn any part thereof or any interest or dividends accruing thereon; that the said money and account so deposited and all accruing interest and dividends thereon have remained unclaimed for more than 20 years after the same were so deposited or credited, and after the withdrawal of any part of the principal or interest or dividends, and said moneys and account now are unclaimed; that the date

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of the last transaction in connection with the said deposit of the said P. A. Campbell, whether by deposit or withdrawal of any portion of such account, or by withdrawal of any interest or dividends accruing thereon, was on the 10th day of November, 1880; that neither the said depositor nor any claimant of the said deposit or account, or of any interest or dividends thereon, has filed any notice with the said defendant bank showing the present residence of the said P. A. Campbell, and the said P. A. Campbell is not known to the president or to the managing officers of the said defendant bank to be now living; that the name of the said depositor, P. A. Campbell, together with the date of the last transaction in connection with his said deposit or account, and the amount now on deposit in the said defendant bank to the credit of the said depositor, were all contained in the annual statement of the said defendant bank filed with the state controller of the state of California in January,

(43 Sup.Ct.)

1917, as required by law, and the Attorney General of the state of California has been informed of all of the foregoing facts.

The Supreme Court declined to express an "opinion upon the question whether the judgment of the superior court herein operates as a present escheat of the rights of the several depositors against the respective banks, or whether under section 1272 they each still have the right within the time there stated to prosecute an action to obtain payment of their several deposits from the state treasurer," and said, "if they have such right, the judgment of the superior court would not be a bar thereto."

[1] Section 5136, U. S. Revised Statutes (Comp. St. § 9661) confers upon national banks power to receive deposits, which necessarily implies the right to accept loans of money, promising to repay upon demand to lender or his order. These banks are instrumentalities of the federal government. Their contracts and dealings are subject to the operation of general and undiscriminating

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state laws, which do *not conflict with the letter or the general object and purposes of congressional legislation. But any attempt by a state to define their duties or control the conduct of their affairs is void, whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation, or impairs the efficiency of the bank to discharge the duties for which it was created. *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283, 288, 290, 16 Sup. Ct. 502, 40 L. Ed. 700.

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. * * * Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.'" *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 33, 34, 23 L. Ed. 196.

Congressional legislation in respect of national banks—

"has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Eas-*

ton v. Iowa, 188 U. S. 220, 229, 23 Sup. Ct. 288, 47 L. Ed. 452.

[2] Plainly, no state may prohibit national banks from accepting deposits, or directly impair their efficiency in that regard. And we think, under circumstances like those here revealed, a state may not dissolve contracts of deposit even after 20 years and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power.

Does the statute conflict with the letter or general object and purposes of the legisla-

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tion by Congress? Obviously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If California may thus interfere other states may do likewise, and, instead of 20 years, varying limitations may be prescribed—3 years, perhaps, or 5, or 10, or 15. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. The depositors of a national bank often live in many different states and countries, and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the state where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.

This court has often pointed out the necessity for protecting federal agencies against interference by state legislation. The approved principle of *obsta principiis* should be adhered to. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204; *Farmers', etc., Bank v. Dearing*, supra; *California v. Central Pac. R. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Davis v. Elmira Savings Bank*, supra; *Easton v. Iowa*, supra; *Covington v. First National Bank*, 198 U. S. 100, 25 Sup. Ct. 562, 49 L. Ed. 963; *Farmers', etc., Bank v. Minnesota*, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. 706; *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234; *Bank of California v. Richardson*, 248 U. S. 476, 39 Sup. Ct. 165, 63 L. Ed. 372.

Reversed.

(262 U. S. 499)

MADERA SUGAR PINE CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (two cases).

(Argued and Submitted March 7, 1923. Decided June 4, 1923.)

Nos. 235, 296.

1. Master and servant — 347—Compensation Act sustainable under interest of state in safety of employees, regardless of citizenship.

State Workmen's Compensation Acts, providing for the liability of the employer to make compensation for injuries received by an employee, irrespective of the question of negligence, are sustainable on the broad ground that the state, by reason of its public interest in the safety and lives of employees engaged in hazardous occupations, may provide, in the exercise of its police power, that the loss of earning power sustained by an employee shall be charged against the industry, and not solely on the ground of the state's interest in preventing injured employees or their dependents from becoming public charges.

2. Constitutional law — 301—Master and servant — 347—Requirement of payment to alien beneficiaries or employees does not invalidate Compensation Act.

Since Workmen's Compensation Acts are not sustainable solely on the interest of the state in preventing its citizens from becoming public charges, the provision of the California Workmen's Compensation Act requiring the payment of compensation for the death of an employee to be made to alien beneficiaries residing out of the country, and who therefore could not become charges on the state, is not invalid, as taking property of the employer without due process of law.

In Error to the Supreme Court of the State of California.

Separate proceedings under the California Workmen's Compensation Act to recover compensation for the death of two employees, by Joseph Barcroft, attorney in fact, for the benefit of aliens residing in Mexico, opposed by the Madera Sugar Pine Company, employer. Petitions to review awards of compensation made by the Industrial Accident Commission were denied by the Supreme Court of California, and the employer brings error. Affirmed.

Mr. H. E. Barbour, of Fresno, Cal., for plaintiff in error.

Messrs. A. E. Graupner and Warren H. Pillsbury, both of San Francisco, Cal., for defendants in error.

Mr. Justice SANFORD delivered the opinion of the Court.

These two cases were heard together. They involve a single question as to the constitutionality of the Workmen's Compensation Act of California.

This is a compulsory compensation act establishing in all except certain employ-

ments, an exclusive system governing compensation for injuries to employees resulting in disability or death. By its terms liability exists against an employer for the compen-

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sation therein provided, in lieu of any other liability whatsoever to any person, and "without regard to negligence," for any injury sustained by his employees, including aliens, arising out of and in the course of the employment, not caused by their intoxication or intentionally self-inflicted; such compensation being recoverable by the employees, according to a prescribed scale gauged by their previous wages and the extent of their disability, or, if the injuries cause death, by those dependent upon them for support, according to prescribed death benefits gauged by the previous wages and the extent of the dependency of the beneficiaries. Laws Cal. 1917, c. 586; Amendment, Laws 1919, c. 471. See *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 695, 151 Pac. 398, and *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642. Non-resident alien dependents are included within its provisions as to death benefits. See *Western Supply Co. v. Pillsbury*, 172 Cal. 407, 416, 156 Pac. 491, Ann. Cas. 1917E, 390.

In the present cases, two laborers employed by the Madera Sugar Pine Company in California, having sustained, without negligence of the Company, fatal injuries, arising out of and in the course of their employment, their partially dependent mother and sisters, respectively, being aliens residing in Mexico, were awarded by the Industrial Accident Commission, in appropriate proceedings under the Act, death benefits against the Company as therein prescribed.

Petitions for writs to review these awards in accordance with the State practice were denied by the Supreme Court of California; and thereupon, on the application of the Company, these writs of error, with superseatas, were allowed by the Chief Justice of that court. See *Napa Valley Co. v. Railroad Commission*, 251 U. S. 366, 372, 40 Sup. Ct. 174, 64 L. Ed. 310.

The sole contention of the Company here is that the act, as construed and applied in these cases, requiring it to make compensation for the death of employees, occurring without fault, to their non-resident alien de-

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pendents, operates to deprive it of property without due process and in violation of the Fourteenth Amendment.

The argument is, in substance, that while an employer may lawfully be compelled to make compensation to the resident dependents of employees whose death was caused by no legal wrong, on the ground that the State is interested in preventing such dependents from becoming public charges, this justification does not extend to the case of foreign dependents, who would not become public

charges of the State; and, therefore, that an act requiring compensation to be made to such foreign dependents in the absence of legal wrong, is not a reasonable exercise of the police power of the State. This argument, however, erroneously assumes that in a compensation act of this character the constitutionality of the provision for death benefits is to be separately determined, independently of the general scope of the act, and solely with reference to the relation of the beneficiaries to the employers and to the State.

[1] Provision is universally made in workmen's compensation acts for compensation not only to disabled employees but to the dependents of those whose injuries are fatal. And the two kinds of payment are "always regarded as component parts of a single system of rights and liabilities arising out of" the relation of employer and employee. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 414, 156 Pac. 491, Ann. Cas. 1917E, 390. The object of such acts "is single—to provide for the liability of the employer to make compensation for injuries received by an employee," whether to the employee himself or to those who suffer pecuniary loss by reason of his death. *Huyett v. Pennsylvania Railroad*, 86 N. J. Law, 683, 684, 92 Atl. 58.

This Court has in several cases sustained the constitutionality of workmen's compensation acts, from which the California Act in its constitutional aspects is not distinguishable, establishing exclusive systems govern-

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ing the *liabilities of employers in hazardous occupations in respect to compensation for industrial accidents to employees resulting in disability or death, and requiring compensation to be paid to a disabled employee or to his surviving dependents in accordance with prescribed scales gauged upon the previous wage and the extent of the disability or dependency. *New York Central Railroad v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; *Ward v. Krinsky*, 259 U. S. 503, 42 Sup. Ct. 529, 66 L. Ed. 1033. And see *Arizona Employers' Liability Cases*, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537. These acts were sustained, in their entirety, without any separate reference to the status of the dependents—although in the *White Case* the right of a widow to compensation was directly involved—upon the broad ground that the State, by reason of its public interest in the safety and lives of employees engaged in such occupations, may provide, in the just and reasonable exercise of its police power, that the loss of earning power sustained by an employee through an industrial accident resulting in his disability or death, constituting a loss arising out of the business and an expense of its operation, shall, in effect, be

charged against the industry after the manner of casualty insurance, and to that end require the employer to make such compensation as may reasonably be prescribed for the loss thus incurred in the common enterprise, irrespective of the question of negligence, to the injured employee or to his surviving dependents. *New York Central Railroad v. White*, 243 U. S. 203, 207, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *Mountain Timber Co. v. Washington*, 243 U. S. 243, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; *Ward v. Krinsky*, 259 U. S. 512, 42 Sup. Ct. 529, 66 L. Ed. 1033. That is to say, as shown by these decisions, the compensation to dependents is merely a part of the general scheme of compensation provided by these acts for the loss resulting from the impairment or destruction of the earning power of an employee caused by an industrial accident, which in case of his death is paid to those whom he had supported by his earnings

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and *who have suffered direct loss through the destruction of his earning power. And it is clear that the underlying reason of these decisions applies alike to all dependents who by his death have been deprived of their support, whether they be residents or non-residents of the State.

[2] If an employment be such as to fall within the State's law-making jurisdiction and the Legislature determines that the employment of labor therein entails upon the employer certain responsibilities toward the persons performing the labor and those dependent on them, there is no constitutional provision requiring that the benefits of such legislative scheme be limited to citizens or residents of the State. *Western Metal Supply Co. v. Pillsbury*, supra, 172 Cal. 416, 156 Pac. 491, Ann. Cas. 1917E, 390. Just as accident insurance goes to the beneficiary regardless of his residence, so the quasi-insurance of a workmen's compensation act goes to those to whom the employee would naturally have made such insurance payable: to himself, although an alien, if he be disabled; and to those dependent upon his earnings for support, if he be killed. *Derinza's Case*, 229 Mass. 435, 441, 118 N. E. 942.

A strong argument in support of the view that as part of a system of compulsory compensation established by a State to protect employees from loss through industrial accidents, the death benefits may properly be extended to alien dependents, is also found, by analogy, in the reason stated in various decisions holding that employers' liability acts authorizing recovery for the death of employees caused by negligence, inure to the benefit of alien as well as resident beneficiaries. Thus, as the *Federal Employers' Liability Act* (Comp. St. §§ 8657-8665), in order to protect the life of the employee gives compensation to those who had relation to it, it makes no difference where they may reside;

it being "the fact of their relation to the life destroyed that is the circumstance to be

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considered, whether we *consider the injury received by them or the influence of that relation upon the life destroyed." *McGovern v. Philadelphia Railroad*, 235 U. S. 389, 400, 35 Sup. Ct. 127, 59 L. Ed. 283. Such employers' liability statutes are designed to benefit all employees. *Vetaloro v. Perkins* (C. C.) 101 Fed. 393, 397. They have the interest of the employees in mind and are primarily for the protection of their lives; the action is given to the beneficiaries on their account and they are not intended to be less protected if their beneficiaries happen to live abroad. *Mulhall v. Fallon*, 176 Mass. 266, 269, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309.

"Many of these toilers in mines, on public works, railroads and the numberless fields of manual labor, receive a moderate wage and are compelled to leave in foreign lands those who are dependent upon them and for whose support they patiently work on, indulging the hope that ultimately they may bring to these shores a mother, or wife and children. * * * The statute not only benefits the survivors, but protects the laboring man. * * * The laborer, leaving wife and children behind him and coming here from abroad, has a right to enter into the contract of employment, fully relying upon the statute." *Alfson v. Bush Co.*, 182 N. Y. 393, 399, 75 N. E. 230, 231 (108 Am. St. Rep. 815); *Kaneko v. Atchison Railway* (D. C.) 164 Fed. 263, 266.

For the foregoing reasons we conclude that the Workmen's Compensation Act of California, as it has been construed and applied in these cases, in providing for death benefits to the non-resident alien dependents of employees meeting death as the result of industrial accidents, is not in conflict with the Fourteenth Amendment.

Affirmed.

(262 U. S. 443)

BRUSH ELECTRIC CO. v. CITY OF GALVESTON et al.

(Argued April 18 and 19, 1923. Decided June 4, 1923.)

No. 179.

I. Electricity ¶11—When rate sought to be enjoined had not been tried, denial of injunction by decree, permitting transfer to suspense docket, held proper.

In suit to enjoin the enforcement of alleged confiscatory rates for electricity established by ordinances, where the latest rates had not been put into operation, and the estimated amount of income thereunder was based on the amount of business done under the former rate, and hence largely a matter of prophecy, a decree denying an injunction and giving plaintiff the option to have the bill dismissed without prejudice, or passed to the suspense docket, with leave to again call the matter up,

after a trial of the ordinance, or before trial, if unusual and extraordinary conditions occurred, held proper.

2. Electricity ¶11 — Electric company held free to apply again for injunction, if rates prove confiscatory.

If, after denial of injunction restraining enforcement of rates for electricity fixed by ordinances, the latest of which rates had not been put into operation, it can be shown that the returns afforded thereby are confiscatory, the electric company held free to make another application for relief.

Appeal from the District Court of the United States for the Southern District of Texas.

Suit by the Brush Electric Company against the City of Galveston and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Messrs. William H. Armbricht, of Mobile, Ala., Charles A. Frueauff, of New York City, and Terry, Cavin & Mills, of Galveston, Tex., for appellant.

Messrs. James W. Wayman and Frank S. Anderson, both of Galveston, Tex., for appellees.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The appellant for many years has been operating an electric light and power plant

in the city of Galveston, *under a franchise reserving to the city the right to regulate rates.

In 1918 an ordinance was enacted increasing the rates then in force. By a subsequent ordinance, passed in 1919, these 1918 rates were decreased.

The present suit was brought by appellant in the federal District court for the Southern District of Texas to enjoin the enforcement of these ordinances, and especially that of 1919, on the ground that the rates fixed thereby were confiscatory. In 1920 the case was referred to a master who heard the evidence and made a report, in which he determined that the rates of 1919 were confiscatory and that those of 1918 were not. To this report both parties filed exceptions. Those filed by the appellant were overruled by the District Court, while those of the appellee were, with two exceptions, sustained. The questions presented are numerous, but, in view of the conclusion we have reached, we do not consider it necessary to review them in detail.

The parties stipulated, and the master found, that the then undepreciated value of the physical property, at January 1, 1920, prices, was \$784,689, and that the cost of the physical property at average pre-war prices, undepreciated, as of January 1, 1920, was \$576,898. The master found the former amount, after deducting the value of real estate, office and utility equipment, and de-

preciation, represented the depreciated value of the depreciable property for rate-making purposes, following the principle established by this court. See *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm.*, 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. —, decided May 21, 1923, and cases cited.

The testimony as to depreciation was conflicting and speculative—the estimates ranging from 15 per cent. to 40 per cent. of the value of the plant. The master fixed it at 28 per cent., making the present depreciated value of the depreciable property \$534,818.

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To this he added the value of various items, including intangible property, real estate, and office and utility equipment, bringing the total up to \$800,000. This he held to be the fair present value of the property. Upon this valuation he recommended an annual return of 8 per cent. and an annual rate for depreciation of $4\frac{1}{2}$ per cent. The gross earnings for the year ending July 31, 1920, which arose from the application of the rates fixed by the ordinance of 1918, were \$333,079.65, which left, after deductions for expenses of operation and maintenance, net earnings of more than \$104,000, or over \$4,000 in excess of a reasonable and fair return. He estimated that under the rates fixed by the 1919 ordinance the net earnings would have been only \$77,665, or over \$22,000 less than a fair and reasonable return. The 1919 rates, however, have never been put into operation, and appellant has continued to operate under the 1918 rates.

The District Judge did not agree with the master's findings, but substituted no base value of his own, because of his conclusion that the injunction should be denied—

"on the ground that the ordinance has had no test, and that in my view, taking the master's base, the ordinance is still not confiscatory, it will not be necessary for me to hazard a guess as to what value ought to be taken, since I feel sure that before the precise valuation of the plant by me can become important, conditions of prices and values will have settled down to such a definite and permanent basis, as that there will be no difficulty in reaching a proper price basis to apply on any future adjustment in or out of court."

[1] The lower court accepted the master's estimate of 8 per cent. upon the value as a fair rate of return, but fixed 4 per cent., instead of $4\frac{1}{2}$ per cent., as a fair rate for annual depreciation. In sustaining certain of the appellee's exceptions, it held that the master's allowance for some items should be decreased and in other instances disallowed. Instead of 28 per cent. for past depreciation,

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the court fixed $3\frac{1}{3}$ per cent., and provisionally determined that the total fair valuation of the plant for rate-making purposes was \$612,000. Upon this valuation, the estimated net earnings under the rates fixed by the

1919 ordinance was shown to be in excess of a fair return to the extent of over \$21,000. The estimated amount of income under the 1919 rates is based on the amount of business done under the 1918 rates, and consequently is largely a matter of prophecy. An actual test of these rates may result in a larger return, by bringing about an increase of business. The conclusion of the court that the temporary restraining order theretofore granted should be dissolved, the injunction prayed for refused, and, at the option of appellant, the bill dismissed without prejudice, or passed to the suspense docket, "with leave to again call the matter up after a trial of the ordinance, or before trial, should unusual and extraordinary conditions occur, making it imperative to save complainant's property from confiscation," under the circumstances disclosed by the record, commends itself to our judgment.

[2] The evidence is so conflicting, and the conclusion to be drawn therefrom in respect of this or that item so uncertain and speculative, that we do not feel warranted in disturbing the findings of the court below, in the absence of an actual test under the new rates. If hereafter it can be shown that the returns afforded are confiscatory, appellant will be free to make another application for relief. *Knoxville v. Water Co.*, 212 U. S. 1, 18, 29 Sup. Ct. 148, 53 L. Ed. 371; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 54, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594; *Louisville v. Cumberland Tel. & Tel. Co.*, 225 U. S. 430, 32 Sup. Ct. 741, 56 L. Ed. 1151; *Galveston Elec. Co. v. Galveston*, 258 U. S. 388, 403, 42 Sup. Ct. 351, 66 L. Ed. 678.

Decree affirmed.

(262 U. S. 371)

UNITED STATES v. AMERICAN LINSEED OIL CO. et al.

(Argued April 25, 26, 1923. Decided June 4, 1923.)

No. 307.

I. Monopolies — 12(1)—Statute intended to secure equality of opportunity and guard against evils incident to suppression of "competition."

The Sherman Act (Comp. St. §§ 8820–8823, 8827–8830) was intended to secure equality of opportunity, and protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress "competition," or the play of the contending forces ordinarily engendered by an honest desire for gain.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Competition.]

2. Monopolies ¶12(3)—Combination of competitors by means of subscriptions to exchange held to have tendency to suppress competition, and unlawful.

A combination of large competing manufacturers and distributors of linseed oil, cake, and meal, by means of subscriptions to a so-called exchange, conducted by a so-called bureau, whereby each subscriber was required to reveal intimate details of its affairs, and furnish a schedule of prices and terms, and adhere thereto, unless more onerous ones were obtained, until prepared to give immediate notice of departure therefrom for relay by the bureau, and agreed to attend monthly meetings, and report matters of interest, and comply with all reasonable requirements of the bureau, and divulge no secrets, held to have necessary tendency to suppress competition, and unlawful under the Sherman Act (Comp. St. §§ 8820-8823, 8827-8830).

3. Monopolies ¶12(1)—Concerted action through combination forbidden, if its necessary tendency is to suppress competition.

Concerted action through combination is forbidden by the Sherman Act (Comp. St. §§ 8820-8823, 8827-8830), when its necessary tendency is to destroy the kind of competition to which the public has long looked for protection.

Appeal from the District Court of the United States for the Northern District of Illinois.

Suit by the United States against the American Linseed Oil Company and others. From a decree for defendants (275 Fed. 939), the United States appeals. Reversed and remanded, with instructions.

Mr. James A. Fowler, of Knoxville, Tenn., for the United States.

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*Messrs. John Walsh, of Washington, D. C., and Thomas M. Debevoise, of New York City, for appellees.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

By an original bill filed June 30, 1920, the United States charged that appellees—de-

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fendants below—were parties *to a combination in restraint of interstate trade and commerce forbidden by the Sherman Act, and asked that they be enjoined from continuing therein. The court below held the combination lawful and dismissed the bill. 275 Fed. 939.

The defendants are 12 corporations, commonly referred to as "crushers," with principal places of business in six different states, which manufacture, sell, and distribute linseed oil, cake, and meal, and Julian Armstrong, who operates at Chicago under the name "Armstrong Bureau of Related Industries." This bureau conducts a so-called "exchange," through which one subscribing manufacturer may obtain detailed information concerning the affairs of others doing

like business. The defendant "crushers" constitute one of the groups who contract for this service. They manufacture and distribute throughout the Union a very large part of the linseed products consumed therein, and prior to the challenged combination were active, unrestrained competitors. Some time in September or October, 1918, each of them entered into an identical written "subscription agreement" with the Armstrong bureau, and a year thereafter signed another, not essentially different. The latter is summarized and quoted from below.

After stating that "the matter contained herein is for the exclusive and confidential use of the subscriber," the agreement recites that it and other "crushers" of flaxseed desire promptly and economically to secure from and through the bureau the following things, "which will promote better and more safe, sane, and stable conditions in the linseed oil, cake, and meal industry and increase its service to the commonwealth": Comprehensive data as to market, trade, and manufacturing conditions in the linseed oil industry; economies in manufacture and sale, by frank exchange of accurate information; the latest authentic information concerning

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the credit of buyers; a *broader market for cake and meal; establishment of uniform cost accounting systems; fair and just freight tariffs and classifications; definite standardization of the products of the industry; economies in the development of foreign markets and increase of sales therein; stabilization of the flaxseed market so far as lawful; shipment of cake and meal to the consumer from the nearest point of production.

The contracting "crusher" agrees:

To subscribe for the bureau's service for 12 months, and thereafter from year to year, subject to cancellation by either party upon 30 days' notice, and pay therefor a sum reckoned upon the amount of flaxseed milled by it, but not less than \$1,100 annually.

That all information reported or received shall be purely statistical and relevant to past operations, and no part of the bureau's machinery will be used to fix prices, divide territory, limit sales, production, or manufacture, or control competition.

That it will "promptly make, have made, forward, and have sent in and to said bureau, as and in the form required by this agreement, full, accurate, complete, signed, and certified reports of all said sales, quotations, and offerings or other information required by the bureau, and full, correct replies or answers to any and all inquiries concerning the same or seeking any information in regard thereto."

That upon request it will "at once turn and have turned over to the bureau's auditor for examination all vouchers, books of account, correspondence, and such other evidence or documents as he may request, or, in lieu of

the same, or any part thereof, such abstracts therefrom as he may designate, verified under oath and certified by a certified public accountant in good standing."

That, "if any subscriber considers that it has good cause to question the report made

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by any other subscriber, then *it may request an investigation or audit to be made by the bureau, and, if considered proper by the bureau, it will be so made," the incident expense to be paid by the party found in error.

That it will deposit with the bureau not less than \$1,000 nor more than \$10,000 of Liberty Bonds, according to its milling capacity.

That, "should the undersigned subscriber fail, in any manner whatsoever, to comply with any of the terms of this agreement, or with any and all reasonable requirements of said bureau, then it shall and does hereby forfeit to said bureau, at its election, all money paid for services and all further benefits and rights under this agreement, which forfeiture, for just cause, may be declared by said bureau, evidenced by written notice thereof mailed to said offender by United States registered mail, and such subscriber shall thereby forfeit all further right, title, or interest in and to said bonds [so on deposit] in whole or in part," subject to the right of appeal to a council, of three subscribers, which shall have power to review the entire matter, reinstate the offender, or take such other final action as seems proper. No fine shall exceed the deposit with the bureau.

That it will (a) "immediately, and when and as hereafter issued, deposit with the bureau all public price lists of the undersigned covering raw and boiled linseed oil, cake, and meal; (b) also to report to the bureau by prepaid telegraph, and further confirm by mail, duplicate of all quotations made at variance with above price lists, giving better terms to the contemplated purchaser than those quoted; (c) with all reports made in compliance with the above paragraph 'b' of quotations which amount to one carload or more of oil, cake, or meal there shall also be reported at the same time and in the same manner the prospective buyer's name, address, and f. o. b. point of shipment; (d) in so far as the above

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reports 'a,' *'b,' and 'c' do not disclose the following, the undersigned 'subscriber' agrees to give the following information in connection therewith, that is: The exact prices, terms, and discounts, and whether made to the jobber, dealer, or consumer, and in what quantities, carload or less than carload, and warehouse or mill prices; (e) also to promptly report all changes in and alterations or withdrawals of the above, of every kind whatsoever, that may be made; (f) also to promptly report by prepaid telegraph, and further confirm by mail, all orders received by the undersigned subscriber in response to special quotations made as above provided in paragraph 'c,' designating the quotation which is

the basis of such order and any variance therefrom."

That "directly at the close of each day's business each subscriber shall mail by special delivery to the bureau a complete report of all its carload sales for that day of oil, cake, or meal, not covered by its previous daily sales reports, which report shall disclose the quantity and kind, price, and terms, and whether for immediate or future delivery, and, if no sale has been so made, this fact shall be likewise reported."

That for the purpose of compiling a weekly sales report "a map of the United States shall be divided into zones as agreed upon by all of the subscribers to this service, and each subscriber at the conclusion of the week shall send to the bureau by special delivery, not later than the following Monday night, a compiled report of all its sales of oil, cake, or meal into each zone made during the period covered by such report, and not previously so reported, specifically setting forth the following: (a-a) Total gallons of oil sold into each zone, also showing the total gallons and price per gallon received for such oil sold; (b-b) total tonnage of cake and meal sold into each zone, also showing total weight and price received per ton for such cake or meal

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sold; (c-c) sales reports on both *oil, cake, and meal shall differentiate spot and future delivery, giving period of such futures."

That before the 10th day of each calendar month it will report to the bureau the number of gallons of oil and the total tons of meal or cake on hand not covered by sale or contract.

That all information received from the bureau or any meeting of subscribers will be treated as confidential.

The bureau undertakes, "with the help of each and every subscriber":

That it will use its best efforts to organize the linseed oil, cake, and meal industry of the United States.

That it will afford its full statistical service for the exchange of information concerning quotations, sales, shipments, production, and terms; also the service of its credit reporting department, will suggest from time to time the means for broader service; and will supply additional service whenever required, the rate to be agreed upon.

That the statistical service furnished shall be accomplished and provided by the use of special report forms conveying information on past transactions which may be modified, changed, and others provided, as experience suggests or as called for by the subscribers in any of their meetings and approved by the bureau.

That the market information received by the bureau will be cleared and relayed promptly to subscribers in good standing.

That it will send to subscribers, in the form of market letters "news clippings" of interest

to the industry and in accordance with the object and terms of the agreement.

It is agreed by all:

That "monthly meetings will be held of all subscribers hereto at some convenient center," with a representative of the bureau, as secretary, who shall present the matters pertaining to the industry, to be therein openly discussed. Subscribers may send in notice of

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matters and *topics for discussion, and if they accord with the agreement and object of the service the bureau shall cause the same to be docketed and presented. "All subscribers shall report at these meetings on all matters and conditions within their knowledge affecting the industry and within the limits of this agreement, that they may be there discussed for mutual benefit." "Any subscriber failing to attend in person or by said representative at each of these meetings, and be in punctual and continued attendance thereon, shall be subject to a fine of \$25 for each offense, the same to be collected by and payable to the bureau. This fine may be remitted by a majority vote of the members present at the meeting where it is incurred."

That "any subscriber who has made offerings or quotations to a prospective buyer, and is advised by such buyer that it is not to be awarded such business, shall have the right to immediately advise the bureau of such unsuccessful offering or quotation, giving all details of such bid or offering, and may then request the bureau to bulletin all of its subscribers asking specific information regarding any quotation or sale to such prospective buyer by any of the other subscribers, and the bureau, on receipt of such request, will immediately bulletin all subscribers asking therefor, and on receipt of replies will send out a compilation report thereof to all subscribers, together with the details of sale, if such a sale has been reported, so that all subscribers, including the original inquirer, will have a complete report of this transaction. On receipt of a request for such specific information from the bureau, the undersigned subscribers will immediately reply to same, giving full information as to any quotation or sale which it may have made to such a buyer, and, if it has made none, so report.

That each subscriber will furnish the bureau, upon request, information pertaining to

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any buyer of linseed *oil, cake, and meal, and may request the bureau to secure like information from all other subscribers, whenever it shall have an order, or an account with, or an inquiry from, the buyer, and this information will be promptly relayed to all interested subscribers.

When an adequate number of subscriptions had been obtained (September, 1918), the organization began vigorously to function according to letter and spirit of the agreement. It will suffice to state a few of the steps taken:

The United States were divided into eight zones for price quoting, and it was stipulated

that each member should quote a basic price for zone No. 1, and should add thereto 1, 2, 4, 6, 7, 8, and 11 cents, respectively, for the others. At subscribers' meetings regularly held "matters pertaining to the industry" were discussed; members were "put on the carpet" and subjected to searching inquiry concerning their transactions. A meeting held October 29, 1919, adopted the following rule:

"In order to provide that the daily market information as relayed by the bureau shall at all times contain the fullest measure of news value, it is agreed that hereafter no council member shall dispatch changes in his prices as last filed with the bureau to more than one buyer, without instantly thereafter telegraphing such full and complete information to the bureau as, and in the form, required by the service contract."

Another meeting—

"resolved that it now be recorded that the recommended terms of this council for the sale of oil be 1 per cent. discount for cash settlement in 10 days, or 30 days net trade acceptance, from date of shipment, and in order that a specific list of the terms of sale of all the council members may now be compiled and distributed, it is further resolved that all council members shall send to the bureau, not later than January 27th, a full explanation of the terms of sale as quoted by them to their trade."

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*The bureau displayed great industry in making inquiries, collecting information, investigating the smallest derelictions, and giving immediate advice to subscribers. Hundreds of so-called "market letters," relating to divers transactions, were sent to subscribers. A sale of two barrels of oil below schedule was deemed worthy of special attention. Also from time to time it gave counsel concerning "unfair merchandising" and the necessity for establishing sound policy by constructive co-operation. The following letters—224 and 245—dated February 5 and 12, 1919, are characteristic:

Will all council members please reply promptly and fully through the bureau whether or not they made the sale in question to the following?

New York, N. Y., Feb. 3, 1919.

Armstrong Bureau of Related Industries, Chicago.

Gentlemen: Our Chicago manager advises us that under date of February 1st the Enterprise Paint Mfg. Co. informed him that they had bought 10 barrels linseed oil at less than \$1.48 from another crusher in the Chicago territory. Will you kindly bulletin the subscribers with a view to finding out if any of the crushers sold this lot under their published price?

Yours very truly,

American Linseed Company.

In the file of replies to-day completed, 11 subscribers state, in effect, that they have neither quoted nor sold the Enterprise Paint

Mfg. Co. The sale was apparently made by subscriber No. 6, whose letter follows:

Minneapolis, Minn., Feb. 6, 1919.

Armstrong Bureau of Related Industries, Chicago.

Gentlemen: Replying to your market letter No. 224, we sold Enterprise Paint Manufacturing Company on February 3d five barrels of bleached linseed oil at \$1.50, delivered their plant. This is our price in the Chicago market at the present time.

Yours truly,

Midland Linseed Products Co.

The prices of oil became more stable.

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*Defendants continued with meticulous care actively to carry out the several provisions of the agreement amongst them, and that they intended further to pursue the plan unless restrained is not denied.

The obvious policy—indeed, the declared purpose—of the arrangement was to submerge the competition theretofore existing among the subscribers, and substitute “intelligent competition,” or “open competition”; to eliminate “unintelligent selfishness” and establish “100 per cent. confidence”—all to the end that the members might “stand out from the crowd as substantial co-workers under modern co-operative business methods.”

In *American Column & Lumber Co. v. United States*, 257 U. S. 377, 42 Sup. Ct. 114, 66 L. Ed. 284, 21 A. L. R. 1093, we considered a combination of manufacturers got up to effectuate this new conception of confidence and competition, and held it within the inhibition of the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830), because of inevitable tendency to destroy real competition, as long understood, and thereby restrain trade. Our conclusion there cannot be reconciled with the somewhat earlier opinion and judgment of the court below. They are in direct conflict.

[1] The Sherman Act was intended to secure equality of opportunity, and to protect the public against evils commonly incident to monopolies, and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.

“The statute did not forbid or restrain the power to make normal and useful contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. * * * The words ‘restraint of trade’ should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose

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of the “statute to protect.” *United States v. American Tobacco Co.*, 221 U. S. 106, 179,

180, 31 Sup. Ct. 632, 55 L. Ed. 663; *Ramsay v. Associated Bill Posters*, 260 U. S. 501, 43 Sup. Ct. 167, 67 L. Ed. —, January 2, 1923; *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, 43 Sup. Ct. 450, 67 L. Ed. —, April 9, 1923.

[2] Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound together, in the light of what has been done under it, the court can see that its necessary tendency is to suppress competition in trade between the states, the combination must be declared unlawful. That such is its tendency, we think, must be affirmed. To decide otherwise would be wholly inconsistent with the conclusion reached in *American Column & Lumber Co. v. United States*, supra.

The record discloses that defendants, large manufacturers and distributors, powerful factors in the trade, of commodities restricted by limited supplies of raw material (linseed), located at widely separated points, and theretofore conducting independent enterprises along customary lines, suddenly became parties to an agreement which took away their freedom of action by requiring each to reveal to all the intimate details of its affairs. All subjected themselves to an autocratic bureau, which became organizer and general manager, paid it large fees, and deposited funds to insure their obedience. Each subscriber agreed to furnish a schedule of prices and terms and adhere thereto, unless more onerous ones were obtained, until prepared to give immediate notice of departure therefrom for relay by the bureau. Each also agreed, under penalty of fine, to attend a monthly meeting and report upon matters of interest to be there discussed, to comply with all reasonable requirements of the bureau, and to divulge no secrets.

With intimate knowledge of the affairs of other producers, and obligated as stated, but

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proclaiming them*selves competitors, the subscribers went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions. Obviously they were not bona fide competitors; their claim in that regard is at war with common experience, and hardly compatible with fair dealing.

[3] We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize, or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem, and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection. The situation here

questioned is wholly unlike an exchange, where dealers assemble and buy and sell openly, and the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted. Their manifest purpose was to defeat the Sherman Act, without subjecting themselves to its penalties.

The challenged plan is unlawful, and an injunction should go against it, as prayed by the original bill. The cause will be remanded to the court below, with instructions to issue such an injunction, and promptly to take any further action necessary to carry this opinion into effect.

Reversed.

(262 U. S. 361)

HOUSTON COAL CO. v. UNITED STATES.

(Argued April 10, 1923. Decided June 4, 1923.)

No. 365.

War 614—District Court has jurisdiction to determine just compensation for requisitioned coal, notwithstanding receipt of amount determined by President as due.

Lever Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), authorizing the President to requisition fuel and to ascertain and pay a just compensation therefor, and providing that, if the compensation so determined is not satisfactory to the person entitled to receive it, he shall be paid 75 per cent. of the amount, and shall be entitled to sue the United States to recover such further sum as will make just compensation, gives the District Court jurisdiction over a suit to recover just compensation for requisitioned coal, brought by an owner who had received the full compensation as determined by the President, since it may be assumed Congress intended the remedy provided by each section of the act to be adequate to afford complete protection to the rights of owners.

In Error to the District Court of the United States for the Southern District of Ohio.

Action by the Houston Coal Company against the United States. From a judgment dismissing the petition, plaintiff brings error. Reversed.

Messrs. A. Julius Freiberg, of Cincinnati, Ohio, and Ira Jewell Williams, of Philadelphia, Pa., for plaintiff in error.

Mr. Alfred A. Wheat, of New York City, for the United States.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

This cause went off below on motion to dismiss the petition and the record presents a question of jurisdiction only. Judicial Code, § 238 (Comp. St. § 1215). Did the District Court have authority to hear and determine

the issues tendered by plaintiff in error? The point is not free from difficulty; but, after considering the contending views, we conclude there was jurisdiction and that the judgment to the contrary must be reversed.

Purporting to proceed under authority granted by section 10¹ of the Lever Act, approved August 10, 1917 (40 Stat. 276, c. 53, [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii]), the President, acting through the Secretary of the Navy, requisitioned coal belonging to the plaintiff in error and paid therefor \$4 per ton, just compensation as ascertained by him. Alleging that this was received under protest, because of duress,

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and with express reservation of the right to demand more, the Coal Company instituted the original action to recover the difference between the amount received and what it claimed to be just compensation. The court held that section 10 did not grant permission to sue the United States therein to one who has received the amount determined by the President for requisitioned articles, and that it lacked jurisdiction to adjudicate the issues which the petition presented.

The Lever Act was passed in view of the constitutional provision inhibiting the taking of private property for public use without just compensation. It vested the President with extraordinary powers over the property of individuals which might be exercised through an agent at any place within the confines of the Union with many consequent hardships. As heretofore pointed out, *United States v. Pfitsch*, 256 U. S. 547, 41 Sup. Ct. 569, 65 L. Ed. 1084, by deliberate purpose the different sections of the act provide varying remedies for owners—some in the District Courts and some in the Court of Claims.

It reasonably may be assumed that Con-

¹ Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessities or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: Provided, that nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the government any necessities held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the government any seed necessary for the seeding of land owned, leased, or cultivated by them.

gress intended the remedy provided by each section should be adequate fairly to meet the exigencies consequent upon contemplated action thereunder and thus afford complete protection to the rights of owners. Considering this purpose and the attending circumstances, we think section 10 should be so construed as to give the District Courts jurisdiction of those controversies which arise directly out of requisitions authorized by that section.

Reversed.

(262 U. S. 432)

**GEORGIA RY. & POWER CO. et al. v.
TOWN OF DECATUR.**

(Argued April 24 and 25, 1923. Decided
June 4, 1923.)

No. 463.

1. Courts ⚡393—Decree affirming final decree held reviewable by Supreme Court, though state court held judgment on former writ of error was res judicata.

Where, after affirmance of interlocutory order granting a temporary injunction and remand of the case, the trial court allowed amendments, ruled on a demurrer, impaneled a jury, directed a verdict, and entered a final decree, which was affirmed, the decree of affirmance was a final judgment, reviewable by the United States Supreme Court on writ of error, though the state Supreme Court ruled that its former judgment was the law of the case and res judicata.

2. Courts ⚡393—When judgment of state court final, so as to be reviewable by federal Supreme Court, stated.

To give the United States Supreme Court appellate jurisdiction, the judgment or decree of a state court must terminate the litigation between the parties on the merits, so that, if there should be an affirmance, the court below would have nothing to do but execute the judgment or decree it has rendered.

3. Courts ⚡394(3)—Decision of state court as to power of municipality under state Constitution and laws held controlling.

The decision of the state Supreme Court that a municipality under the Constitution and laws of the state had power to contract with electric railway company as to fares, in the absence of action by the state, is controlling on the United States Supreme Court.

4. Courts ⚡394(9)—Supreme Court determines for itself whether there was a contract in passing on constitutional questions, but leans to agreement with state court.

In deciding questions presented under the United States Constitution, the United States Supreme Court will determine for itself whether there was in fact a contract between a municipality and an electric railway company with respect to fares, and, if so, the extent of its

binding obligations, but will lean to an agreement with the state court.

5. Carriers ⚡12(9)—Question whether rates fixed by valid contract are confiscatory of no concern.

When contract between municipality and electric railroad company fixing rates is valid, the Supreme Court is not concerned with the question whether the stipulated rates are confiscatory.

6. Constitutional law ⚡135—Statute extending contract rights to territory annexed to town held to impair obligation of contract.

Where a contract between a town and an electric railroad company prescribed the rate of fare chargeable between such town and a city, a statute construed as making such rates applicable in territory thereafter annexed to the town impaired the obligation of the contract by adding to its burdens.

7. Constitutional law ⚡241—Street railroads ⚡67—Statute prohibiting impairment of contracts by Railroad Commission held not to deny the equal protection of the laws.

Civ. Code Ga. 1910, § 2662, extending the power of the Railroad Commission to street railroad companies, but providing that it shall not be construed to impair any valid subsisting contract between any municipality and any such company, is not obnoxious to the equal protection clause of Const. U. S. Amend. 14, in the absence of any showing that the classification thereby made is in fact unreasonable and arbitrary.

8. Carriers ⚡12(10)—Order of Railroad Commission as to transfers held not objectionable, when not going beyond provisions of contract.

An order of a state Railroad Commission directing that no change be made in the matter of issuing free transfers on an electric railway on which rates were fixed by contract with municipality, was not open to constitutional objection, when, so far as appeared, it did not go beyond the terms of the contract specifically providing for transfers.

9. Street railroads ⚡70—Order of Railroad Commission as to seating capacity and trailers held not beyond its powers as to adequate service.

An order of a state Railroad Commission, directing an electric railroad company to provide additional seating capacity on some lines and trailers on a line on which rates were fixed by contract with a municipality, was not beyond its power to require adequate service, where there was nothing in the contract in conflict therewith.

In error to the Supreme Court of the State of Georgia.

Suit by the town of Decatur against the Georgia Railway & Power Company and another, in which R. C. Hackman and others intervened. A decree in favor of plaintiff was affirmed by the Supreme Court of Georgia.

gia (153 Ga. 329, 111 S. E. 911), and defendants bring error, and petition for certiorari. Writ of certiorari denied; judgment reversed, and cause remanded.

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*Mr. Walter T. Colquitt, of Atlanta, Ga., for plaintiffs in error.

Messrs. J. Howell Green, of Decatur, Ga., and Frank Harwell, of Atlanta, Ga., for defendant in error.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The defendant in error, plaintiff below, brought suit against the power and electric companies, defendants below, to enjoin them from increasing the rate of fare on a line of street railway between Decatur and the city of Atlanta. Hackman and others intervened, asserting that they resided near Atlanta and used certain car lines of defendant going to and from Atlanta, upon which a seven-cent fare was exacted, and that the contract, hereinafter referred to, giving residents of Decatur a lower rate of fare, constituted an illegal discrimination against them and against the localities where they lived. They did not allege that the seven-cent fare was unreasonable, nor did they seek any change in that rate, but merely joined with defendants in praying that the contract be held void and of no effect.

The electric company was the owner and the power company the lessee of the lines involved. About the year 1902 the electric com-

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pany owned three lines between Atlanta and Decatur. Desiring to abandon the most northerly of these lines, the company began to tear it up. Thereupon suit was brought for an injunction. The controversy was adjusted by an agreement between the company and the town of Decatur, by which the company was allowed to remove its line and an ordinance was enacted, carrying the agreement into effect. This ordinance, which was formally accepted, bound the company "to never charge more than five cents for one fare upon its main Decatur line * * * for one passenger and one trip upon its regular cars from the terminus of said line in the city of Atlanta to the terminus of the same in the town of Decatur, or from the terminus of said line in the town of Decatur to the terminus of the same in the city of Atlanta, * * *" and "to grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the town of Decatur * * * to any point within the city of Atlanta on any of its lines in said city and vice versa." In pursuance of this agreement the company tore up, removed, and abandoned the northerly line and has never since restored it.

The company maintained a five-cent fare until October, 1920, at which time it gave notice that the fare would be increased to

seven cents. Prior thereto an application of the company to the Railroad Commission of Georgia for permission to make this increase had been denied, on the ground that, because of the contract, the commission was without jurisdiction. The company then sought by mandamus to compel the commission to assume jurisdiction of the question; but the application was denied by the trial court, whose ruling was affirmed by the Supreme Court of the state, in so far as it related to the line covered by the contract. The present suit against the defendants was predicated upon the foregoing facts. The contentions of the defendants were that the

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execution of the contract was beyond the powers of the town; that permission to remove and abandon the northerly line furnished no consideration for it; that it constituted an attempt to fix fares outside the corporate limits of the town; that, since it was entered into, these limits had been twice extended so as to include a portion of the main line, outside the corporate limits when the contract was entered into; and that the contract could not be applied to this additional territory without impairing its obligation, in violation of the Constitution of the United States. They further contended that, in any event, the five-cent fare should be limited to passengers entering cars at the termini of the line in Atlanta and Decatur and not to those entering at intermediate points, and that, because of changed conditions since the contract was made, the five-cent fare was confiscatory. Upon an application made by the defendants, after the disposition of the mandamus proceeding, the Railroad Commission had fixed a seven-cent fare on lines not covered by the contract and required the defendants to furnish, during rush hour periods, additional seating capacity, and, on the main Decatur and College Park routes, to operate trailers during such rush hours. The commission had also ordered that no change should be made in the existing rules and practices of the company as to transfers.

The trial court made an interlocutory order, granting a preliminary injunction, which was affirmed on writ of error by the state Supreme Court. 152 Ga. 143, 108 S. E. 615. Thereafter, the case having been remanded, defendants were allowed to amend their answer and cross-bill in several particulars. A general demurrer to these amended pleadings was sustained in part; and a jury, impaneled to try the remaining issues, found for the plaintiff by direction of the court, upon which a final decree was entered. A second writ of error from the state Supreme Court followed. That court held that its judgment

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upon the first writ of error became the law of the case and was res judicata and therefore precluded a further review and the de-

cree of the trial court was affirmed. 153 Ga. 329, 111 S. E. 911. Deprivation of rights under the federal Constitution was duly and properly asserted. The case is here on writ of error. From motives of caution defendants also filed a petition praying the issuance of a writ of certiorari, consideration of which was postponed to await the hearing on the writ of error.

[1, 2] Preliminarily, defendant in error insists that the decision of the state Supreme Court on the first writ of error affirming the interlocutory order of the trial court, was a final adjudication from which a writ of error from this court might have been sued out, and, hence, that we are precluded from considering the present writ of error. *Rio Grande Railway v. Stringham*, 239 U. S. 44, 36 Sup. Ct. 5, 60 L. Ed. 136, is cited and relied upon; but that case furnishes no support to the contention. There the trial court had adjudged the title to a piece of land to be in the defendant. Upon appeal the state Supreme Court reversed this judgment and remanded the case with directions to enter judgment awarding plaintiff title to a right of way over the land. The trial court followed this direction. Plaintiff again appealed, insisting, as it had done before, that it had title in fee simple; but the appellate court declined to consider the question, holding that the former decision concluded the court as well as the parties. This court held that as the judgment on the first appeal disposed of the whole case on the merits and directed that judgment should be entered, it left nothing to the judicial discretion of the trial court and was therefore final. Here the first writ of error was not from a final judgment, but from an interlocutory order granting a temporary injunction. That it did not finally dispose of the case is clear, since the trial court thereafter allowed amendments, ruled on a demurrer, impaneled a jury, directed a verdict and entered a

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*final decree, and it was upon this decree that the second writ of error was brought. We are not unmindful of the ruling of the appellate court to the effect that the issues were, in fact, disposed of on the first writ of error and its powers brought to an end; but whatever may be the view of that court in respect of its own power to again consider the issues, the judgment now under review is the only one this court can consider as final, for the purpose of exercising its appellate jurisdiction. *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343, 16 Sup. Ct. 850, 40 L. Ed. 991; *United States v. Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93, 24 Sup. Ct. 33, 48 L. Ed. 106; *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 214, 29 Sup. Ct. 430, 53 L. Ed. 765; *Zeckendorf v. Steinfeld*, 225 U. S. 445, 454, 32 Sup. Ct. 728, 56 L. Ed. 1156. While prior decisions on the

subject of what constitutes a final judgment are not entirely harmonious, the rule is established that in order to give this court appellate jurisdiction the judgment or decree "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had * * * rendered." *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73 and cases cited.

We hold, therefore, that the writ of error was properly brought and come to a consideration of the substantive matters presented.

[3] 1. The principal question, and the one to which the briefs and arguments are mainly directed, is, whether the agreement between the plaintiff and the electric company was within the powers of the town and is now valid and subsisting. This contract has been before the Supreme Court of Georgia in the course of the litigation on three distinct occasions: 149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1; 152 Ga. 143, 108 S. E. 615; and (the instant case) 153 Ga. 329, 111 S. E. 911. That court, in carefully considered and well-reasoned opinions, sustained the authority of the municipality and upheld the contract as valid and subsisting. Defendants contend

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that the authority to fix rates devolved by the state Constitution upon the General Assembly, and therefore that the town of Decatur was without power to enter into a contract on that subject. When the contract was made the General Assembly had never exercised this authority and the state Supreme Court held that there was nothing in the Constitution of the state which precluded the municipality from contracting as to fares, and that, while the matter was one falling within the police power, whose exercise could not be abridged by contract, it was competent for the municipality to enter into such a contract where the state had not exercised and was not seeking to exercise its police power over the subject, and that this contract would remain effective until there should be conflicting legislative action. See *Milwaukee Elec. Ry. v. Wisconsin R. R. Comm.*, 238 U. S. 174, 183, 35 Sup. Ct. 820, 59 L. Ed. 1254. This conclusion, involving, as it does, a construction of the state Constitution and laws and powers of state municipalities, is controlling upon this court, as it has decided many times. See for example, *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116, 33 Sup. Ct. 967, 57 L. Ed. 1410; *Claiborne County v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. Ed. 470; *City of Richmond v. Smith*, 15 Wall. 429, 438, 21 L. Ed. 200.

[4, 5] On the other hand, in deciding the constitutional questions presented, this court will determine for itself whether there is, in

fact, a contract and, if so, the extent of its binding obligations, but will lean to an agreement with the state court. *Tampa Water Works v. Tampa*, 199 U. S. 241, 242-243, 26 Sup. Ct. 23, 50 L. Ed. 170, and cases cited; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 595, 21 Sup. Ct. 493, 45 L. Ed. 679; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 386, 22 Sup. Ct. 410, 46 L. Ed. 592; *Milwaukee Electric Ry. v. Wisconsin R. R. Commission*, *supra*. And considering the question in this light we see no reason to differ with that court in its view of the validity and binding quality of the contract. The contract being valid we are not concerned with the question whether the stipulated

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rates are confiscatory. *Southern *Iowa Co. v. Chariton*, 255 U. S. 539, 542, 41 Sup. Ct. 400, 65 L. Ed. 764; *Paducah v. Paducah R. Co.*, 261 U. S. 267, 43 Sup. Ct. 335, 67 L. Ed. —, decided February 19, 1923.

[6] 2. Treating the contract as valid, it is insisted that its obligation is impaired by the statutory extension of the limits of the town and the action of the court in holding the five-cent fare applicable in the added territory. While the statute does not refer to the contract or in terms make the rates applicable in the annexed territory, the necessary result of the decision of the state courts is to give it that effect, and in that way the statute, in the respect complained of, does substantially impair the obligation of the contract by adding to its burdens. *Detroit United Railway v. Michigan*, 242 U. S. 238, 247, 248, 37 Sup. Ct. 87, 61 L. Ed. 268; *Columbia Railway, Gas & Electric Co. v. South Carolina*, 261 U. S. 236, 43 Sup. Ct. 306, 67 L. Ed. —, decided February 19, 1923.

[7] 3. The state statute of August 23, 1907 (Civil Code, § 2662), extends the power of the Railroad Commission to street railroad companies, but contains a proviso to the effect that it shall not be construed "to impair any valid, subsisting contract now in existence between any municipality and any such company." It is insisted that this proviso brings about an arbitrary classification, in violation of the equal protection clause of the Fourteenth Amendment, because it sub-

jects future contracts to the power of the Commission while exempting existing contracts therefrom. But it is not shown that the classification in fact is unreasonable and arbitrary and, under the decisions of this court, we cannot say that it is obnoxious to the constitutional provision. *Arkansas Natural Gas Co. v. Arkansas Railroad Commission et al.*, 261 U. S. 379, 43 Sup. Ct. 387, 67 L. Ed. —, decided March 19, 1923, and cases cited.

[8, 9] 4. We cannot agree with the contention of defendants that the order of the commission, directing that no change be made in the matter of the issuance of free transfers is open to constitutional objection. The or-

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der of the com*mission went no further than to direct a continuance of a practice which, so far as the record discloses, was not beyond the terms of the contract providing specifically for such transfers.

Neither are we able to say that the order of the commission, directing the defendants to provide additional seating capacity on some of its lines and trailers upon the line covered by the contract, was beyond its ordinary power to require adequate service. There is nothing in the contract with which the order conflicts, and such service naturally would seem to be implied, in the absence of a provision to the contrary.

5. Other contentions advanced by defendants we find so clearly lacking in merit that we dismiss them without special consideration.

It results from the foregoing that the judgment below, in so far as it makes applicable the contract rates within the annexed territory cannot be sustained. The contract rates apply only to the town of Decatur, as it existed when the contract was made. To apply them to additional territory is to impose a burden upon defendants outside the contract. We find no other error; but, upon the ground stated under paragraph 2, the decree of the state Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Writ of certiorari denied.

(262 U. S. 441)

GEORGIA RY. & POWER CO. et al. v. MAYOR AND COUNCIL OF CITY OF COLLEGE PARK.

(Argued April 24, 25, 1923. Decided June 4, 1923.)

No. 464.

1. Constitutional law —135—Obligation of contract fixing electric railway fares held impaired by extending such fare to annexed territory.

Where contract between a municipality and an electric railway company fixed the fare chargeable between the municipality and another city, the application of such fare to territory afterwards annexed to the municipality impaired the obligation of the contract.

2. Carriers —12(10)—When contract fixing fares did not provide for issuance of transfers, order requiring free issuance held erroneous.

Where a contract between a city and an electric railway company, fixing the fare chargeable between such city and another city, contained no provision on the subject of transfers, an order of the Railroad Commission requiring the issuance of free transfers was erroneous.

3. Carriers —12(9)—Contract fixing fare between two cities held to apply to fare either way.

A contract between the city of C. and an electric railway company limiting the fare chargeable from C. to A. to 5 cents, required passengers to be carried in either direction between C. and A. at the stipulated rate, especially where this construction agreed with the practice followed for many years.

In Error to the Supreme Court of the State of Georgia.

Suit by the Mayor and Council of the City of College Park against the Georgia Railway & Power Company, and others. A decree for plaintiff was affirmed by the Supreme Court of Georgia (153 Ga. 329, 111 S. E. 911), and defendants bring error, and petition for certiorari. Reversed and remanded, and writ of certiorari denied.

Mr. Walter T. Colquitt, of Atlanta, Ga., for plaintiffs in error.

Mr. Geo. P. Whitman, of Atlanta, Ga., for defendant in error.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The facts in this case and the contentions to be considered, with some exceptions presently to be stated, are essentially the same as those involved in *Georgia Railway & Power Co. et al. v. Town of Decatur* (No. 463) 262 U. S. 432, 43 Sup. Ct. 613, 67 L. Ed. —,

just decided. From their inception in the

state courts the two cases *442 have been considered together and in each of the three decisions referred to in the *Decatur* Case the state Supreme Court has disposed of them in a single opinion.

[1, 2] The contract here involved was made in 1905. It granted to the electric company the right to convert its single track within the limits of the municipality into a double track line of electric railway and provided:

"That no greater fare than that of five cents for each passenger be charged for passage from the southern limits of said city of College Park to some central point in the city of Atlanta."

The contract, however, unlike the *Decatur* one, contains no provision on the subject of transfers. Subsequently, by an act of the Legislature, the limits of College Park were extended so as to take in a portion of the College Park line theretofore outside the municipality. Upon the authority of the *Decatur* Case, we hold that the application of the five-cent fare to the annexed territory impairs the obligation of the contract. In addition to that, the order of the commission requiring the issuance of free transfers to College Park patrons, was erroneous.

[3] The state courts, in effect, construed the contract as obliging defendant to carry passengers in both directions between College Park and Atlanta at the stipulated rate, and with this construction we agree. It cannot be supposed to have been within the intention of the contracting parties that one rate of fare should be charged for passage in one direction and a different rate in the opposite direction, for the same distance, over the same line, under the same conditions and entailing the same service. Such a construction of the clause would subvert the plain purpose of the ordinance, which was to fix a five-cent fare between the two cities. We construe the phrase "from * * * College Park to * * * Atlanta" as though it read "between College Park and Atlanta." See *State v. Stone*, 20 R. I. 269, 38 Atl. 654.

*443 This construction, moreover, agrees with the practice of the appellant, extending over many years in charging the same fare in each direction.

The decree of the state Supreme Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Writ of certiorari denied.

(262 U. S. 426)

COLLINS v. LOISEL, United States Marshal.

(Argued May 4, 1923. Decided June 4, 1923.)

No. 880.

1. Criminal law ⚡176—Preliminary examination is not "jeopardy," barring subsequent proceedings for same offense.

The constitutional provision in the Fifth Amendment against double jeopardy cannot apply, unless a prisoner has theretofore been placed on trial, and the preliminary examination of one arrested on suspicion is not a trial, so that his discharge under a warrant of arrest for extradition does not bar a subsequent arrest on new papers for the same offense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jeopardy (in Criminal Law).]

2. Extradition ⚡15—Treaties permit second arrest on new papers for same offense.

The extradition treaties with Great Britain and other countries do not prevent a second arrest of the same fugitive, after discharge at the first hearing, for the same offense, based on new papers.

3. Judgment ⚡751—Constitutional guaranty against double jeopardy does not supplant doctrine of res judicata.

The Fifth Amendment to the Constitution, providing against double jeopardy, was not intended to supplant the fundamental principle of res judicata in criminal cases.

4. Habeas corpus ⚡117(2) — Discharge on habeas corpus is not res judicata against right to arrest for same offense on new papers.

A discharge on writ of habeas corpus from custody under a warrant for arrest for extradition, on the ground that the proceedings for arrest were irregular, is res judicata only that accused was at the time illegally in custody, and does not prevent a subsequent arrest for the same offense on new papers.

5. Habeas corpus ⚡70—Pendency of habeas corpus in another case does not invalidate second extradition warrant for same prisoner.

The fact that habeas corpus proceedings to procure the discharge of petitioner from custody under a warrant for extradition were pending at the time new papers for his arrest for a different offense were filed merely prevented the withdrawal of the prisoner from the custody of the court having jurisdiction of the habeas corpus proceedings and did not deprive the magistrate of jurisdiction to entertain the application for arrest on the other charges.

6. Extradition ⚡16 — Order of commitment need not state offense.

An order committing for extradition must be interpreted as limited by the finding of the magistrate as to the charge established by the evidence, and need not specifically set forth that charge.

7. Habeas corpus ⚡85(2)—May assume foreign government will not try prisoner on charges for which he was not extradited.

It may be assumed that the foreign government which procures the extradition of a prisoner will not try him on charges other than those on which the extradition is allowed.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Habeas corpus proceedings by Charles Glen Collins against Victor Loisel, United States Marshal. From a judgment dismissing the petition, petitioner appeals. Affirmed.

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*Messrs. J. Zach Spearing, of New Orleans, La., and Guion Miller, of Baltimore, Md., for appellant.

Mr. Robert H. Marr, of New Orleans, La., for appellee.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This is the third appeal by Collins in habeas corpus proceedings instituted to prevent his extradition to British India. After the decision in *Collins v. Miller*, 252 U. S. 364, 40 Sup. Ct. 347, 64 L. Ed. 616, the District Court dismissed the application for habeas corpus so far as the commitment was based on the charge of obtaining property by false pretenses from Mahomed Alli Zaimel Ali Raza, and remanded Collins to the custody of Loisel, the marshal. The judgment of the District Court discharged the prisoner, so far as the commitment was based on charges of obtaining property by false pretenses from Pohoomul Bros. and from Ganeshi Lall & Sons. The ground of the discharge, stated in the judgment, was that Collins had been remanded to await further proceedings on these charges to the end that he might be given the opportunity of introducing evidence at a preliminary examination under the law of Louisiana; that no further examination

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had been held; *that the prosecution on those affidavits had been definitely abandoned; and that other new affidavits had been filed by the British consul general. In this judgment the British consul general acquiesced. Collins appealed. The judgment was affirmed in *Collins v. Loisel*, 259 U. S. 309, 42 Sup. Ct. 469, 66 L. Ed. 956.

On those new affidavits, referred to in the judgment, apparently Collins was again committed to await extradition; the papers were transmitted for action to the Department of State with the magistrate's certificate; but, owing to the fact that proceedings were still pending in the District Court, the department refused to issue the warrant of extradition. Thereafter, while the Loisel Case was pending in this court, and while Collins was being held in custody to answer on the charge of obtaining property from Mahomed Alli Zaimel Ali Raza, a third set of affidavits were lodged against the prisoner by the British consul general before the same committing magistrate. They were in form and substance identical with those in which Collins had been previously charged with obtaining property by false pretenses from Pohoomul

Bros. and from Ganeshi Lall & Sons and discharged by the District Court. Alleging that the affidavits were identical with those first filed on which he had been so discharged, Collins moved, before the magistrate, to quash the new affidavits. His motion was overruled; and, after due hearing, an order was entered by the magistrate again committing Collins to be held for extradition on these charges. Then he filed, in the same District Court, this petition for a writ of habeas corpus and certiorari. Judgment was entered therein in December, 1922, dismissing this second petition for a writ of habeas corpus; Collins was remanded to the custody of the marshal; and this appeal was taken under section 238 of the Judicial Code (Comp. St. § 1215). After hearing counsel for appellant, this court on May 4, 1923, ordered that the judgment below be affirmed,

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and that *the mandate issue forthwith. Because of the importance of the question presented, the reasons for this decision are now stated.

[1, 2] Collins contended that commitment on the new affidavits, after discharge in proceeding based on others identical in form and substance, was a violation of the Fifth Amendment and of the Treaty with Great Britain. The constitutional provision against double jeopardy can have no application unless a prisoner has, theretofore, been placed on trial. See *Kepner v. United States*, 195 U. S. 100, 126, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655. The preliminary examination of one arrested on suspicion of a crime is not a trial; and his discharge by the magistrate upon such examination is not an acquittal. *Commonwealth v. Rice*, 216 Mass. 480, 104 N. E. 347; *People v. Dillon*, 197 N. Y. 254, 256, 90 N. E. 820, 18 Ann. Cas. 552. Even the finding of an indictment followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in *Bassing v. Cady*, 208 U. S. 386, 391, 28 Sup. Ct. 392, 52 L. Ed. 540, 13 Ann. Cas. 905, not to constitute jeopardy. Likewise it has been consistently held under the treaties with Great Britain and other countries, that a fugitive from justice may be arrested in extradition proceedings a second time upon a new complaint charging the same crime, where he was discharged by the magistrate on the first complaint or the complaint was withdrawn.¹ The precise question appears not to have been passed upon by this court in any case in-

volving international extradition. But in *Bassing v. Cady*, supra, the rule was applied to a case of interstate rendition. Protection against unjustifiable vexation and harassment

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incident to repeated arrests for the same alleged crime must ordinarily be sought, not in constitutional limitations or treaty provisions, but in a high sense of responsibility on the part of the public officials charged with duties in this connection. The proceedings before the committing magistrate on the first and on the second set of affidavits; and the action of the Department of State on the latter were no bar to the proceedings on the third set of affidavits here involved. The filing by the British consul general of these new affidavits was clearly justified.

[3, 4] The discharge of Collins on the first petition for habeas corpus, so far as it related to the charge of obtaining property from Pohoomul Bros. and from Ganeshi Lall & Sons does not operate as *res judicata*. It is true that the Fifth Amendment, in providing against double jeopardy, was not intended to supplant the fundamental principle of *res judicata* in criminal cases, *United States v. Openheimer*, 242 U. S. 85, 37 Sup. Ct. 68, 61 L. Ed. 161, 3 A. L. R. 516; and that a judgment in habeas corpus proceedings discharging a prisoner held for preliminary examination may operate as *res judicata*. But the judgment is *res judicata* only that he was at the time illegally in custody, and of the issues of law and fact necessarily involved in that result.² The discharge here in question did not go to the right to have Collins held for extradition. It was granted because the proceedings on which he was then held had been irregular and the British consul general, instead of undertaking to correct them, had concluded to abandon them, and to file the charges anew by another set of affidavits.

[5] The contention was also made that, as the arrest on the new affidavits after discharge on the old was an independent proceeding, and Collins was then being held on an entirely different charge under review by

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this court *in the Loisel Case, the magistrate was without jurisdiction. There was here no attempt to interfere by the second proceeding with the custody of Collins on the first. The fact that Collins was in the custody of the court did not render invalid the second warrant. It would merely prevent withdrawal of the prisoner from the custody of the court by means of the execution of a second warrant. In re *MacDonnell*, 11 Blatch. 170, 177, 178, Fed. Cas. No. 8772; Compare *Ponzi v. Fessenden*, 258 U. S. 254, 260, 265, 42 Sup. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879. The

¹ 6 Op. Atty. Gen. 91; 10 Op. Atty. Gen. 501; In re *MacDonnell*, 11 Blatch. 170, 179, Fed. Cas. No. 8772; In re *Kelly*, 26 Fed. 852; *Fergus*, Petitioner, 30 Fed. 607; Ex parte *Schorer* (D. C.) 195 Fed. 334. See, also, 1 *Moore on Extradition*, pp. 457-464; 1 *Hyde, International Law*, p. 596; *Muller's Case*, 5 Phila. 289, Fed. Cas. No. 9913; In re *Farez*, 7 Blatch. 345, Fed. Cas. No. 4645.

² Compare Ex parte *Milburn*, 9 Pet. 704, 710, 9 L. Ed. 280; In re *White* (D. C.) 45 Fed. 237; *United States v. Chung Shee* (D. C.) 71 Fed. 277; Id., 76 Fed. 951, 22 C. C. A. 639; Ex parte *Gagliardi* (D. C.) 284 Fed. 190.

pendency of habeas corpus proceedings, relating to the charge involved in the Loisel Case, supra, did not deprive the magistrate of jurisdiction to entertain this application for arrest on other charges. *Stallings v. Splain*, 253 U. S. 339, 342, 40 Sup. Ct. 537, 64 L. Ed. 940.

[6, 7] It was further contended that the magistrate's order of commitment was insufficient, because it adjudged that Collins be held for extradition "for trial on the charges pending against him in the Chief Presidency Magistrate's Court at Bombay," and that, since he could legally be tried there only on the charge for which he was extradited, the order of commitment must specifically set forth that crime. *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425. The contention is unsound. The order must of course, be interpreted as limited by the finding therein made, that the evidence produced "justify his commitment on the charge of having obtained property by false pretenses." The certificate which the magistrate issued thereon to the Secretary of State identifies the charges as those set forth in the two new affidavits. By established practice, the warrant of extradition issued by the Secretary of State likewise identifies the crime with which the prisoner has been charged and for the trial of which the prisoner is delivered up. Moreover, it may be assumed that the British government will not try appellant upon charges other than those upon which the extradition is allowed. *Kelly v. Griffin*, 241 U. S. 6, 15, 36 Sup. Ct. 487, 60 L. Ed. 861.

Affirmed.

(262 U. S. 413)

ATLANTIC COAST LINE R. CO. v. DOUGHTON, Commissioner of Revenue, et al.
No. 724.

NORFOLK SOUTHERN R. CO. v. SAME.
No. 727.

SEABOARD AIR LINE RY. CO. v. SAME.
No. 744.

SOUTHERN RY. CO. v. SAME.
No. 756.

(Argued April 25, 1923. Decided June 4, 1923.)

1. Courts ⇨263—In cases properly in federal courts on federal questions, state questions must also be decided.

Where cases are properly in the federal courts on federal questions, all questions involved in the record, whether involving federal law or state law, must be considered.

2. Commerce ⇨72—State may tax net income from property used in interstate commerce.

A state may, consistently with the federal Constitution impose a tax on the net income

of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce.

3. Commerce ⇨72—State taxing statute held not to conflict with Interstate Commerce Commission's definition of "net income."

Income Tax Act N. C. March 8, 1921, schedule D, § 202, as amended by Pub. Laws 1921, c. 35, providing for the ascertainment of the net income of railroads by making certain deductions from the net operating income as established by the accounts of the railroads with the Interstate Commerce Commission, imposes a tax on the railroad property, and not on the corporations operating the property, so that it does not conflict with the Interstate Commerce Commission's definition of "net income," which applies to the income of the operating companies and provides for consideration of nonoperating income and expenses disregarded under the state statute.

4. Commerce ⇨72—State tax cannot burden or discriminate against interstate commerce.

Under the commerce clause of the United States Constitution, it is essential that a state tax shall not directly burden interstate commerce, and shall not discriminate against interstate commerce.

5. Commerce ⇨72—State tax on interstate commerce carriers held not levied on gross receipts.

The North Carolina income tax levied on the net income of carriers, ascertained by making certain deductions from the net operating income, as determined by the accounts with the Interstate Commerce Commission, but not considering the nonoperating income and charges which fixed the net income of the companies operating the property, but not the income from the property itself, is not a tax on the gross receipts from interstate commerce, which admittedly would be void.

6. Commerce ⇨85—State need not follow accounting method of Interstate Commerce Commission in determining income of interstate carriers.

A state statute, imposing a tax on the net income of interstate carriers and purporting to base it on the accounts filed with the Interstate Commerce Commission, is not invalid because it departs in some particulars from the system of accounting prescribed by the Interstate Commerce Commission, since the Commission's standard form is not immutable, and the Commission is not intrusted with the function of determining whether a tax burdens interstate commerce.

7. Constitutional law ⇨229(1)—Taxation ⇨54—Public service companies can be classified separately for levy of income tax.

A state statute levying a tax on the net income of public service companies, which differs from the income tax levied on other property, does not deny the equal protection of the laws, since a separate classification of public service corporations was not arbitrary, and the state might, consistently with the equal protection clause, have subjected only such corporations to the income tax.

8. Constitutional law ⚡229(1) — State can separately classify lumber company railroads for railroad income tax.

Income Tax Act N. C. § 202, applying only to corporations required to keep records according to the standard classification of the Interstate Commerce Commission, and therefore not applying to certain steam railroads within the state, which were owned and operated by lumber companies, and which were taxed as part of the property of the lumber companies, does not thereby deny equal protection of the laws to interstate carriers, since the state might reasonably classify lumber railroads differently from ordinary carriers.

9. Taxation ⚡54—State income tax on public service corporations held not to violate state Constitution.

Income Tax Act N. C. March 8, 1921, schedule D, §§ 100-904, as amended by Pub. Laws 1921, c. 35, which imposes an income tax on public service corporations different from that imposed on other corporations, does not violate Const. N. C. art. 5, § 3, authorizing an income tax, or the uniformity clause of the state Constitution, which does not prevent reasonable classification.

10. Taxation ⚡54—Act passed in March, taxing incomes for calendar year, is not void as retroactive.

Income Tax Act N. C. March 8, 1921, is not retroactive and void, because it lays a tax based on the net income of the calendar year.

11. Taxation ⚡608(9) — Remedy at law against new state income tax held not plain and adequate.

In the absence of a decision by the state courts construing a new state Income Tax Act, the United States Supreme Court cannot say that the remedy of the taxpayer at law, by paying the tax under protest and seeking to recover the amount, is plain and adequate, so as to prevent suit in equity on the ground the statute violates the United States and state Constitutions.

Appeals from the District Court of the United States for the Eastern District of North Carolina.

Four separate suits, by the Atlantic Coast Line Railroad Company, by the Norfolk Southern Railroad Company, by the Seaboard Air Line Railway Company, and by the Southern Railway Company, against R. A. Doughton, Commissioner of Revenue, and others. From a decree in each suit, dismissing the bill, complainants appeal. Affirmed.

See, also, 289 Fed. 301.

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*Mr. Thomas W. Davis, of Wilmington, N. C., for appellant Atlantic Coast Line R. Co.

Mr. W. B. Rodman, of Norfolk, Va., for appellant Norfolk Southern R. Co.

Mr. Murray Allen, of Raleigh, N. C., for Seaboard Air Line Ry. Co.

Mr. S. R. Prince, of Washington, D. C., for appellant Southern Ry. Co.

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*Messrs. Geo. H. Brown, of Washington, N. C., and Wm. P. Bynum, of Greensboro, N. C., for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Constitution of North Carolina (article 5, section 3, as amended January 7, 1921) authorizes the General Assembly to tax incomes at a rate not exceeding 6 per cent. The Income Tax Act of March 8, 1921 (Revenue Act, c. 34, schedule D, §§ 100-904, as amended by chapter 35, Public Laws 1921), laid upon corporations a tax equal to 3 per cent. of the entire net income as therein defined and upon individuals a progressive tax not exceeding that percentage. For the purpose of ascertaining the taxable income, the statute divides taxpayers into three classes—individuals, ordinary corporations, and public service corporations (including railroads). The statute, in terms, taxes only net income. For railroads and other public service corporations required to keep accounts according to the method established by the Interstate Commerce Commission, it makes those accounts the basis for determining the "net operating income" (section 202 as amended), and it directs that, in order to ascertain the "net income," there shall be deducted from the net operating income (a) uncollectible

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revenue; (b) taxes for the income year, other than income taxes, and war profits and excess profits taxes; (c) amounts paid for car hire. Whether the statute is unconstitutional, because it fails to include among the deductions from income allowed public service corporations the capital charges, including other rentals paid, is the main question for decision.

[1] The first year's tax under the act was payable in 1922, with respect to the net income received during the calendar year 1921. To enjoin its enforcement these four corporations brought suit in the federal court for the Eastern district of North Carolina against the commissioner of revenue and others. Each plaintiff owns and operates a line of railroad within the state, and is an interstate carrier. Each assails the statute on the grounds that it violates the commerce clause, the Fourteenth Amendment, and the state Constitution, and only on these grounds. Each case was heard upon the merits, and in each a final decree was entered dismissing the bill. Appeals were taken under section 238 of the Judicial Code (Comp. St. § 1215), and orders of the District Court stayed collection of the taxes pending the determination of the appeals. Since the cases are properly here on federal questions, all questions presented by the record, whether involving federal law or state law, must be considered. *Southern Railway Co. v. Watts*, 260 U. S. 519, 43 Sup. Ct. 192, 67 L. Ed. —.

It is conceded by appellants that taxation of the net income of an interstate carrier does not violate the commerce clause, *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; *Shaffer v. Carter*, 252 U. S. 37, 57, 40 Sup. Ct. 221, 64 L. Ed. 445; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 41 Sup. Ct. 45, 65 L. Ed. 165; and by the state, that taxation of gross receipts would be void as burdening interstate commerce, *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031. It is conceded by appellants that classification of public service corporations, and specifically of railroads, for purposes of taxation does not violate the

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Fourteenth Amend*ment, *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. Ed. 892; *Southern Railway Co. v. Watts*, 260 U. S. 519, 43 Sup. Ct. 192, 67 L. Ed. —; and by the state, that an arbitrary classification is obnoxious to the equal protection clause, *Southern Ry. Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247. The contentions are that the statute, in fact, taxes gross income; that the classification as made by it is unreasonable; and that for these and other reasons it violates both the federal and the state Constitution. All the contentions are, in our opinion, unsound. To appreciate the objections urged, and to present the reasons for holding them groundless, it is necessary to show the incidence of the tax. This may be done by examining how the assessment of \$13,133.09 made upon the Seaboard Air Line, and here assailed, was calculated.

The Seaboard being an interstate carrier, the accounts were kept as required by the Interstate Commerce Commission. Interstate business was apportioned, as customary, according to mileage. The results of operations within the state calculated according to the statute were these:

Operating revenues	\$8,457,328 52
Operating expenses	7,308,823 29
Net operating income.....	\$1,148,505 23
From the net operating income were deducted:	
Uncollectible revenue	\$ 6,342 31
Taxes paid	410,043 38
Car hire	294,350 02
Additional deductions	\$710,735 71
Net taxable income.....	\$437,769 52
Tax on \$437,769.52, at 3 per cent. \$13,133.09.	

Thus, about $1/20$ of the operating revenues of the Seaboard was subjected to taxation. To this one-twentieth the 3 per cent. income tax was applied. *The tax assessed (\$13,133.09) is about $1/650$ of the total operating revenues \$8,457,328.52.

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That the calculation is correct, in accordance with the statute, is not disputed; that is, the net income earned, in 1921, by the Seaboard's lines in North Carolina was as

calculated \$437,769.52. The Seaboard insists that it had no net income taxable in North Carolina, but, on the contrary, a loss, of which \$254,290.22 was apportionable to North Carolina. The loss is figured in this way:

Net income as calculated under the statutes	\$437,769 52
Non-operating income—not taken into account under the statute ¹	539,643 30
Total net income.....	\$977,412 82
From which deduct:	
Capital charges (including rents paid) not taken into account under the statute ²	\$1,231,703 04
Net loss or deficit.....	\$ 254,290 22 ³

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*Thus the state takes, as the entity to be taxed, the railroad property operated by the Seaboard within the state. Therefore it takes, as the primary basis for the tax, only operating revenues; that is, the gross receipts from operating such property. The Seaboard, on the other hand, assumes, as the entity which should be taxed, the company in respect to its North Carolina interests. Therefore the Seaboard takes, as the primary basis for the tax, in addition to the

¹ The items of the above nonoperating income are these:

Dividend income	\$113,350 45
Income from funded securities.....	97,257 47
Income from unfunded securities.....	13,781 90
Income from lease of road.....	259,525 95
Joint facility rent income.....	12,664 17
Rent from work equipment.....	5,047 23
Rent from floating equipment.....	18 22
Rent from locomotives.....	6,767 21
Miscellaneous rent income.....	22,387 79
Miscellaneous nonoperating physical property	7,685 69
Miscellaneous income.....	1,157 22
	\$539,643 30

² The items of the above capital charges are these:

Interest on funded debt.....	\$1,179,252 20
Interest on unfunded debt.....	43,823 64
Annual allotment of discount on bonds...	24,494 16
Rent of leased roads.....	10,448 12
Rents of joint facility.....	34,480 98
Rent of locomotives.....	19,860 91
Rent for floating equipment.....	2,599 96
Rent for working equipment.....	510 24
Rents, miscellaneous	3,194 86
Income charges, miscellaneous.....	685 25
	\$1,231,703 04

If the above items were added, the total would be \$1,319,350.32. There is apparently some error in the items, which is not, however, material to the result.

³ For the Atlantic Coast Line the calculation in accordance with the statute shows a net income of \$1,389,565.25. According to the company's contention the net income was \$333,205.09.

For the Norfolk Southern the calculation in accordance with the statute, it is said, shows a net income of \$653,882.17. (The correct figures would seem to be \$603,003.51.) According to the company's contention there was a deficit of \$424,333.92.

For the Southern Railway the calculation in accordance with the statute shows a net income of \$2,384,068.71. According to the company's contention, the net income on one calculation was \$554,724.41, and on another calculation was \$456,798.56.

operating revenues of the lines within the state, North Carolina's proportion of the nonoperating income of the company derived from other property owned by it, wherever

situated. For the Seaboard, like ^{*420}most other railroad systems, is, to some extent, a holding company, as well as an operating company, and, as holding company, receives dividends from other concerns, interest on bonds of other concerns, and rental from property owned but not operated. As the state treats the operated property as the entity, it does not concern itself with interest charges and the rentals paid, just as it does not concern itself with a mortgage upon the real estate when it lays the ad valorem tax. On the other hand, as the Seaboard treats the company—the person—as the entity to be taxed, it undertakes to ascertain the net income of the company. This includes as gross income, a proportion of the receipts from property not within the state and includes among the deductions from the gross income of the company, the capital charges.

[2] That a state may, consistently with the federal Constitution, impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in *Shaffer v. Carter*, 252 U. S. 37, 44, 52, 40 Sup. Ct. 221, 64 L. Ed. 445. There an Oklahoma statute was sustained which laid the tax upon the net income of Oklahoma oil property owned by a citizen and resident of Illinois. The federal Constitution which permits to be taxed the net income of property owned by an individual although a citizen of another state, obviously does not preclude such a tax where the property is owned or operated by a corporation. It is a common provision in state income tax laws to tax the net income of property within the state which is owned, or operated, by nonresidents.⁴ The differences between the parties arise, in the main, not

from differ^{*421}ence in the method of determining what is net income, but from difference as to what is the subject of the tax. In other words, they differ as to the thing of which the net income is to be ascertained. This will appear from an examination of the several grounds on which the validity of the statute is assailed.

[3-5] First. The contention that the statute is obnoxious to the commerce clause rests upon the argument that the state's definition of net income differs from that adopted by the Interstate Commerce Commission; that the state is without power to depart from

the Commission's definition so far as concerns interstate commerce; and that, since the statutory definition differs, the act is unconstitutional. A conclusive answer to that argument is found in the fact that the state adopts (without modification) the Commission's definition for the net income of that which it taxes; for, treating as the entity to be taxed the railroad property operated by the company within the state, it appears that every item which the railroad claims the statute wrongly disallowed as a deduction is of such a character, that it is either clearly a capital charge (as distinguished from an operating charge) or reasonably may be deemed such as a matter of accounting.⁵ The question of law thus presented is not one which involves inquiry into the intricacies of railroad account^{*422}ing. Under the commerce clause it is essential that a state tax shall not directly burden interstate commerce and that it shall not discriminate against interstate commerce. With these essentials the North Carolina act complies. It is not assessed on gross receipts.⁶ Compare *Peck & Co., Inc. v. Lowe*, 247 U. S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049; *Pullman Co. v. Richardson*, 261 U. S. 330, 43 Sup. Ct. 366, 67 L. Ed. —. It does not discriminate against interstate commerce. For the taxable net income of other public service corporations which are wholly intrastate is determined also without allowing capital charges as a deduction. That there is no basis for the claim that the commerce clause is violated by the burden resulting from the aggregate of the several North Carolina rail-

⁵ To prove that the statute, in fact, taxes some part of the gross earnings, attention is called specifically to some minor items which the statute does not allow as deductions. But these stand in no different position than the major items—interest on funded debt and leased line rentals—discussed above. Prominent among these lesser items is "joint facility rents" which, in the case of the Seaboard, amounted net to \$21,816.81. Joint facility rents paid were \$34,480.98; those received (credited as nonoperating income) were \$12,664.17. This is rental paid for railroad facilities—like tracks, terminals and roundhouses. They are needed by the carrier as a part of the plant and, not being owned, are rented from others. The fact that they are used jointly with others, is, of course, immaterial. This rent, like the rent of a leased line, is paid to secure control of the property operated. Hire of freight cars might have been treated in the same way, but the state, for reasons satisfactory to it, permitted that financial charge to be deducted, and to that extent reduced the tax.

⁶ The term "net income," in law or in economics, has not a rigid meaning. Every Income Tax Act necessarily defines what is included in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income, is exempt from taxation. These details are largely a matter of governmental policy. As to them states differ; and there is apt to be difference of view in the same states at different times; and at the same time a different definition of taxable net income for different classes of taxpayers. Obviously such differences in detail do not render obnoxious to the commerce clause a state income tax which is otherwise unobjectionable.

⁴ The federal government taxes the net income of property owned or business carried on within the United States by a citizen resident abroad. *DeGanay v. Lederer*, 250 U. S. 376, 39 Sup. Ct. 524, 63 L. Ed. 1042. The New York income tax law involved in *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 73, 40 Sup. Ct. 223, 64 L. Ed. 460, taxes the net income "from all property owned * * * by natural persons not residents of the state."

road taxes was settled in *Southern Ry. Co. v. Watts*, supra.

[6] Another, and more technical, argument in support of the contention that the statute violates the commerce clause as applied to interstate carriers is based upon the cases which sustain the power of the Interstate Commerce Commission to prescribe a uni-

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form system of accounting.⁷ *It is said that, since the statute in ascertaining net income purports to follow the standard form of accounts prescribed by the Interstate Commerce Commission, but in fact departs therefrom, the statute invades the province of Congress and conflicts with the policy expressed in Transportation Act of 1920. There is in fact no such divergence in the accounting. But if there had been, it would not follow that every departure from the Commission's standard classification would render unconstitutional a state income tax act. The function of determining whether a tax burdens interstate commerce was not conferred upon the Commission. Its sole function is the regulation of carriers. For this purpose it has been empowered by Congress to require of them a uniform system of accounting. The financial results of their operations as therein disclosed are useful for many purposes. But they are not made conclusive for all. Moreover, the Commission's standard form is not immutable. Railway accounting is in process of development.⁸

[7] Second. The contention that the statute is obnoxious to the equal protection clause rests upon the argument that the state's definition of net income of public service corporations (including railroads) is arbitrary. It is alleged to be arbitrary because it allows to other corporations and to

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individuals, certain deductions which *are denied to public service corporations; namely, interest on funded debt, rentals, and certain worthless debts. Section 306, pars. 2, 3, 6, and 7. That the differentiation results

⁷ *Kansas City Southern Ry. Co. v. United States*, 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729; also *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 461, 462, 27 Sup. Ct. 700, 51 L. Ed. 1128; *Union Pacific R. R. Co. v. United States*, 99 U. S. 402, 420, 427, 25 L. Ed. 274.

⁸ See *Groesbeck v. Duluth, South Shore & Atlantic Ry. Co.*, 250 U. S. 607, 614, 40 Sup. Ct. 33, 63 L. Ed. 1167; 3 L. C. C. 289, 343. Power to prescribe a mandatory accounting system was first conferred upon the Commission by *Hepburn Act* June 29, 1906, c. 3591, § 7 (34 Stat. 584, 593 [Comp. St. § 8592]). In 1888 a recommendatory classification of operating revenues, expenses and charges was issued by the Commission, and between that date and 1903 the form was revised from time to time. On June 1, 1903, the Commission ordered carriers to make reports in the form prescribed and furnished by the Commission. Thereafter changes continued to be made from time to time. A comprehensive and detailed classification of income accounts was issued effective July 1, 1912. This was superseded by the revised classification effective July 1, 1914, which is now in force.

from the difference in the subject of the tax and, hence, is not arbitrary has been pointed out above. But, in any event, the differentiation would not render the statute unconstitutional. The state might, consistently with the equal protection clause, have subjected only public service corporations to the income tax, or it might have laid upon them a higher income tax than upon others, as it laid upon railroads a higher franchise tax than it did upon other corporations. Compare *Southern Railway Co. v. Watts*, 260 U. S. 519, 43 Sup. Ct. 192, 67 L. Ed. —.

[8] The classification is also assailed as arbitrary on the ground that section 202 defining net income applies only to corporations required to keep records "according to the standard classification of accounting of the Interstate Commerce Commission"; that there are in the state corporations which are not required by law to keep their accounts according to the Commission's form, but which own railroads of standard gauge operated by steam, and have obtained authority to act as limited common carriers. In support of this contention, two railroads with short lines are instanced. They are owned by lumber companies and are taxed, not as railroads, but as if part of the lumber corporation. So far as appears the North Carolina authorities might require them to file accounts according to the Commission's classification, if they deemed this advisable. But obviously the state might reasonably classify such railroads differently from ordinary carriers.

[9, 10] Third. The claim that the statute violates the state Constitution rests mainly on the contention that the tax is not upon the net income.⁹ As shown above, the as-

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sumption is erroneous. Only the net income of the property operated as a utility is taxed. There is nothing in the Constitution of the state which precludes taxing the net income of the property so operated, as distinguished from the net income of the company. There is no inconsistency between sections 101 and 202 of the statute. It would seem from the decisions of the Supreme Court of North Carolina that the uniformity clause applies to income taxation; but that court has repeatedly held that the uniformity clause does not prevent reasonable classification.¹⁰ The contention that the uniformity clause is violated because the permissible deductions in the case of public service corporations are

*The provision is: "The General Assembly may also tax * * * incomes provided the rate * * * shall not * * * exceed six per cent., and there * * * may be allowed * * * deductions * * * so that only net incomes are taxed."

¹⁰ *Smith v. Wilkins*, 164 N. C. 135, 80 S. E. 163; *Caldwell Land & Lumber Co. v. Smith*, 151 N. C. 70, 65 S. E. 641; *Lacy v. Packing Co.*, 134 N. C. 567, 47 S. E. 53; *Gatlin v. Town of Tarboro*, 78 N. C. 119. Compare *State v. Williams*, 158 N. C. 610, 73 S. E. 1000, 40 L. R. A. (N. S.) 279; *State v. Moore*, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472; *Worth v. Railroad*, 89 N. C. 291, 45 Am. Rep. 673.

different from (and not so great as) those allowed individuals or other defendants¹¹ is unfounded, for reasons stated above. So is the contention that the statute is retroactive and void, because it was not enacted until March, 1922, but lays a tax based upon the net income of the calendar year.

[11] On behalf of the state it was urged that the bill was properly dismissed by the District Court because there is under the laws of North Carolina a plain, adequate,

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and *complete remedy at law by which a taxpayer may recover the amount of an illegal tax paid by him under protest. Our attention has been called to several North Carolina cases and statutes bearing upon this contention. But the statute mainly relied upon is a recent one which appears not to have been construed and applied by the highest court of the state. In the absence of such decision, we cannot say the remedy at law is plain and adequate. *Dawson v. Kentucky Distilleries*, 255 U. S. 288, 296, 41 Sup. Ct. 272, 65 L. Ed. 638; *Wallace v. Hines*, 253 U. S. 66, 68, 40 Sup. Ct. 435, 64 L. Ed. 782; *Shaffer v. Carter*, 252 U. S. 37, 47, 40 Sup. Ct. 221, 64 L. Ed. 445; *Union Pacific R. R. Co. v. Weld County*, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110; *Davis v. Wakelee*, 156 U. S. 680, 688, 15 Sup. Ct. 555, 39 L. Ed. 578. We have therefore passed upon the merits.

Affirmed.

(262 U. S. 390)

MEYER v. STATE OF NEBRASKA.

(Argued Feb. 23, 1923. Decided June 4, 1923.)

No. 325.

1. Constitutional law ⇨255—Matters embraced within "liberty," protected by Constitution, specified.

Under Const. U. S. Amend. 14, providing that no state shall deprive any person of liberty without due process of law, "liberty" denotes, not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those

privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liberty.]

2. Constitutional law ⇨255—Liberty may not be interfered with by arbitrary legislative action.

The liberty protected by Const. U. S. Amend. 14, may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.

3. Constitutional law ⇨70(3)—Legislative determination as to proper exercise of police power subject to supervision.

Determination by the Legislature of what constitutes a proper exercise of the police power is not final or conclusive, but subject to supervision by the courts.

4. Constitutional law ⇨255—Schools and school districts ⇨164—Statute relative to teaching of foreign languages held unconstitutional, as taking liberty without due process of law.

Act Neb. April 9, 1919 (Laws 1919, c. 249), prohibiting the teaching of any subject in any language other than the English language in any school, or the teaching of languages other than the English language below the eighth grade, is unconstitutional, as arbitrary and without reasonable relation to any end within the competency of the state, and as depriving teachers and parents of liberty without due process of law, in violation of Const. U. S. Amend. 14.

5. Constitutional law ⇨278(4)—Statute relative to teaching of foreign languages held not sustainable as a health measure.

Act Neb. April 9, 1919 (Laws 1919, c. 249), prohibiting the teaching of any subject in any language other than the English language, or the teaching of languages other than the English language to pupils who have not passed the eighth grade, cannot be sustained as designed to protect the health of children, by limiting their mental activities, as it leaves complete freedom as to matters other than modern languages.

Mr. Justice Holmes and Mr. Justice Sutherland, dissenting.

In Error to the Supreme Court of the State of Nebraska.

Robert T. Meyer was convicted of an offense, and his conviction was affirmed by the Supreme Court of Nebraska (107 Neb. 657, 187 N. W. 100), and he brings error. Reversed and remanded.

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*Messrs. A. F. Mullen, of Omaha, Neb., C. E. Sandall, of York, Neb., and I. L. Albert, of Columbus, Neb., for plaintiff in error.

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*Messrs. Mason Wheeler, of Lincoln, Neb., and O. S. Spillman, of Pierce, Neb., for the State of Nebraska.

¹¹ Every corporation is allowed to deduct from gross income all operating expenses—that is, the disbursements incident to the life and the conduct of its business. But the individual is not permitted to deduct from gross income any part of his living expenses (except so far as they may be covered by the exemption). Railroads and other public corporations are allowed to deduct, as an operating expense, the cost of tools and small equipment. Individuals and other corporations are not. Ordinary corporations and individuals are allowed to deduct rentals and interest paid. Compare the limited deduction for interest paid under the federal Corporation Tax Act. *Anderson v. Forty-Two Broadway Co.*, 239 U. S. 69, 36 Sup. Ct. 17, 60 L. Ed. 162; *New York, New Haven & Hartford R. R. Co. v. United States* (C. C. A.) 269 Fed. 907.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a

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child of 10 years, who had not attained *and successfully passed the eighth grade. The information is based upon "An act relating to the teaching of foreign languages in the state of Nebraska," approved April 9, 1919 (Laws 1919, c. 249), which follows:

"Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

"Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

"Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100), or be confined in the county jail for any period not exceeding thirty days for each offense.

"Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval."

The Supreme Court of the state affirmed the judgment of conviction. 107 Neb. 657, 187 N. W. 100. It declared the offense charged and established was "the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade," in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefor. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion:

"The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of

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permitting for*eigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best in-

terests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. *Pohl v. State*, 102 Ohio St. 474, 132 N. E. 20; *State v. Bartels*, 191 Iowa, 1060, 181 N. W. 508.

"It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The Legislature no doubt had in mind the practical operation of the law. The law affects few cit-

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izens, except those of foreign line*age. Other citizens, in their selection of studies, except perhaps in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence."

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment:

"No state * * * shall deprive any person of life, liberty or property without due process of law."

[1-3] While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064,

30 L. Ed. 220; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; *Algeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97; *Chicago, B. & Q. R. R. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; *Adams v. Tanner*, 224 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973; *New York Life Ins. Co. v. Dodge*, 246 U. S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772, Ann. Cas. 1918E, 593; *Truax v. Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254; *Adkins v. Children's Hospital* (April 9, 1923), 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. —; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439, 23 L. R. A. (N. S.) 147. The established doctrine

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is that this liberty may not be inter*fered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385.

[4] The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares:

"Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

The challenged statute forbids the teach-

ing in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that "the so-called ancient or dead languages" are not "within the spirit or the

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purpose of *the act." *Nebraska District of Evangelical Lutheran Synod, etc., v. McKelvie et al.* (Neb.) 187 N. W. 927 (April 19, 1922). Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and "that the English language should be and become the mother tongue of all children reared in this state." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:

"That the wives of our guardians are to be common, and their children are to be common,

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and no parent is to know his own child, *nor any child his parent. * * * The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be."

In order to submerge the individual and develop ideal citizens, Sparta assembled the

males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court.

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Adams v. *Tanner, 244 U. S. 594, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

[5] As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further

proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes and Mr. Justice Sutherland, dissent.

(262 U. S. 404)

BARTELS v. STATE OF IOWA.

No. 134.

BOHNING v. STATE OF OHIO.

No. 181.

POHL v. SAME.

No. 182.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES et al. v. McKELVIE et al.

No. 440.

(No. 134, Argued and Submitted Nov. 28, 1922. Nos. 181, 182, Argued Oct. 10, 1922. No. 440, Argued Feb. 23, 1923. Decided June 4, 1923.)

Constitutional law ⇨255—Schools and school districts ⇨164—Statutes relative to teaching of foreign languages held unconstitutional.

Act Iowa April 10, 1919 (Laws 1919, c. 198), Act Ohio June 5, 1919 (108 Ohio Laws, p. 614), and Act Neb. April 14, 1921 (Laws 1921, c. 61), relative to the teaching of foreign languages, or the use of foreign languages as a medium of instruction, are unconstitutional, as violating Const. U. S. Amend. 14, providing that no state shall deprive any person of liberty without due process of law.

Mr. Justice HOLMES and Mr. Justice SUTHERLAND dissenting in part.

In Error to the Supreme Court of the State of Iowa.

In Error to the Supreme Court of the State of Ohio.

In Error to the Supreme Court of the State of Nebraska.

Criminal prosecutions by the State of Iowa against August Bartels, and by the State of Ohio against H. H. Bohning and against Emil Pohl, and suit for injunction by the Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and Other States, and others, against Samuel R. McKelvie and others. Judgments of conviction in the first three cases were affirmed (191 Iowa, 1060, 181 N. W. 508; 102 Ohio St. 474, 132 N. E. 20), and a judgment for plaintiffs in the fourth case was reversed (187 N. W. 927), and defendants in the first three cases and plaintiffs in the fourth case bring error. Judgments in the first three cases reversed, judgment in the fourth case reversed as to one defendant, and case dismissed as to the others.

No. 134:

Messrs. Frank E. Farwell and Charles E. Pickett, both of Waterloo, Iowa, and I. L. Albert, of Columbus, Neb., for plaintiff in error Bartels.

Mr. Bruce J. Flick, of Des Moines, Iowa, for the State of Iowa.

Nos. 181, 182:

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*Messrs. Timothy S. Hogan and Frank Davis, Jr., both of Columbus, Ohio, for plaintiffs in error Bohning and Pohl.

Mr. E. J. Thobaben, of Cleveland, Ohio, for the State of Ohio.

No. 440:

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*Messrs. A. F. Mullen, of Omaha, Neb., and C. E. Sandall, of York, Neb., for plaintiffs in error Nebraska Dist. of Evangelical Lutheran Synod and others.

Messrs. Mason Wheeler, of Lincoln, Neb., and O. S. Spillman, of Pierce, Neb., for defendants in error McKelvie and others.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The several judgments entered in these causes by the Supreme Courts of Iowa, Ohio, and Nebraska, respectively, must be reversed upon authority of *Meyer v. Nebraska*, 262 U. S. 390, 43 Sup. Ct. 625, 67 L. Ed. —, decided to-day.

No. 134. Plaintiff in error was convicted of teaching pupils in a parochial school below the eighth grade to read German, contrary to "An act requiring the use of the English language as the medium of instruction in all secular subjects in all schools within the state of Iowa," approved April 10, 1919 (Acts 1919, c. 198).¹ He used English for teaching the common school branches, but taught young pupils to read German. The Supreme Court of the state held:

"The manifest design of this language statute is to supplement the compulsory education law by requiring that the branches enumerated to be taught shall be taught in the English language, and in no other. The evident purpose is that no other language shall be taught in any school, public or private, during the tender years of youth, that is, below the eighth grade." 191 Iowa, 1060, 181 N. W. 508.

Nos. 181 and 182. Bohning and Pohl, of St. Johns Evangelical Congregational School, Garfield Heights, Cuyahoga county, Ohio,

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were severally convicted (102 *Ohio St. 474, 132 N. E. 20) of violating "An act to supplement section 7762 of the General Code * * * and to repeal section 7729, concern-

¹ Section 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited, provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade.

Sec. 2. That any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00).

ing elementary, private and parochial schools and providing that instruction shall be in the English language" (108 Ohio Laws, 614), approved June 5, 1919,² which prohibits the teaching of German to pupils below the eighth grade.

No. 440. An injunction is sought against the Governor and Attorney General of the state and the attorney for Platte county to prevent enforcement of "An act to declare the English language the official language of this state, and to require all official proceedings, records and publications to be in such language and all school branches to be taught in said language in public, private, denominational and parochial schools," etc., approved

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April 14, *1921 (Laws 1921, c. 61).³ This

² Section 7762—1. That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

Sec. 7762—2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct; provided that the German language shall not be taught below the eighth grade in any such schools within this state.

Sec. 7762—3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each separate day in which such act shall be violated shall constitute a separate offense.

* Section 1. The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.

Sec. 2. No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

Sec. 3. Languages other than the English language may be taught as languages only, after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides: Provided, that the provisions of this act shall not apply to schools held on Sunday or on some other day of the week which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times: Provided that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language.

Sec. 7. Chapter 249, of the Session Laws of Nebraska for 1919, entitled, "An act relating to the teaching of foreign languages in the state of Nebraska," is hereby repealed.

statute is subject to the same objections as those offered to the act of 1919 and sustained in *Meyer v. Nebraska*, supra. The purpose of the later enactment as stated by counsel for the state, is "to place beyond the possibility for legal evasion a prohibition against the teaching in schools of foreign languages to children who have not passed the eighth grade." The Supreme Court considered the merits of the cause, upheld the statute, and refused an injunction. (Neb.) 187 N. W. 927 (April 19, 1922).

McKelvie and Davis, formerly Governor and Attorney General, no longer occupy those offices. The cause is dismissed as to them. Otto F. Walter is now the county attorney and the judgment below as to him must be reversed.

Reversed.

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*Mr. Justice HOLMES. We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment. It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 204, 33 Sup. Ct. 44, 47 (57 L. Ed. 184); *Hebe Co. v. Shaw*, 248 U. S. 297, 303, 39 Sup. Ct. 125, 63 L. Ed. 255; *Jacob Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260. I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.

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*I agree with the Court as to the special proviso against the German language contained in the statute dealt with in *Bohning v. Ohio*.

Mr. Justice SUTHERLAND concurs in this opinion.

(262 U. S. 522)

CHAS. WOLFF PACKING CO. V. COURT OF INDUSTRIAL RELATIONS OF STATE OF KANSAS.

(Argued April 27, 1923. Decided June 11, 1923.)

No. 739.

1. Constitutional law ⇨275(2)—**Right of employer or employee to contract is part of the liberty protected by due process clause.**

The right of the employer, on the one hand, and of the employee, on the other, to contract about his affairs, is part of the liberty of the individual protected by the guaranty of the due process clause of Const. Amend. 14.

2. Constitutional law ⇨276—**Restraint of freedom of contract must not be arbitrary or unreasonable, and can be justified only by exceptional circumstances.**

While there is no such thing as absolute freedom of contract, freedom is the general rule, and restraint is the exception, and must not be arbitrary or unreasonable, and can be justified only by exceptional circumstances.

3. Constitutional law ⇨70(1)—**Legislative declaration that business is affected with public interest not conclusive.**

Legislative declaration that business is affected with public interest is not conclusive of the question whether attempted regulation on that ground is justified, and the circumstances of its alleged change from a private business to one in which the public have come to have an interest are always a subject of judicial inquiry.

4. Constitutional law ⇨296(1)—**Circumstances which clothe business with "public interest" must create peculiarly close relation between public and those engaged in it.**

The circumstances which clothe a particular kind of business with a "public interest," so as to be subject to regulation, must be such as to create a peculiarly close relation between the public and those engaged in it and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Interest.]

5. Constitutional law ⇨296(1)—**One does not devote property or business to public use by engaging in common callings; "public use;" "public interest."**

One does not devote his property or business to a public use, or clothe it with a public interest, merely because he makes commod-

ities for and sells to the public in common callings, such as those of the butcher, baker, tailor, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Use.]

6. Constitutional law ⚡296(1)—Right to sell or not at will usually distinguished private from quasi public occupations.

While the right of one to sell or not as he likes does not necessarily exclude his business from those clothed with a public interest, it usually distinguishes private from quasi public occupations.

7. Constitutional law ⚡296(1)—Extent to which business clothed with public interest may be regulated depends on nature of business.

Though a business be clothed with a public interest, the extent to which it may be regulated depends on the nature of the business, the feature which touches the public, and the abuses reasonably to be feared.

8. Constitutional law ⚡296(1)—Public regulation can secure continuity of business only when obligation to public is direct and arises as contractual condition.

Public regulation can only secure continuity of a business, as against the owner or his employees, when the obligation to the public of continuous service is direct, clear, and mandatory, and arises as a contractual condition, express or implied, of entering the business either as owner or worker.

9. Constitutional law ⚡47—Effect of act establishing compulsory arbitration on employees considered in determining validity on employer's complaint.

As the penalties of the Kansas Court of Industrial Relations Act are directed against effort of either side to interfere with settlement of wage disputes by arbitration, and without this joint compulsion the whole theory and purpose of the act would fail, its effect on the employee is a proper factor to be considered in determining its validity on complaint of the employer.

10. Courts ⚡394(3)—Construction of statute by state court conclusive in determining validity.

The construction of the Kansas Court of Industrial Relations Act by the state Supreme Court as authorizing compulsory arbitration of wage disputes, though cessation of the operation of the employer's packing plant would not greatly inconvenience the public, is controlling in determining the validity of the act.

11. Constitutional law ⚡275(2)—Master and servant ⚡69—Statute providing compulsory arbitration held unconstitutional.

The Kansas Court of Industrial Relations Act, declaring the business of manufacturing and preparing food for human consumption affected with a public interest, and reasonable continuity and efficiency of such industry to be necessary for the public peace, health, and general welfare, and giving the industrial court power, in case of controversy between employers and workers endangering such continuity

or efficiency, to fix the terms and conditions of employment, and requiring the employer to pay the wages fixed, and forbidding employees to strike against them, so far as it permits such fixing of wages, deprives the employer of its property and liberty of contract without due process of law, in violation of Const. Amend. 14.

In Error to the Supreme Court of Kansas.

Mandamus proceeding, instituted in the Supreme Court of Kansas by the Court of Industrial Relations of the State of Kansas against the Charles Wolff Packing Company. Judgment granting a writ of mandamus was rendered by the Supreme Court (207 Pac. 806), and defendant brings error. Reversed.

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*This case involves the validity of the Court of Industrial Relations Act of Kansas. Chapter 29, Special Session, Laws of 1920. The act declares the following to be affected with a public interest: First, manufacture and preparation of food for human consumption; second, manufacture of clothing for human wear; third, production of any substance in common use for fuel; fourth, transportation of the foregoing; fifth, public utilities and common carriers. The act vests an industrial court of three judges with power upon its own initiative or on complaint to summon the parties and hear any dispute over wages or other terms of employment in any such industry, and if it shall find the peace and health of the public imperiled by such controversy, it is required to make findings and fix the wages and other terms for the future conduct of the industry. After 60 days, either party may ask for a readjustment, and then the order is to continue in effect for such reasonable time as the court shall fix, or until changed by agreement of the parties. The Supreme Court of the state may review such orders, and in case of disobedience to an order that court may be appealed to for enforcement.

The Charles Wolff Packing Company, the plaintiff in error, is a corporation of Kansas engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. It has \$600,000 capital stock and total annual sales of \$7,000,000. More than half its products are sold beyond the state. It has 300 employees. There are many other packing houses in Kansas, of greater capacity. This is considered a small one.

In January, 1921, the president and secretary of the Meat Cutters' Union filed a complaint with the industrial court against the Packing Company respecting the wages its employees were receiving. The company appeared and answered and a hearing was had. The court made findings, including one

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of an emergency, and an order as *to wages, increasing them over the figures to which the company had recently reduced them.

The company refused to comply with the order and the industrial court then instituted mandamus proceedings in the Supreme Court to compel compliance. That court appointed a commissioner to consider the record, to take additional evidence, and report his conclusions. He found that the company had lost \$100,000 the previous year, and that there was no sufficient evidence of an emergency or danger to the public from the controversy to justify action by the industrial court. The Supreme Court overruled his report and held that the evidence showed a sufficient emergency.

The prescribed schedule of wages and the limitation of hours and the rate of pay required for overtime resulted in an increase in wages of more than \$400 a week.

It appeared from the evidence that the company and plant were under the control of, and in business association with, what were called "The Allied Packers" who have plants in various cities and compete with the so-called Big Five Packers, the largest in the country; that the products of the Wolff Packing Company are sold in active competition with such products made by other concerns throughout the United States. It appeared, further, that about the time of this controversy a strike was threatened in the packing houses of the Big Five, which the President of the United States used his good offices to settle. The chief executive of the Wolff Company testified that there had been no difficulty in securing all the labor it desired at the reduced rates offered. The industrial court conceded that the Wolff Company could not operate on the schedule fixed without a loss, but relied on the statement by its president that he hoped for more prosperous times.

The packing company brings this case here on the ground that the validity of the

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Industrial Court Act was *upheld although challenged as in conflict with the provision of the Fourteenth Amendment that no state shall deprive any person of liberty or property without due process of law.

Messrs. D. R. Hite and John S. Dean, both of Topeka, Kan., for plaintiff in error.

Messrs. John G. Egan, of Topeka, Kan., and Chester I. Long, of Wichita, Kan., for defendant in error.

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*Mr. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

The necessary postulate of the Industrial Court Act is that the state, representing the people, is so much interested in their peace, health, and comfort that it may compel those engaged in the manufacture of food and clothing, and the production of fuel,

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whether owners or *workers, to continue in their business and employment on terms fixed by an agency of the state, if they cannot agree. Under the construction adopted

by the state Supreme Court the act gives the industrial court authority to permit the owner or employer to go out of the business, if he shows that he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege under the circumstances is generally illusory. *Block v. Hirsh*, 256 U. S. 135, 157, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165. A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit or combine with others to induce them to quit.

[1, 2] These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U. S. 390, 43 Sup. Ct. 625, 67 L. Ed. —, decided June 4, 1922. While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. —, decided April 9, 1923.

It is argued for the state that such exceptional circumstances exist in the present case and that the act is neither arbitrary nor unreasonable. Counsel maintain:

First. The act declares that the preparation of human food is affected by a public interest and the power of the Legislature so to declare and then to regulate the business is established in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, *Brass v. Stoesser*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757, *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, *Ann. Cas. 1912A, 487*, *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, *L. R. A. 1915C, 1189*, and *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165.

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*Second. The power to regulate a business affected with a public interest extends to fixing wages and terms of employment to secure continuity of operation. *Wilson v. New*, 243 U. S. 332, 352, 353, 37 Sup. Ct. 298, 61 L. Ed. 755, *L. R. A. 1917E, 938*, *Ann. Cas. 1918A, 1024*.

Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the pub-

lic. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial Legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. *State v. Edwards*, 86 Me. 102, 29 Atl. 947, 25 L. R. A. 504, 41 Am. St. Rep. 528; *Terminal Taxi-cab Co. v. District of Columbia*, 241 U. S. 252, 254, 36 Sup. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765.

(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *Budd v. New York*, 117 N. Y. 1, 27, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *Id.*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *Brass v. Stoesser*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757; *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487; *German Alliance*

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Insurance Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; *VanDyke v. Geary*, 244 U. S. 39, 47, 37 Sup. Ct. 483, 61 L. Ed. 973; *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165.

[3] It is manifest from an examination of the cases cited under the third head that the mere declaration by a Legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

[4] In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business

with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

It is urged upon us that the declaration of the Legislature that the business of food preparation is affected with a public interest and devoted to a public use should be most persuasive with the court, and that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise. To this point, counsel for the state cite *Clark v. Nash*, 193 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 600, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008; *Union Lime Co. v. Chicago & North Western Ry. Co.*, 233 U. S. 211, 34 Sup. Ct. 522, 58 L. Ed. 924; *Jones v. Portland*, 245 U. S. 217, 38 Sup. Ct. 112, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann.

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Cas. 1918E, 660; and *Green v. Frazier*, 253 U. S. 233, 40 Sup. Ct. 499, 64 L. Ed. 878. These cases are not especially helpful in determining how a business must be devoted to a public use to clothe it with a public interest so as to permit regulation of rates or prices. They were of two classes—one where condemnation proceedings were opposed on the ground that private property could only be taken for a public use and the use contemplated by the Legislature was not a public one. The other was of tax suits in which the validity of the tax was denied because the use for which the tax was levied was not a public one. "Public use" in such cases would seem to be a term of wider scope than where it is used to describe that which clothes property or business "with a public interest." In the former, the private owner is fully compensated for his property. In the latter, the use for which the tax is laid may be any purpose in which the state may engage and this covers almost any private business if the Legislature thinks the state's engagement in it will help the general public and is willing to pay the cost of the plant and incur the expense of operation.

[5] It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest

merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

[6] An ordinary producer, manufacturer, or shopkeeper may sell or not sell as he

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likes, *United States v. *Freight Association*, 166 U. S. 290, 320, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Terminal Cab Co. v. Kutz*, 241 U. S. 252, 256, 36 Sup. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, it usually distinguishes private from quasi-public occupations.

In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not likely, and the danger from local monopolistic control less than ever.

It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular busi-

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ness that one engaging therein subjects *himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi public businesses, noted above, because, even so, the valid regulation to which it might be sub-

jected as such, could not include what this act attempts.

[7] To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when char-

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acterizing a similarly *extreme contention. *Civil Rights Cases*, 109 U. S. 3, 24, 3 Sup. Ct. 18, 27 L. Ed. 835. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.

This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing and fuel supply. By section 6 reasonable continuity and efficiency of the industries specified are declared to be necessary for the public peace, health and general welfare, and all are forbidden to hinder, limit or suspend them. Section 7 gives the industrial court power in case of controversy between employers and workers which may endanger the continuity or efficiency of service, to bring the employer and employees before it and after hearing and investigation to fix the terms and conditions between them. The employer is bound by this act to pay the wages fixed and while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them and thus is compelled to give up that means of putting himself on an equality with his

employer which action in concert with his fellows gives him.

There is no authority of this court to sustain such exercise of power in respect to those kinds of business affected with a public interest by a change in pais, first fully recognized by this court in *Munn v. Illinois*, supra, where it said (94 U. S. 126, 24 L. Ed. 77):

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

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He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

[8] These words refute the view that public regulation in such cases can secure continuity of a business against the owner. The theory is that of revocable grant only. *Weems Steamboat Co. v. People's Co.*, 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222. If that be so with the owner and employer, a fortiori must it be so with the employee. It involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear, and mandatory, and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service.

[9] We are considering the validity of the act as compelling the employer to pay the adjudged wages, and as forbidding the employees to combine against working and receiving them. The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The state cannot be heard to say, therefore, that upon complaint of the employer the effect upon the employee should not be a factor in our judgment.

Justification for such regulation is said to be found in *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. It was there held that in a nation-wide dispute over wages between railroad companies and their train operatives, with a general strike, commercial

paralysis, and grave loss and suffering over-

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"hanging the country, Congress had power to prescribe wages not confiscatory, but obligatory on both for a reasonable time to enable them to agree. The court said that the business of common carriers by rail was in one aspect a public business because of the interest of society in its continued operation and rightful conduct and that this gave rise to a public right of regulation to the full extent necessary to secure and protect it; that viewed as an act fixing wages it was an essential regulation for protection of public right; that it did not invade the private right of the carriers because their property and business were subject to the power of government to insure fit relief by appropriate means and it did not invade private rights of employees since their right to demand wages and to leave the employment individually or in concert was subject to limitation by Congress because in a public business which Congress might regulate under the commerce power.

[10] It is urged that under this act the exercise of the power of compulsory arbitration rests upon the existence of a temporary emergency as in *Wilson v. New*. If that is a real factor here, as in *Wilson v. New*, and in *Block v. Hirsh*, 256 U. S. 135, 157, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165 (see *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 43 Sup. Ct. 158, 67 L. Ed. —, decided December 11, 1922) it is enough to say that the great temporary public exigencies, recognized by all and declared by Congress, were very different from that upon which the control under this act is asserted. Here it is said to be the danger that a strike in one establishment may spread to all the other similar establishments of the state and country, and thence to all the national sources of food supply so as to produce a shortage. Whether such danger exists has not been determined by the Legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor.

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"The small extent of the injury to the food supply of Kansas to be inflicted by a strike and suspension of this packing company's plant is shown in the language of the Kansas Supreme Court in this case (*Court of Industrial Relations v. Packing Co.*, 111 Kan. 501, 207 Pac. 806):

"The defendant's plant is a small one, and it may be admitted that, if it should cease to operate, the effect on the supply of meat and food in this state would not greatly inconvenience the people of Kansas; yet, the plant manufactures food products and supplies meat to a part of the people of this state, and, if it should cease to operate, that source of supply would be cut off."

The Supreme Court's construction of the operation and effect of the act is controlling.

The language quoted shows how drastic and all-inclusive it is.

But the chief and conclusive distinction between *Wilson v. New* and the case before us is that already referred to. The power of a Legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier, which accepts a railroad franchise, is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss (*Brooks-Scanlon Co. v. R. R. Commission*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; *Bullock v. R. R. Commission*, 254 U. S. 513, 41 Sup. Ct. 193, 65 L. Ed. 380), it may give up its franchise and enterprise, but, short of this, it must continue. Not so the owner, when by mere changed conditions his business becomes clothed with a public interest. He may stop at will, whether the business be losing or profitable.

The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation

of the business of ^{*544} the plaintiff in error, whose classification as public is at the best doubtful. It is not too much to say that the ruling in *Wilson v. New* went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us.

[11] We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law.

The judgment of the court below must be Reversed.

(262 U. S. 544)

**KENTUCKY FINANCE CORPORATION v.
PARAMOUNT AUTO EXCHANGE
CORPORATION.**

(Argued Oct. 5, 1922. Decided June 11, 1923.)

No. 17.

1. Courts ¶12(3)—Foreign corporation can bring suit in state court to replevy its property brought into the state.

A foreign corporation, not authorized to do business within state, may bring a suit therein in a court of competent jurisdiction to

replevy property belonging to the foreign corporation, and brought into the state without the foreign corporation's knowledge or consent.

2. Constitutional law ¶210, 252—Foreign corporation is "person," within both equal protection and due process clauses.

A foreign corporation is a "person," within the meaning of both the due process clause and the equal protection clause of Const. Amend. 14.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

3. Constitutional law ¶210—Foreign corporation bringing replevin in proper court of a state is a person "within its jurisdiction."

In the clause of the Fourteenth Amendment of the Constitution that no state shall deny to any person within its jurisdiction the equal protection of the laws, the words "within its jurisdiction" are comprehensive, and include a foreign corporation not entitled to do business within the state, but properly bringing suit in a state court of competent jurisdiction to replevy property belonging to the foreign corporation taken from its possession elsewhere and fraudulently brought into the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Within the Jurisdiction.]

4. Constitutional law ¶210—Foreign corporation within jurisdiction cannot be denied equal protection.

A foreign corporation within the jurisdiction of a state is no less entitled to the equal protection of the laws of that state than an individual would be in the same circumstances.

5. Constitutional law ¶249—Foreign corporation cannot be subjected to onerous and unreasonable requirements as condition to bringing suit.

Though a foreign corporation seeking relief in the courts of a state must conform to the prevailing modes of procedure in those courts, and submit to reasonable rules for the payment of costs or security therefor, and the like, it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact, and not laid on other suitors in like situations.

6. Constitutional law ¶249—Requiring secretary of foreign corporation to come into state for examination held arbitrary discrimination.

The requirement of St. Wis. 1917, § 4096, subd. 7, and section 4097, subd. 2, that an officer of a foreign corporation which brought suit in the state may be required to attend at a time and place within the state for examination, and that the suit may be dismissed for his failure to do so, though a nonresident individual, who brings suit under similar circumstances can be examined only at his place of residence, is an arbitrary discrimination against a foreign corporation, which denied it the equal protection of the laws.

Mr. Justice Brandeis and Mr. Justice Holmes dissenting.

In Error to the Supreme Court of the State of Wisconsin.

Replevin by the Kentucky Finance Corporation against the Paramount Auto Exchange Corporation. An order dismissing the action for failure of plaintiff's secretary to appear for examination was affirmed by the Supreme Court of Wisconsin (171 Wis. 586, 178 N. W. 9), and plaintiff brings error. Reversed.

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*Messrs. Albert K. Stebbins and Jackson B. Kemper, both of Milwaukee, Wis., for plaintiff in error.

Mr. Walter H. Bender, of Milwaukee, Wis., for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

The plaintiff in error, a Kentucky corporation, brought an action of replevin in a state court at Milwaukee, Wis., against the defendant in error, a Wisconsin corporation, to recover an automobile; the right of recovery asserted in the complaint being put on the ground that the plaintiff was the owner and entitled to the possession of the automobile, that one Allen had unlawfully taken it from the plaintiff's possession at Louisville, Ky., had fraudulently removed it to Milwaukee and had there wrongfully delivered it to the defendant and that the defendant was unjustly withholding it from the plaintiff under some groundless claim derived from Allen. The defendant appeared and obtained from the court an order requiring the plaintiff's secretary, who resided at Louisville and was in the plaintiff's service there, to appear in Milwaukee at a fixed time before a designated court commissioner, to bring with him all papers, files, and records of the plaintiff which were under

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his control and relevant *to the controversy, and then and there to submit to an examination by the defendant. The order was sought and granted on the ground that the examination would better enable the defendant to plead to the complaint, which as yet it had not done. The plaintiff was not engaged in any business in Wisconsin, nor had it complied with the law of that state prescribing conditions on which it might do so. It had no property in the state other than the automobile, and it had gone into the state only for the purpose of instituting and prosecuting the action to repossess itself of that vehicle. Its secretary was not within the state; nor did it have any representative there, other than the attorneys who were prosecuting the action in its behalf. For itself and its secretary it consented that such an examination as was sought might be had at Louisville, at any time and before any officer the court might designate, but it objected to any order requiring that the examination be had in Milwaukee. The objection was overruled, and the court put in the order a direction

that the defendant tender to the plaintiff for its secretary the railroad fare from the southern boundary of Wisconsin to Milwaukee and return, being \$4.74, and one day's witness fee, being \$1.50. The tender was made and declined, and the secretary, with the plaintiff's approval, refused to comply with the order. Because of this the court, on the defendant's motion and over the plaintiff's objection, made a further order striking the plaintiff's complaint from the files and dismissing its cause of action, with costs. On appeal to the Supreme Court of the state, both orders were sustained over the plaintiff's contention that they and the statute under which they were made violate the due process and equal protection clauses of the Fourteenth Amendment. 171 Wis. 586, 178 N. W. 9. To obtain a review of the judgment of the Supreme Court the case was brought here on writ of error under section 237 of the Judicial Code (Comp. St. § 1214).

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*The statutory provisions whose validity is questioned are parts of a procedural measure, embodied in the 1917 edition¹ of the Wisconsin Statutes, abrogating prior modes of obtaining a discovery under oath and providing for an adversary examination of a "party, his or its assignor, officer, agent or employé, or of the person who was such officer, agent or employé at the time of the occurrence" involved—the examination to be had at any time after the case is begun and to take the form of a deposition "upon oral interrogatories" and be transmitted to the court like other depositions. The provisions in question are subdivision 7 of section 4096 and subdivision 2 of section 4097, which read as follows:

"In case a foreign corporation is a party, the examination of its president, secretary, other principal officer, assignor or agent or employé, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of this state. The court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers, books, files, records, things, and matters in the possession of such person by reason of his relation to such corporation, relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpoena."

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*"If any officer, agent or employé, or any person who was such officer, agent, or employé of a foreign corporation, at the time of the oc-

¹ After the proceedings in the Milwaukee court some changes were made in this procedural measure, but the changes do not affect the orders in question.

currence of the facts made the subject of the examination, be lawfully required to appear and testify, as provided in this chapter, either within or without the state, * * * shall refuse and neglect to have with him any papers, books, files, records, things, and matters in the possession of such party relevant to the controversy, such party may be punished as for a contempt and in the discretion of the court, the pleading of such foreign corporation stricken out, and judgment given against it as upon default or failure of proof."

When the order for the examination was made, other parts of the statute, applicable to all suitors other than foreign corporations, provided, notably subdivisions 3 and 6 of section 4096, that where the party against whom the examination was sought was a resident of the state the examination could be had only in the county of his residence, and where the party was a nonresident the examination could be had in the state only if he could be personally served therein with notice and subpoena, and then only in the county where such service was had. In *George v. Bode*, 170 Wis. 411, 175 N. W. 939, the Supreme Court of the state held that an examination within the state could not be ordered against a party, other than a foreign corporation, residing outside and on whom personal service could not be had therein, the court saying in that connection:

"The examination may be taken in this state if he can be personally served with notice and subpoena; the inevitable inference is that it is only if he can be served that he can be so examined. If the provisions of subdivision 3 mean that the court might fix a time and place for his examination within this state regardless of the personal service of notice and sub-

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pœna, then the provisions of subdivision 6 regarding nonresidence would be wholly unnecessary. These considerations move us to construe the statute as not empowering the court to order the examination of a nonresident to take place within this state when he cannot be personally served with notice and subpoena."

By subdivision 7 of section 4096, before quoted, an exception was made as to foreign corporations whereby examinations within the state might be ordered and compelled against them regardless of their nonresidence and of any inability to obtain service on them in the state. Thus they were subjected to a rule much more onerous than that applicable to nonresident individuals in like situations and also more onerous than that applicable to resident suitors, whether individuals or corporations. The Supreme Court justified this difference in legislative treatment and also the order for an examination in this case on the ground that they amounted to no more than a reasonable exercise of the authority of the state over a nonresident corporation coming voluntarily into the state to seek a remedy in her courts against a resident defendant.

[1-4] We take a different view of the mat-

ter. According to the sworn complaint, to the allegations of which due regard must be had, the automobile belonged to the plaintiff. It had been unlawfully taken from the plaintiff's possession in Kentucky and put in the defendant's possession in Wisconsin. It did not get into the latter state through any act of the plaintiff; nor did the acts by which it got there make it any the less the plaintiff's property. Only by going into that state and there instituting an action of replevin against the wrongful possessor could the plaintiff repossess itself of its property. Unless it took that course, its property would be lost. The state court whose aid it invoked was one whose jurisdiction was general and adequate for the purpose. In the

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circumstances, the right to bring the action was plain. See *Charter Oak Life Insurance Co. v. Sawyer*, 44 Wis. 387; *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193. To have denied that right would in effect have deprived the plaintiff of its property and have been an intolerable injustice. That the plaintiff owed its corporate existence to Kentucky did not enable Wisconsin to treat its plight with indifference. It was a "person" within the meaning of both the due process clause and the equal protection clause of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific R. R. Co.*, 118 U. S. 394, 396, 6 Sup. Ct. 1132, 30 L. Ed. 118; *Covington & Lexington Turnpike Co. v. Sandford*, 164 U. S. 578, 592, 17 Sup. Ct. 198, 41 L. Ed. 560; *Smyth v. Ames*, 169 U. S. 466, 522, 18 Sup. Ct. 418, 42 L. Ed. 819; *Atchison, Topeka & Santa Fé Ry. Co. v. Vosburg*, 238 U. S. 56, 35 Sup. Ct. 675, 59 L. Ed. 1199, L. R. A. 1915E, 953. The latter clause declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws," meaning, of course, the protection of laws applying equally to all in the same situation. The words "within its jurisdiction" are comprehensive, but we have no need for attempting a full definition of them here. It is enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that state, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking. See *Southern Ry. Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432. And we think there is no tenable ground for regarding it as any less entitled to the equal protection of the laws in that state than an individual would have been in the same circumstances; for, as was held in *Gulf, Colorado, & Santa Fé Ry. Co. v. Ellis*, 165 U. S. 154, 17 Sup. Ct. 256, 41 L. Ed. 666 "a state

has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

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[5, 6] *No doubt a corporation of one state seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see Canadian Northern Ry. Co. v. Eggen, 252 U. S. 553, 561, 40 Sup. Ct. 402, 64 L. Ed. 713); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files, and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

We hold that the statute as it was applied in this case was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws. This conclusion renders it unnecessary to consider the contention made under the due process clause.

Judgment reversed.

Mr. Justice BRANDEIS, dissenting, with whom Mr. Justice HOLMES concurs.

To sustain the contention that the statute violates the due process clause, it would be necessary to hold that under no conceivable

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circumstances could the trial court *have reasonably required the nonresident plaintiff who invoked its process to submit within the state to examination as a witness and to an inspection of relevant books and papers. If the order for examination was legal, it was

proper to dismiss the suit in case the order was disobeyed. That there may be cases in which oral examination of a plaintiff in the presence of defendant and by counsel familiar with the matter in issue is essential to an adequate presentation of the facts cannot be doubted. If so, it is within the power of a state to require that a plaintiff shall submit to such preliminary examination somewhere. Whether this was a case requiring such examination could be determined properly only upon hearing the parties; and for such hearing opportunity was given by the judge of the trial court. If this was a case in which oral examination and inspection of the documents was essential to an adequate presentation of the matter in controversy, it was necessary, in order to secure it, that either the plaintiff's secretary should go to Milwaukee for examination, or that defendant and counsel should go to Louisville. Whether, under such circumstances, the plaintiff should in fairness be required to come to the place where he instituted suit, or the defendants be obliged to go with counsel to the plaintiff's place of residence, was, likewise, a matter which could properly be determined only upon hearing the parties; and this opportunity was given by the judge of the trial court. It cannot be that the due process clause of the Fourteenth Amendment deprives a state of the power to authorize its courts to so mould their process as to secure, in this way, the adequate presentation of a case.

To sustain the contention that the statute denies to plaintiff equal protection of the laws would seem to require the court to overrule *Blake v. McClung*, 172 U. S. 239, 260, 261, 19 Sup. Ct. 165, 43 L. Ed. 432, and many other cases. The plaintiff, a foreign corpora-

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tion, not doing business within the state *of Wisconsin, was not a person "within its jurisdiction." Moreover, the statutory provision complained of put nonresidents substantially upon an equality with residents. Compare *Kane v. New Jersey*, 242 U. S. 160, 167, 37 Sup. Ct. 30, 61 L. Ed. 222. No question of interstate commerce is involved. In my opinion the equal protection clause does not prevent Wisconsin from moulding, in the case of foreign corporations, the details of its judicial procedure to accord with the requirements of justice.

(262 U. S. 695)

CITY NAT. BANK OF EL PASO, TEX., v. EL PASO & N. E. R. CO. et al.¹

(Argued March 12, 1923. Decided June 11, 1923.)

No. 309.

Carriers ⇐212—Delivery to commission company, without surrender of bill of lading, held delivery to consignee bank.

Where previous shipments were made to consignee bank, "care of" a named commission company, and by the terminal carrier delivered to the commission company without first requiring payment of drafts attached to bills of lading, all with the acquiescence of and ratification by the shipper, *held* that, on a later shipment, billed by the same agent of the shipper at whose instance the waybills directed delivery to the consignee in care of the commission company, delivery to the commission company was sufficient delivery, though the bill of lading by mistake omitted such direction; the Carmack Amendment (Comp. St. §§ 8604a, 8604aa), making carriers liable for delivery without surrender of bill of lading, having no application.

Certiorari to the Court of Civil Appeals, Eighth Supreme Judicial District, Texas.

Action by the City National Bank of El Paso, Tex., against the El Paso & Northeastern Railroad Company and others. Judgment for defendants was affirmed by the Texas Court of Civil Appeals (225 S. W. 391), and plaintiff brings certiorari. Affirmed.

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*Mr. A. H. Culwell, of El Paso, Tex., for petitioner.

Mr. Wm. R. Harr, of Washington, D. C., for respondents.

Mr. Justice BUTLER delivered the opinion of the Court.

This action was commenced in the district court of El Paso county by the petitioner to recover \$10,101.18 for alleged failure to deliver, in accordance with a shipping contract, 847 head of cattle shipped October 27, 1911, by the petitioner from El Paso, Tex., to Kansas City, Mo., over the connecting lines of railway of respondents, there to be

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delivered to the First National Bank of *that city. Judgment for the respondent was affirmed by the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas. 225 S. W. 391. The Supreme Court of the state denied a writ of error. On petitioner's application, asserting that federal rights claimed by it in the state courts under the Carmack Amendment (34 Stat. c. 3591, p. 595 [Comp. St. §§ 8604a, 8604aa]) are denied by

the judgment, the case was brought here on certiorari.

The petitioner declared upon alleged failure of respondents to deliver the cattle to the First National Bank of Kansas City, in accordance with a bill of lading issued by the initial carrier; it alleged the value of the cattle to be \$20,000, and claimed \$10,101.18 on account of failure by the carriers to deliver the cattle to the consignee named.

The shipment in question was the last of 18 or 20 trainload shipments of cattle by petitioner from El Paso to Kansas City. The record shows that, for some time prior to the date of this shipment, one Cameron had been buying cattle in the interior of Mexico and shipping them to Juarez, whence they entered the United States at El Paso. A bank of Chihuahua furnished the money to pay for the cattle. That bank consigned them to petitioner at El Paso, making draft with bill of lading attached, for the amount of the purchase price. After the cattle were delivered to the petitioner on the American side, it paid the draft and refunded the purchase price to the Chihuahua bank. It then shipped the cattle to Kansas City for sale. J. P. Peters was a cattle broker doing business in Kansas City under the name of J. P. Peters Commission Company. His son, J. A. Peters, was employed by Cameron. He also acted for the petitioner, and all of the shipments were handled exclusively by him as its agent. All of the previous shipments

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were delivered to the commission com*pany upon arrival at Kansas City, and, with the exception of some of the earliest, were shipped by him to the First National Bank of Kansas City, "care of the J. P. Peters Commission Company." This practice was adopted because the bank was closed at the time one of the earlier shipments arrived, and the day's market was lost.

At the time of the shipment in question, a bill of lading was issued by the receiving carrier, signed by its agent and by the "City National Bank, by J. A. Peters, Shipper." The waybill contemporaneously made designated the consignee "First National Bank, Kansas City, Mo., care J. P. Peters Commission Company. * * *" The petitioner made a draft, with bill of lading attached, on the commission company, and forwarded it to the bank at Kansas City, with directions to release the cattle on payment of the draft, and to wire petitioner for instructions, if the draft was not paid. The terminal carrier delivered the cattle to the commission company without surrender of the bill of lading or the payment of the draft. The bank returned the bill of lading and the draft to the petitioner. The draft has never been paid in full, and this action is to recover the amount remaining unpaid. The jury found that, at the time of the execution of the bill of lading, it was agreed be-

¹ The other respondents are: El Paso & Southwestern Company, El Paso & Northeastern Railway Company, El Paso & Rock Island Railway Company, Chicago, Rock Island & El Paso Railway Company, Chicago, Rock Island & Gulf Railway Company, and Chicago, Rock Island & Pacific Railway Company.

(43 Sup.Ct.)

tween the petitioner, acting through J. A. Peters, and the receiving carrier, that the cattle should be consigned by bill of lading to the First National Bank of Kansas City, Mo., care of the J. P. Peters Commission Company; that through mutual mistake, the bill of lading omitted the words "care of the J. P. Peters Commission Company"; and that the petitioner through its said agent, directed the agent of the receiving carrier to note on the waybill that the cattle were consigned to the First National Bank of Kansas City, care of the J. P. Peters Commission Company. The jury also found that prior shipments of cattle above referred to had been delivered by the terminal carrier to the

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commission company before the payment of drafts to which the bills of lading were attached, and that the First National Bank acquiesced in and ratified such deliveries; that in reliance on such acquiescence and ratification, the terminal carrier delivered the shipment in question to the commission company without the surrender of the bill of lading; and that such acquiescence or ratification was reasonably sufficient to induce the belief that the commission company was authorized to receive the cattle for the bank.

The petitioner complained that the carrier failed to deliver the cattle to the bank named as consignee or to the petitioner. If delivery was made to that bank, or to the petitioner, or on its order, the carriers did not commit any breach alleged, and there can be no recovery.² And if, as in the case of previous shipments, the contract had read "First National Bank of Kansas City, Mo., care of J. P. Peters Commission Company," delivery to the commission company would have been performance of the agreement. See *Ela v. American Merchants' Union Express Co.*, 29 Wis. 611, 616, 9 Am. Rep. 619; *Bell v. Windsor & Annapolis Ry. Co.*, 24 Nova Scotia, 521. The bank had ratified the delivery of prior shipments to the commission company before payment of drafts accompanying bills of lading. The terminal carrier had a right to assume that delivery of this shipment properly might be made to the commission company. J. A. Peters acted for the petitioner in making all of the shipments. He directed the prior shipments to be made to the consignee bank in care of the commission company. At his instance the waybill directed delivery of this shipment to the named consignee in care of the commission company. His orders and directions were binding on the petitioner. Thus

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in legal effect the petitioner at the time it

made the shipment expressly ordered delivery to be made to the consignee bank in care of the commission company, and caused the agent of the receiving carrier to so direct on the waybill. We think it must be held that, under these circumstances, delivery to the commission company was delivery to the consignee bank.

This being so, the provisions of the Carmack Amendment have no application.

The judgment of the Court of Civil Appeals is affirmed.

(262 U. S. 640)

LION BONDING & SURETY CO. v.
KARATZ.

DEPARTMENT OF TRADE AND COMMERCE OF NEBRASKA et al. v.
HERTZ et al.

(Submitted on Motion to Modify Decree May 21, 1923. Decided June 11, 1923.)

Nos. 574, 467.

Courts $\Leftrightarrow$ 351½—Supreme Court, on reversing receivership decrees in federal court for lack of jurisdiction, could not provide for expenses of receivership or for creditors who filed claims in federal court.

Where federal court decrees in receivership proceedings against an insolvent corporation, whose business was being administered by a state court, were reversed by the Supreme Court for want of equity and for want of jurisdiction in the federal court, the decree of reversal would not be modified to provide for receivership expenses, including counsel fees, from assets of the corporation, nor to direct the state authorities liquidating the company's business to apply to the state court to allow creditors, whose claims had been filed in the federal court, to file their claims in the state court, in which the time for filing claims had expired; for the lower federal courts, being without jurisdiction, were without power to make any charge on, or disposition of, the company's assets, and the Supreme Court had jurisdiction only to correct the errors of the lower federal courts in taking jurisdiction, so that the only course open to creditors, and to the receivers and their counsel, was to apply to the state court.

On motion to modify decrees. Motion denied.

For original opinion, see 262 U. S. 77, 43 Sup. Ct. 480, 67 L. Ed. —.

See, also, 262 U. S. 733, 43 Sup. Ct. 701, 67 L. Ed. —.

Mr. Bruce W. Sanborn, of St. Paul, Minn., for the motion.

Messrs. O. S. Spillman, of Pierce, Neb., and John F. Stout, Halleck F. Rose, Arthur R. Wells and Paul L. Martin, all of Omaha, Neb., opposed.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The decision in these cases rendered April

² See decision of this case in Court of Civil Appeals, 225 S. W. 391, 400, holding that the petition alleging failure to deliver to consignee would not support recovery for a delivery without surrender of bill of lading.

23, 1923, reversed the decrees with costs and directed that the bills be dismissed. Before

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the mandate issued Hertz and *Levin, the receivers appointed by the federal court for Minnesota, applied for modification of the decrees. They ask approval of the disbursements for expenses of the receivership paid by them out of moneys realized from assets of the Lion Bonding & Surety Company. They ask approval of charges made by counsel employed in certain ancillary proceedings which these counsel propose to deduct from funds collected in another district. They ask that payment be directed of other additional expenses incurred in connection with the original receivership and the ancillary receiverships, aggregating \$3,384.55. They also ask that they and their general counsel be paid compensation for services rendered during the two years which have elapsed since their appointment as receivers. The amounts involved in these several requests aggregate nearly \$30,000. There are still some assets of the corporation within the district of Minnesota and in two other districts in which Hertz and Levin were appointed ancillary receivers. The aggregate value of these assets appears to be less than the aggregate amount now claimed. The receivers pray for a general direction that payment be made out of funds of the insolvent estate now being administered by the state court.

The receivers also call attention to the fact that the time allowed creditors for filing claims under the decree of the Nebraska court elapsed May 1, 1922; that many creditors filed their claims only in the federal court; that these claims will be barred from sharing in the distribution to be made, unless an order is entered allowing such claims to be filed in the state court; and they ask that this court direct the Department of Trade and Commerce of Nebraska to take such proceedings in the state court as may be necessary to secure to such creditors the right to share in the assets of the corporation.

This court is without power to grant any part of the relief sought. The District Court

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was without jurisdiction as a federal court to appoint receivers in, or otherwise to entertain, the Karatz suit. For this reason, among others, the Hertz suit, a dependent bill, was dismissed. As the lower federal courts lacked jurisdiction, they are necessarily without power to make any charge upon, or disposition of, the assets within their re-

spective districts.¹ Even where the court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court.² Where a case is dismissed for want of jurisdiction as a federal court, there is not even power to award costs against the defeated party.³ The case at bar is unlike *Palmer v. Texas*, 212 U. S. 118, 132, 29 Sup. Ct. 230, 53 L. Ed. 435, upon which the receivers rely. In that case the costs and expenses of a receiver erroneously appointed by the federal court were directed to be paid out of funds realized in that court. There the Circuit Court had jurisdiction as a federal court; but the decree appointing the receiver was reversed, because it was erroneous.

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*Obviously, this court has no power to direct the Department of Trade and Commerce of Nebraska to apply to the state court for the order allowing creditors to prove their claims in that court. Our jurisdiction is limited in this proceeding to the correction of the errors committed by the lower federal courts in taking jurisdiction and in granting relief. The only course open to the creditors, as to the receivers and their counsel, is to apply to the state court.

Motion denied.

¹ Compare *Missouri v. Angle*, 236 Fed. 644, 149 C. C. A. 640; *In re Sage* (D. C.) 224 Fed. 525; *Hawes v. First Nat. Bank of Madison*, 229 Fed. 51, 143 C. C. A. 645; *In re Standard Fuller's Earth Co.* (D. C.) 186 Fed. 578.

² *In re Diamond's Estate*, 259 Fed. 70, 170 C. C. A. 138; *In re Williams* (D. C.) 240 Fed. 788; *In re Standard Fuller's Earth Co.* (D. C.) 186 Fed. 578; *Matter of Rogers* (D. C.) 116 Fed. 435. Compare *In re Watts*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; *Randolph v. Scruggs*, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165.

³ *Inglee v. Coolidge*, 2 Wheat. 363, 368, 4 L. Ed. 261; *McIver v. Wattles*, 9 Wheat. 650, 6 L. Ed. 182; *Strader v. Graham*, 18 How. 602, 15 L. Ed. 464; *Citizens' Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451. In removal cases the rule was changed by Act of March 3, 1875, c. 137, sec. 5, 18 Stat. 470, 472 (Comp. St. § 1019); *Josslyn v. Phillips* (C. C.) 27 Fed. 481; *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Mattingly v. North Western Virginia R. R. Co.*, 153 U. S. 53, 15 Sup. Ct. 725, 39 L. Ed. 894. Although the dismissal below is for want of jurisdiction, costs in this court may be allowed, because it has jurisdiction to review. *Winchester v. Jackson*, 3 Cranch, 514, 2 L. Ed. 516; *Montalet v. Murray*, 4 Cranch, 46, 2 L. Ed. 545; *Halsted v. Buster*, 119 U. S. 341, 7 Sup. Ct. 276, 30 L. Ed. 462; *Blacklock v. Small*, 127 U. S. 96, 105, 8 Sup. Ct. 1096, 32 L. Ed. 70.

(262 U. S. 506)

**SONNEBORN BROS. v. CURETON, Atty.
Gen. of Texas, et al.**(Reargued Oct. 5, 1922. Decided June
11, 1923.)

No. 20.

**1. Commerce —41(1)—Oil sold from ware-
house in Texas in original packages in which
brought into the state may be made the ba-
sis of occupation tax.**

Oil transported from other states to ware-
rooms or a warehouse in Texas, and there held
for sale, and subsequently sold and delivered
in Texas in the original packages, may be made
the basis of occupation tax, which applies to
all wholesale dealers in oil making sales and
delivery in Texas without discrimination, as
is done by Rev. St. Tex. art. 7377.

**2. Commerce —40(2)—Sales of oil not in
state or solicitation of orders therefor can-
not be taxed.**

Sales of oil made in Texas before the oil
to fulfill the sales was sent to Texas, or the
soliciting of orders for such sales, could not
be taxed by the state, as any tax thereon is
regulation of, and burden on, interstate com-
merce.

**3. Commerce —72—Gross receipts from in-
terstate transportation or transmission can-
not be taxed by state.**

A tax on the gross receipts from interstate
transportation or transmission, whether re-
ceipts from intrastate transportation or trans-
mission are equally taxed or not, is unlawful,
because a direct burden on interstate com-
merce.

**4. Constitutional law —229(1)—Licenses —
7(6)—Tax on property brought into state for
sale thereof lawful only when not discrimina-
tive.**

A state tax on merchandise brought in from
another state or on its sale, whether in original
packages or not, after it has reached its des-
tination and is in a state of rest, is lawful
only when the tax is not discriminating against
the merchandise because of its origin in an-
other state.

Mr. Justice McReynolds dissenting in part,
but concurring in the result.

Appeal from the District Court of the
United States for the Western District of
Texas.

Action by Sonneborn Bros. against C. M.
Cureton, Attorney General of Texas, and an-
other. From a decree for defendants, plain-
tiffs appeal. Affirmed.

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*Messrs. J. M. McCormick and Francis Ma-
rion Etheridge, both of Dallas, Tex., for ap-
pellants.

Messrs. E. F. Smith and C. M. Cureton,
both of Austin, Tex., and C. W. Taylor, of
Corsicana, Tex., for appellees.

Mr. Chief Justice TAFT delivered the opin-
ion of the Court.

This is an appeal from a decree of a Unit-
ed States District Court under section 238.
Judicial Code (Comp. St. § 1215), in a case
in which a law of Texas is claimed to be in
contravention of the Constitution of the
United States. The law in question is ar-
ticle 7377 of the Revised Civil Statutes of
Texas, approved May 16, 1907. Acts Tex.
1907, p. 479. It provides that every individ-
ual, firm, or corporation, foreign or domestic,
engaging as a wholesale dealer in coal oil
or other oils refined from petroleum, shall
make a quarterly report to the state comp-
troller, showing the gross amount, collected
and uncollected, from any and all sales made
within the state during the quarter next pre-
ceding, and that an occupation tax shall be
paid by such dealer equal to 2 per cent. of
the gross amount of such sales, collected or
uncollected.

From an agreed statement of facts, the
following appears:

Sonneborn Bros. is a firm of nonresident
merchants selling petroleum products, with
its principal place of business in New York
City. In January, 1910, it opened an office in
Dallas, Tex., and since that time has main-
tained it and connecting warerooms and has
rented space in a public warehouse at San
Antonio, Tex. From January, 1910, until
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April 11, 1919, receipts from its total *sales,
made through orders received at the Dallas
office, have amounted to \$860,801.50. This
sum included:

(1) Those from the sale of oil which, when
sold, was not in Texas.

(2) Those from sales of oil to be delivered
from Texas out of the state.

(3) Those arising from the sale of oil ship-
ped into Texas and afterwards sold from the
storerooms in unbroken original packages.

(4) Those from sales in Texas from broken
packages.

The receipts from the first two classes
amounted to \$643,622.40 and the state au-
thorities made no effort to tax them. The
receipts from (4) amounted in the period
named to \$16,549.84, and appellants do not
deny their liability for the tax thereon. The
sales made under (3) of unbroken packages,
after their arrival in Texas, and after stor-
age in the warerooms or warehouse of ap-
pellants amounted to \$217,179.10, and the tax
on this, amounting to \$4,674.58, is the sub-
ject of the contest here.

[1] The question we have to decide is
whether oil transported by appellants from
New York or elsewhere outside of Texas to
their warerooms or warehouse in Texas,
there held for sales in Texas in original
packages of transportation, and subsequently
sold and delivered in Texas in such original
packages, may be made the basis of an oc-

cupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.

Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and, whether in the original packages or not, a

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state tax upon the oil *as property or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject.

This has been established so far as property taxes on the merchandise are concerned by a formidable line of authorities. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; *Pittsburg Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. Ed. 394; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 520, 24 Sup. Ct. 365, 48 L. Ed. 538; *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754; *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615.

But the argument is that for articles in original packages the sale is a final step in the interstate commerce, and that the owner may not be taxed upon such sale, because this is a direct burden on that step. The reasoning is based on the supposed analogy of the immunity from state taxation of imports from foreign countries which lasts until the article imported has been sold, or has been taken from its original packages of importation and added to the mass of merchandise of the state. This immunity of imports was established by this court in *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. Ed. 678, and was declared in obedience to the prohibition of the Constitution contained in section 10, art. 1, par. 2, providing that:

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The holding was that the sale was part of the importation. It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it. This immunity

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has been enforced as against *a license or oc-

cupation tax on the importer in *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, as against a personal property tax on a stock of wines of a wine dealer to the extent to which the stock included imported wines in the original packages. *Low v. Austin*, 13 Wall. 29, 20 L. Ed. 517, and as against an occupation tax on an auctioneer measured by his commissions on the sales of such imports, *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015. When, however, the article imported is sold or is taken from the original package and exposed for sale, the immunity is gone. *Waring v. Mobile*, 8 Wall. 110, 19 L. Ed. 342; *May v. New Orleans*, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165.

Cases subsequent to *Brown v. Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce.

The first of the cases making this distinction is *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382. In that case, Woodruff, an auctioneer in Mobile, received, in the course of his general business for himself and as consignee and agent for others, merchandise from Alabama and from other states and sold it in unbroken packages. The city of Mobile under its charter levied a uniform tax on real and personal property, on sales at auction, on sales of merchandise, and on capital employed in the business in the city. Woodruff objected to paying any tax on the auction sales of merchandise from other states in original packages. The question most considered by the court was whether merchandise exported from one state to another was an export which a state was forbidden to tax by article 1, § 10, par. 3, of the federal Constitution, above quoted. It was held that it was not, and that the words "imports and exports" as there used referred to,

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and included only mer*chandise brought in from, or transported to, foreign countries. The court (8 Wall. 140, 19 L. Ed. 382) further held that such a tax which did not discriminate against the sales of goods from other states, but was imposed upon sales of all merchandise, whether its origin was in Alabama or in any other state, was not "an attempt to fetter commerce among the states."

At the close of the opinion in *Brown v. Maryland*, Chief Justice Marshall made the remark "that we suppose the principles laid down in this case apply equally to importations from a sister state." This was pronounced in *Woodruff v. Parham* not to be a judicial decision of the question, but an obiter dictum.

While the opinion by Mr. Justice Miller in *Woodruff v. Parham* is chiefly devoted to showing that exports are limited to goods sent out of the country, the decision on the interstate commerce phase of the issue was most fully considered. The adverse view was pressed with all the learning and force of argument of John A. Campbell, formerly a Justice of this court.

Immediately following *Woodruff v. Parham* is *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 387, in which was at issue the validity of a provision of the Alabama law that before it should be lawful for a dealer introducing spirituous liquors into the state to offer the same for sale, he must pay 50 cents a gallon thereon. The provision was sustained as not being an attempt to burden interstate commerce, because by another section of the same law every distiller of the state was required to pay 50 cents a gallon on all liquor made by him, and the two sections were complementary in order "to make the tax equal on all liquors sold in the state."

Woodruff v. Parham was affirmed and applied in *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257, where coal mined in Pennsylvania and sent in barges to New Orleans, to be sold after arrival from

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those barges, without being landed, to a *vessel bound to a foreign port, was held while awaiting sale to be subject to taxation by the state as property in Louisiana.

The case of *Woodruff v. Parham* has never been overruled, but has often been approved and followed, as the cases above cited show. As an authority it controls the case before us, and shows conclusively that the tax in question is valid.

The distinction between the immunity from state taxation of imports in original packages, and that of articles coming from interstate commerce in original packages, is again brought out with emphasis by Mr. Justice White, afterwards Chief Justice, in *American Steel & Wire Co. v. Speed*, 192 U. S. 522, 24 Sup. Ct. 365, 48 L. Ed. 538. In that case, articles of hardware were shipped by the American Steel & Wire Company from their factories in the East to Memphis, Tennessee, and there kept in store in original packages to be distributed to Arkansas and other states when sold, on orders to be subsequently secured. Memphis, under a general law, imposed a merchant's tax on the wire company, based on the average capital invested in the business and included this stock of original packages in the average. The court conceded that if these goods were "imports," they could not be taxed under *Brown v. Maryland*, but said (192 U. S. 519, 24 Sup. Ct. 370, 48 L. Ed. 538):

"But the goods not having been brought from abroad, they were not imported in the legal sense, and were subject to state taxation after they had reached their destination and whilst held in the state for sale,"

and cited the cases of *Woodruff v. Parham* and *Brown v. Houston*. Speaking of these cases, the Justice said:

"Those two cases, decided, the one more than 35 and the other more than 18 years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States."

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The doctrine which the two *cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the states of the Union."

Support for the contention that a state tax on sales of merchandise in original packages brought in from another state is to be distinguished from ad valorem taxes on the merchandise itself is supposed to be found in the cases of *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; and *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150. In those cases it was held that a law of a state which forbade sales of merchandise brought in to the state from another state and subjected it to forfeiture, was invalid because freedom to sell was part of interstate commerce and interference with such freedom was an obstruction and would be so regarded as long as the merchandise was unsold and in an original package. The reasoning in *Brown v. Maryland* as to the necessity of sale to complete importation was resorted to by the Court in *Leisy v. Hardin* to sustain the view that a sale was a part of interstate commerce and any state action which intercepted the merchandise brought in before sale in the original package was void. In drawing the proper line between the valid operation of state prohibition laws and lawful interstate commerce, Chief Justice Marshall's conception of that to be drawn between importation from abroad under the Constitution and state taxation was adopted. Without questioning the reasoning used to reach the conclusion in *Leisy v. Hardin*, it is enough to point out the radical difference between state legislation preventing any sale at all accompanied by forfeiture of the merchandise, and a provision for an occupation tax applicable to all sales of such merchandise whether *domestic or brought from another state. The one plainly interferes with or destroys the commerce, the other merely puts the merchandise on an equality with all other merchandise in the state and constitutes no real hindrance to introducing the merchandise into the state

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for sale *upon the basis of equal competition. Mr. Justice White in his opinion in the *American Steel & Wire Co. v. Speed*, thus distinguished *Leisy v. Hardin* from the case then before the Court. The obstruction to interstate commerce in *Leisy v. Hardin* was like that in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 12, 18 Sup. Ct. 757, 43 L. Ed. 49, in *Railroad Co. v. Husen*, 95 U. S. 465, 469, 24 L. Ed. 527, in *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455, in

Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862, in *Scott v. Donald*, 165 U. S. 58, 97, 17 Sup. Ct. 265, 41 L. Ed. 632, in *Vance v. Vandercook*, No. 1, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, and in *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417.

Counsel for the appellants cite the case of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, 42 Sup. Ct. 106, 66 L. Ed. 239, as affirming their argument that a tax on a sale of merchandise in an original package brought from another state is a tax on interstate commerce and is different from an ad valorem property tax on the merchandise. But that case was not concerned with the power to tax, but rather with the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky to be delivered at a railway station in Kentucky for shipment to Tennessee, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that state might nevertheless make and enforce without incurring the penalty of the state law. It was said in that case (257 U. S. 290, 42 Sup. Ct. 108, 66 L. Ed. 239) that—

"Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 446, 447; *American Steel & Wire Company v. Speed*, 192 U. S. 500, 519. On the same principle, where goods are purchased in one state for transportation to another, the

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*commerce includes the purchase quite as much as it does the transportation. *American Express Company v. Iowa*, 196 U. S. 133, 143."

But this language has no relevancy to show that a tax without discrimination on goods after the transportation ceases, is a burden on interstate commerce, a proposition negatived in the *American Steel & Wire Co.* Case it cites, or that a different rule should apply to an ad valorem property tax from that in case of a tax on sales.

[2] Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were in effect contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; *Stoutenburgh v. Hennick*, 129 U. S. 141,

147, 9 Sup. Ct. 256, 32 L. Ed. 637; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Dozier v. Alabama*, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264; *Crenshaw v. Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565; *Stewart v. Michigan*, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. Ed. 786; *Western Oil Co. v. Lipscomb*, 244 U. S. 346, 37 Sup. Ct. 623, 61 L. Ed. 1181.

[3] So too a tax upon the gross receipts from interstate transportation or transmission whether receipts from intrastate transportation or transmission are equally taxed or not, is an unlawful tax because a direct burden upon interstate commerce. Case of the *State Weight Tax*, 15 Wall. 232, 276, 277, 21 L. Ed. 146; *Fargo v. Michigan*, 121 U. S. 230, 244, 7 Sup. Ct. 857, 30 L. Ed. 888; *Philadelphia & So. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 336, 7 Sup. Ct. 1118, 30 L. Ed. 1200; *Leloup v. Port of Mobile*, 127 U. S. 640, 648, 8 Sup. Ct. 1380, 32 L. Ed. 311; *McCall v. California*, 136 U. S. 104, 109, 10 Sup. Ct. 881, 34 L. Ed. 391; *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. 295.

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[4] *A state tax upon merchandise brought in from another state or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state. This distinction is illustrated in the difference between those cases which uphold the validity of a tax upon peddlers engaged in selling merchandise from out of the state which they carry with them, like those of *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; *Baccus v. Louisiana*, 232 U. S. 334, 34 Sup. Ct. 439, 58 L. Ed. 627; and *Wagner v. Covington*, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. 157, on the one hand, and that of *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347, in which a peddler's tax was held bad because it was levied only on goods from other states, on the other. *Ward v. Maryland*, 12 Wall. 418, 429, 20 L. Ed. 449; *Guy v. Baltimore*, 100 U. S. 434, 442-443, 25 L. Ed. 743; *Tierman v. Rinker*, 102 U. S. 123, 26 L. Ed. 103; *Webber v. Virginia*, 103 U. S. 344, 350, 26 L. Ed. 565, and *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691, are other instances showing the invalidity of state tax laws discriminating against merchandise brought in from other states.

Appellants' chief argument to sustain their contention that a sale of merchandise in the

original package made after it is brought into the state from another state is exempt from state taxation is based upon the language of the opinions in certain recent cases in this court. They are *Standard Oil Co. v. Graves*, 249 U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662; *Askren v. Continental Oil Co.*, 252 U. S. 444, 40 Sup. Ct. 355, 64 L. Ed. 654, *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 Sup. Ct. 606, 65 L. Ed. 1139, and *Texas Co. v. Brown*, 258 U. S. 466, 42 Sup. Ct. 375, 66 L. Ed. 721.

Oil Co. v. Graves was a case of excessive inspection fees. The law of Washington in that case required inspection and labelling before sale, and punished sales without them. The Supreme Court of the state said the law could be sustained as an excise law on selling oil in the state. The opinion contains this passage:

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"In this case the amended complaint alleges that the oils were shipped into Washington from California. They are brought there for sale. This right of sale as to such importations is protected * * * by the federal Constitution, certainly while the same are in the original receptacles or retainers in which they are brought into the state."

The court said finally:

"We reach the conclusion that the statute imposing these excessive inspection fees, in the manner stated, upon all sales of oils brought into the state in interstate commerce necessarily imposes a direct burden upon such commerce, and is, therefore violative of * * * the federal Constitution."

There is nothing in the statement of the case to show the details of the importations of oil, and nothing to indicate how much, if any, of the oil imported had been ordered before shipment into the state or how much sold after importation. The remark of the court as to original receptacles or retainers, therefore, is not shown to have been necessary to the conclusion.

The case of *Askren v. Continental Oil Co.* involved the validity of a law called an inspection law, imposing a license tax upon those selling gasoline in the state, and an excise tax of 2 cents a gallon on the sale or use of it. The inspectors' duties were to see to the execution of the act and the excess of receipts after payment of their salaries and expenses went into the road fund of the state. The case was decided on the averments of the bill which described complainant's business of two kinds: First, that of selling oil to customers in tanks, and also in barrels and packages containing not less than two 5-gallon cans, without breaking them; and, second, of selling gasoline from such tanks and cans in quantities desired by the purchaser. There was nothing to show whether the first kind of business was done on orders lodged before importation or after.

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*The court, however, said:

"As to the gasoline brought into the state in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in *Standard Oil Co. v. Graves*, 249 U. S. 389, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case, we reaffirmed, what had been often adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the federal Constitution the importer of such products from another state into his own state for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved."

If the orders for such sales in original packages were given before importation, the conclusion reached by the court that they were protected against an excise or license tax is in accord with all of the cases already cited, though the fact that they were delivered in the original packages would not give them any additional immunity. It should be noted that in this opinion, the case of *Wagner v. Covington*, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. 157, is quoted approvingly and followed although in that case a tax was upheld on merchandise brought in from Ohio by the seller and sold there in the original packages. In the absence of specification as to when ordered, we can not be sure that the case was wrongly decided, but only that the language used contained implications which can not be sustained.

The case of *Bowman v. Continental Oil Co.* was the same case as the *Askren Case*, the representatives of the state having changed. The *Askren Case* had come here on an appeal from an interlocutory injunction and

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was *decided on the averments of the bill. When the case went back, an answer was filed and the case was heard and it turned out that only 5 per cent. of the business was in tank cars and unbroken packages sold, and that 95 per cent. was in sales of gasoline in quantities desired. The main point decided in the *Bowman Case* was that a license tax law which imposed a lump tax as a condition of doing business, part of which it was unlawful under the federal Constitution to tax, must be declared void, though the other part of the business might have been properly the subject of such a tax. As to the excise tax, the court directed the injunction to issue with respect to the imposition "upon sales of gasoline brought from without the state into the state of New Mexico and there sold and delivered to customers in the original packages, whether tank cars, barrels, or other packages, and in the same form and

condition as when received by the plaintiff in that state." If this covered gasoline that was ordered by the purchaser before importation, it was right. If it covered gasoline, whether in original packages or not, which was sold after it reached its destination, then it is not in accord with the law as we understand it to be under the authorities we have cited. There is nothing in the case as disclosed either in the statements of facts in the Askren or the Bowman Case to show what the fact was in this regard.

It is hardly to be supposed that the court intended in these cases to overrule or narrowly to distinguish the cases of *Woodruff v. Parham*, *Hinson v. Lott*, *Brown v. Houston*, *Pittsburg Coal Co. v. Bates*, *American Steel & Wire Co. v. Speed*, and *Wagner v. City of Covington*, without mentioning them, especially when we find that in *Texas Co. v. Brown*, 258 U. S. 466, 476, 42 Sup. Ct. 375, 378 (66 L. Ed. 721) they are quoted approvingly and followed. That case involved the question whether an inspection law resulting in receipts greatly in excess of the cost of in-

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spection, and construed *by the Georgia Supreme Court to be an excise tax was valid in its application to oil shipped into Georgia from Texas and stored in Georgia for distribution and sale. It was held to be a valid tax. The case was rightly decided, and for the right reason; but in seeking to distinguish the previous cases, the opinion uses this language:

"Appellant insists that *Standard Oil Co. v. Graves*, 249 U. S. 389, is inconsistent with the imposition of inspection fees on a revenue basis upon goods brought from another state, however held or disposed of in Georgia. That decision, however, extended the exemption from such fees of goods brought from state to state, no further than 'while the same are in the original receptacles or containers in which they are brought into the state' (pages 394, 395), and so it was interpreted in *Askren v. Continental Oil Co.*, 252 U. S. 444, 449."

Upon full consideration and after a re-argument, we can not think this extension of the exemption referred to, if intended to apply to oil sold after arrival in the state, to be justified either in reason or in previous authority, and to this extent the opinions in the cases cited are qualified.

The cases all involved the validity of statutes providing for excessive inspection fees and the question of saving the statute as an excise law applicable to part of the sales of the oil was an incidental one. The facts upon which the line between taxable and nontaxable sales could be correctly drawn do not appear fully in any of the cases, or to have been discussed by counsel. This is what has led to a confusion as to the real distinctions and to observations in the opinions, which

unless much restricted in their application constitute a departure from theretofore established principles.

In *Woodruff v. Parham*, 8 Wall. 137, 19 L. Ed. 382, Mr. Justice Miller gives an illustration of the injustice which would arise if the constitutional immunity from state tax-

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ation, as to *imports from abroad were to be held to apply to imports from one state to another. It correctly describes the result if the interstate commerce clause were to afford the same immunity:

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a life time and escape all state, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the state nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchases in New York is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

This argument is as strong to-day as when it was written, and it would be a source of confusion and injustice, if through too broad expressions in a few opinions, a different conclusion from that to which it should carry us, were to obtain.

The decree of the District Court is Affirmed.

Mr. Justice McREYNOLDS, concurring.

I am unable to concur in all said to support the conclusion adopted by the court. To me the result seems out of harmony with the theory upon which recent opinions proceed. There is unfortunate confusion concerning the general subject and certainly some pronouncement that can abide is desirable.

Apparently no great harm, and possibly some good, will follow a flat declaration that

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irrespective of analogies and *for purposes of taxation we will hold interstate commerce ends when an original package reaches the consignee and comes to rest within a state, although intended for sale there in unbroken form. It may be said that the effect on interstate commerce is not substantial and too remote, notwithstanding the rather clear logic of *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, to the contrary and the much discussed theory respecting freedom of interstate commerce from interference by the states, announced and developed long after *Woodruff v. Parham* (1868) 8 Wall. 123, 19 L. Ed. 382. Logic and taxation are not always the best of friends.

(262 U. S. 643)

**AMERICAN BANK & TRUST CO. et al. v.
FEDERAL RESERVE BANK
OF ATLANTA et al.**(Argued April 30, and May 1, 1923. Decided
June 11, 1923.)

No. 717.

1. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—Federal Reserve Banks cannot be compelled to pay exchange charges nor abandon superior facilities to prevent loss of profit by country banks.

Federal Reserve Banks cannot be compelled to pay exchange charges nor abandon their superior facilities for handling and collecting checks, because their collection of checks causes country banks on which drawn to lose the profits made under the former methods of collecting checks.

2. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—Federal Reserve Banks authorized to collect checks, though drawn on banks not affiliated with them and refusing to assent to clearance at par.

Under Act Dec. 23, 1913, § 13, as amended by Act September 7, 1916, Act June 21, 1917, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9796) and Act Dec. 23, 1913, § 4 (Comp. St. § 9788), Federal Reserve Banks have authority to collect, for other reserve banks, members or affiliated nonmembers, checks on any bank within their respective districts, if payable on presentation and collectible consistently with drawee's legal rights, without paying exchange charge, though the drawee is not a member of, or affiliated with, the Federal Reserve system, and has definitely refused to assent to clearance at par.

3. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—Federal Reserve Banks ordinarily may present checks for payment over the counter.

If check is payable on presentation and can be collected consistently with drawee's legal rights without paying exchange charge, Federal Reserve Banks have ordinarily the same right to present check to the drawee for payment over the counter as any other bank would have.

4. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—Bank's loss from Federal Reserve Bank's collection of checks without paying exchange held *damnum absque injuria*.

The loss of profits sustained by country banks through Federal Reserve Bank's employment of improved facilities in the collection of checks without payment of exchange charge to the country bank is *damnum absque injuria*.

5. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—In suit against Federal Reserve Bank, refusal to permit intervention of other banks held not abuse of discretion.

In suit by country banks against Federal Reserve Bank to enjoin it from collecting checks drawn on plaintiffs in excess of its

powers, and from employing alleged unfair methods of collection, refusal to allow intervention as plaintiffs of banks located outside the Federal Reserve district held not an abuse of discretion.

6. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—Exclusion of evidence of activities of other Federal Reserve Banks not abuse of discretion.

In suit by country banks to enjoin Federal Reserve Bank from collecting checks drawn on them in alleged excess of its powers, and from employing alleged coercive methods in their collection, it was not an abuse of discretion to exclude evidence of activities engaged in by other Federal Reserve Banks under the approval of the Federal Reserve Board.

7. Courts ⚡351—Admission of joint answers to interrogatories held not abuse of discretion.

It was not an abuse of discretion vested in the trial court to admit joint answers to interrogatories propounded under equity rule 58.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Suit by the American Bank & Trust Company and others against the Federal Reserve Bank of Atlanta and others. A decree granting plaintiff insufficient relief (280 Fed. 940) was affirmed by the Circuit Court of Appeals (284 Fed. 424), and plaintiffs appeal. Affirmed.

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*Mr. Alexander W. Smith, of Atlanta, Ga., for appellants and petitioners.

Mr. John W. Davis, of New York City, for respondents and appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

After the decision in this case reported in 256 U. S. 350, 41 Sup. Ct. 499, 65 L. Ed. 983, an answer was filed which denied, in large part, the allegations of the bill. Then, by an amended answer, the Federal Reserve Bank disclaimed any intention of demanding payment in cash, when presenting checks at the banks, and averred its willingness to accept payment in drafts, either on the drawee's Atlanta correspondent or on any other solvent bank, if collectible at par. The District Court heard the case upon the evidence. It found that the Federal Reserve Bank was not inspired by any ulterior purpose to coerce or to injure any nonmember bank which refused to remit at par. It found that the evidence was insufficient to sustain any charge that the Federal Reserve Bank was exercising its rights so as to injure or oppress plaintiff banks. And it found, specifically, that the evidence did not sustain the charge that the Federal Reserve Bank accumulated checks upon nonmember country banks until they reached a large amount and then caused the checks to be presented for payment over the counter, in order to compel plaintiff banks to

keep in their vaults so much cash that they would be obliged either to agree to remit at par or to go out of business. With regard to publication on the par list of the names of nonassenting banks, the District Court held that the evidence did not justify a finding that such publication was made in order

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to injure or oppress plaintiff *banks. But it was of opinion that insertion of their names might lead to the belief that the plaintiff banks had agreed to remit at par. An injunction was, therefore, granted against inclusion of their names on the par list. The relief sought was in all other respects denied. The decree left the Federal Reserve Bank free to publish that it would make collection at par of checks upon any bank in any town, thus including those in which plaintiffs had their respective places of business. 280 Fed. 940. These findings were approved by the Circuit Court of Appeals, and the decree was affirmed. 284 Fed. 424.

The case is here on an appeal taken by the plaintiffs. The evidence was conflicting. No adequate reason is shown why the concurrent findings of fact made by the two lower courts should not be accepted by us. *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, 145, 39 Sup. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522. Whether on the undisputed facts plaintiffs were entitled to additional relief is the main question for decision. In order to decide that question it is necessary to consider the course of business formerly prevailing and the changes wrought by the attempt to introduce universal par clearance and collection of checks through the Federal Reserve Banks.

[1] A large part of the checks drawn on country banks are sent to payees who reside in places other than that in which the drawee bank is located. Payment of such a check is ordinarily secured through the payee's depositing it in his local bank for collection. This bank ordinarily used, as the means for presenting the check to the drawee, a clearing house and/or correspondent banks. Formerly when the check was so presented, the drawee ordinarily paid, not in cash, but by a remittance drawn on his balance in some reserve city or by a credit with some correspondent. This process of collection yielded to the country bank a twofold profit. It earned some profit by the small service

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charge called exchange, which *it made for the remittance or the credit. And it earned some profit by using the depositor's money during the period (sometimes weeks) in which the check was traveling the often circuitous route, with many stops, from the payee's bank to its own, and also while the exchange draft was being collected. These avenues to profit are, in large measure, closed by the Federal Reserve Banks' course of action. These banks do not pay any exchange charges to the drawee. And their superior facilities so shorten the time required to collect checks

that the drawee bank's balances available for loans are much reduced. Largely because of the fact that the reserve banks thus make the collection without any deduction for exchange, most checks on country banks are now routed through the reserve banks. Although there is, as the District Court found, no intentional accumulation or holding of checks in order to embarrass, the advantages offered by the Federal Reserve Banks have created a steady flow in increased volume of checks on country banks so routed. That the action contemplated by the Federal Reserve Bank will subject the country banks to certain losses is clear.¹ In order to protect them from the resulting loss it would be necessary to prevent the Federal Reserve Banks from accepting the checks for collection. For these banks cannot be compelled to pay exchange charges or to abandon superior facilities.

[2, 3] The contention is that the injunction should issue, because it is ultra vires the Federal Reserve Banks to collect checks on banks which are not members of the system or affiliated with it, through establishing an exchange balance, and which have definitely refused to assent to clearance at par. It is true that Congress has created in the reserve banks institutions special in character, with

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limited functions and with duties and powers carefully prescribed. Those in respect to the collection of checks are clearly defined. The original act (Act Dec. 23, 1913, c. 6, § 13, 38 Stat. 251, 263) authorized the reserve banks to—

“receive from any of its member banks, and from the United States, deposits of * * * checks * * * upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal Reserve Banks deposits of * * * checks * * * upon solvent member or other Federal Reserve Banks, payable upon presentation.”

By the amendment to section 13 by Act Sept. 7, 1916, c. 461, 39 Stat. 752, the class of checks receivable was extended to “checks payable upon presentation within the district.” By the amendment to section 13 by Act June 21, 1917, c. 32, § 4, 40 Stat. 232, 235, the class of banks from which checks might be received “solely * * * for collection” was extended. Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9796. By the latter amendment the facilities offered by the Federal Reserve Banks were made available also to such nonmembers as became affiliated with the Federal Reserve system by establishing the required balance “to offset items in transit.” It is true, also, that in practice this amendment might result in excluding checks on par-

¹ It is said that introduction of a universal system of par clearance and collection of checks through the Federal Reserve Banks would bring compensatory advantages to the country banks.

ticular banks from the class collectible through the Federal Reserve Banks. For it enacted the clause which prohibits payment of exchange charges by Federal Reserve Banks. And as this prohibition would prevent Reserve Banks from using the usual channels in making collection of checks drawn on those country banks which insist upon exchange charges, the Reserve Bank might find it impossible or unwise, as a matter of banking practice, to collect such checks at all. But the class of checks to which the Reserve Bank's collection service might legally be applied, was left by the amendment as those "payable upon presentation within its district." Wherever collection can be made by the Federal Reserve Bank, without pay-

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ing exchange, neither *the common law, nor the Federal Reserve Act precludes their undertaking it, if it can be done consistently with the rights of the country banks already determined in this case. 256 U. S. 350, 41 Sup. Ct. 499, 65 L. Ed. 983.

Federal Reserve Banks are, thus, authorized by Congress to collect for other Reserve Banks, for members, and for affiliated non-members, checks on any bank within their respective districts, if the check is payable on presentation and can in fact be collected consistently with the legal rights of the drawee without paying an exchange charge. Within these limits Federal Reserve Banks have ordinarily the same right to present a check to the drawee bank for payment over the counter, as any other bank, state or national, would have. For section 4 (38 Stat. 251, 254 [Comp. St. § 9788]) provides that the Federal Reserve Banks shall have power:

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this act and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this act."

[4] The findings of fact negative the charges of wrongful intent and of coercion. The Federal Reserve Bank has formally declared that it is willing, when presenting checks, to accept in payment a draft of the drawee bank upon its Atlanta correspondent or a draft upon any other solvent bank—if collectible at par. Country banks are not entitled to protection against legitimate competition. Their loss here shown is of the kind to which business concerns are commonly subjected when improved facilities are introduced by others, or a more efficient competitor enters the field. It is *damnum absque injuria*. As the course of action contemplated by the Federal Reserve Bank is not *ultra vires*, we need not consider whether lack of power, if it had existed, would have entitled plaintiffs to relief. Compare *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188;

Blair v. Chicago, 201 U. S. 400, 450, 26 Sup. Ct. 427, 50 L. Ed. 801.

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[5-7] *Some minor objections are urged. The Federal Reserve Bank of Atlanta serves, directly, only the Sixth Reserve District, which includes Georgia. It is contended that the decree should be reversed because the District Court refused to allow the intervention as plaintiffs of banks located outside of that district; because that court refused to admit evidence of the activities engaged in by other Federal Reserve Banks in other districts under the approval of the Federal Reserve Board; and because the court admitted certain joint answers to interrogatories propounded under equity rule 58 (33 Sup. Ct. xxxiv). We cannot say that the trial court abused the discretion vested in it, or erred, in so ruling.

Affirmed.

(262 U. S. 649)

FARMERS' & MERCHANTS' BANK OF MONROE, N. C., et al. v. FEDERAL RESERVE BANK OF RICHMOND, VA.

(Argued April 30 and May 1, 1923. Decided June 11, 1923.)

No. 823.

1. Banks and banking ☞288½, New, vol. 11A Key-No. Series—Statute permitting payment of checks in exchange, unless otherwise specified, does not make anything other than gold or silver legal tender.

Laws N. C. 1921, c. 20, § 2, permitting payment of checks in exchange on reserve deposits, when presented through any Federal Reserve Bank, etc., unless the contrary is specified on the face of the check, does not violate Const. U. S. art. 1, § 10, cl. 1, prohibiting a state from making anything except gold or silver a tender in payment of debts, as there is nothing in the federal Constitution prohibiting depositor from consenting to payment by draft, or presumption of consent from absence of dissent.

2. Contracts ☞167—Law subsisting at time or place of making or performance are parts of contract.

Laws which subsist at the time and place of making of a contract, and where it is to be performed, whether affecting its construction, or its enforcement or discharge, are a part thereof, as though expressly referred to or incorporated therein.

3. Banks and banking ☞288½, New, vol. 11A Key-No. Series—Statute as to payment of checks binds payees and holders, whether citizens of state or not, wherever transfer takes place.

Laws N. C. 1921, c. 20, § 2, permitting payment of checks in exchange on reserve deposits when presented through Federal Reserve Banks, etc., unless specified on the face thereof to the contrary, binds the payee and every sub-

sequent holder, whether a citizen of North Carolina or not, and wherever the transfer was made, as holder has no right to require payment under general law, but takes subject to construction, and with rights conferred by the laws of North Carolina, the place of the bank's contract and of performance.

4. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—Statute permitting payment of checks in exchange does not permit payment by bad draft.

In the absence of controlling decision by the state court, Laws N. C. 1921, c. 20, § 2, permitting payment of checks in exchange on reserve deposits, will not be construed as authorizing payment in a bad draft, but only in such exchange drafts as had customarily been used.

5. Constitutional law ⚡296(1)—Statute permitting payment of checks in exchange, when presented through Federal Reserve Banks, does not deny due process.

Laws N. C. 1921, c. 20, § 2, permitting payment of checks in exchange on reserve deposits when presented through Federal Reserve Bank, post office, or express company, and designed to promote the solvency of state banks, is merely an exercise of the police power regulating the banking business, for protection of the public and promotion of the general welfare, and not so extreme as inherently to deny rights protected by the due process clause of the federal Constitution.

6. Constitutional law ⚡212—Legislature may direct police regulation against existing evil, without covering all possible abuses.

A state Legislature may direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses, notwithstanding the equal protection clause of the federal Constitution.

7. Constitutional law ⚡240(1)—Classification by statute permitting payment of checks in exchange, when presented through Federal Reserve Bank, post office, or express company, held warranted.

That a Federal Reserve Bank was undertaking to collect checks at par, whether the drawees assented or not, and, if state banks persisted in their refusal, was presenting them for payment in cash over the counter, justified the classification made by Laws N. C. 1921, c. 20, § 2, permitting payment of checks in exchange on reserve deposits when presented through any Federal Reserve Bank, post office, or express company, or their agents.

8. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—Federal Reserve Bank under no duty to receive checks for collection.

Act Dec. 23, 1913, § 4, and section 13, as amended by Act Sept. 7, 1916, and Act June 21, 1917, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9796), merely confer authority, and impose on Federal Reserve Banks no obligation, to receive checks for collection, especially when drawn on banks which refuse to remit, except on allowance of exchange charges, which Reserve Banks are not permitted to pay.

9. Statutes ⚡227—"May" construed as meaning "shall" only when such construction compelled.

In statutes, the word "may" is sometimes construed as "shall," but only when the con-

text or subject-matter compels such construction.

10. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—Statute permitting payment of checks in exchange does not obstruct any duty or right of Federal Reserve Banks.

No duty or right of a Federal Reserve Bank in the collection of checks is obstructed by Laws N. C. 1921, c. 20, § 2, permitting payment of checks, when presented through Federal Reserve Bank, in exchange on reserve deposits, for which, under section 1, a charge is permitted, unless the contrary is specified on the face of the check.

11. Banks and banking ⚡288½, New, vol. 11A Key-No. Series—Statute permitting payment of checks in exchange not invalid, because preventing Federal Reserve Board from establishing universal par clearance.

Under Act Dec. 23, 1913, §§ 13, 16, as amended by Act Sept. 7, 1916, and Act June 21, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 9796, 9799), and especially in view of the Hardwick Amendment to the act of 1917, no duty is imposed on the Federal Reserve Board to establish a universal system of par clearance and collection of checks, and Laws N. C. 1921, c. 20, § 2, permitting payment of checks in exchange on reserve deposits, for which charge is permitted by section 1, is not invalid as interfering with the performance of such alleged duty.

Mr. Justice Van Devanter and Mr. Justice Sutherland dissenting.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

Suit by the Farmers' & Merchants' Bank of Monroe, N. C., and others, against the Federal Reserve Bank of Richmond, Va. A decree for plaintiffs was reversed by the Supreme Court of North Carolina (183 N. C. 546, 112 S. E. 252), and plaintiffs bring certiorari. Reversed.

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*Messrs. A. W. Smith, of Atlanta, Ga., and John J. Parker, of Charlotte, N. C., for petitioners.

Mr. Henry W. Anderson, of Richmond, Va., for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Legislature of North Carolina provided by section 2 of chapter 20, Public Laws of 1921, entitled "An act to promote the solvency of state banks":

"That in order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this state, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the re-

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serve deposits of said drawee *bank when any such check is presented by or through any Federal Reserve Bank, post office, or express company, or any respective agents thereof."

Section 1 authorizes banking institutions chartered by the state to charge a fee not in

excess of one-eighth of 1 per cent. on remittances covering checks, the minimum fee on any remittance therefor to be 10 cents. Section 4 exempts from the operation of sections 1 and 2 all checks drawn in payment of obligations to the federal or the state government. Whether this statute conflicts with section 13 of the Federal Reserve Act (Act Dec. 23, 1913, c. 6, 38 Stat. 251, 263, as amended by Act Sept. 7, 1916, c. 461, 39 Stat. 752, and Act June 21, 1917, c. 32, § 4, 40 Stat. 232, 234 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9796]) or otherwise with the federal Constitution is the question for decision.

The legislation arose out of the effort of the Federal Reserve Board to introduce in the United States universal par clearance and collection of checks through Federal Reserve Banks. See *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 256 U. S. 350, 41 Sup. Ct. 499, 65 L. Ed. 983. The Federal Reserve Bank of Richmond serves the Fifth Federal Reserve District, which includes North Carolina. Upon the enactment of this statute the bank gave notice that it considered the legislation void under the federal Constitution; that, when presenting checks to North Carolina state banks for payment over the counter, it would refuse to accept exchange drafts on reserve deposits as required by section 2; and that it would return as dishonored checks for which only exchange drafts had been tendered in payment. Some checks were returned thus dishonored, and to enjoin such action this suit was brought in a court of the state by the Farmers' & Merchants' Bank of Monroe and 11 other state banks. Two hundred and seventy-one more joined later as plaintiffs. So far as appears, none of them was a member of the Federal Reserve system or was affiliated with it. The trial court granted a per-

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petual injunction. The Supreme Court of the state reversed the decree (183 N. C. 546, 112 S. E. 252), and the case is here on writ of certiorari (261 U. S. 610, 43 Sup. Ct. 361, 67 L. Ed. —). Defendant admits that, if the North Carolina statute is constitutional, plaintiffs are entitled to an injunction.

To understand the occasion for the statute, its operation, and its effect, the applicable banking practice must be considered.¹ Par clearance does not mean that the payee of a check who deposits it with his bank for collection will be credited in his account with the face of the check if it is collected. His bank may, despite par clearance, make a charge to him for its service in collecting the

check from the drawee bank. It may make such a charge, although both it and the drawee bank are members of the Federal Reserve system; and some third bank which aids in the process of collection may likewise make a charge for the service it renders. Such a collection charge may be made, not only to member banks by member banks, national or state, but it may be made to member banks also by the Federal Reserve Banks for the services which the latter render. The collection charge is expressly provided for in section 16 of the Federal Reserve Act (38 Stat. 268 [Comp. St. § 9799]), which declares that:

"The Federal Reserve Board shall, by rule, fix the charges to be collected by the member banks from its patrons whose checks are cleared through the Federal Reserve Bank and the charge which may be imposed for the service of clearing or collection rendered by the Federal Reserve Bank."

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*Par clearance refers to a wholly different matter. It deals, not with charges for collection, but with charges incident to paying. It deals with exchange. Formerly, checks, except where paid at the banking house over the counter, were customarily paid either through a clearing house or by remitting, to the bank in which they had been deposited for collection, a draft on the drawee's deposit in some reserve city. For the service rendered by the drawee bank in so remitting funds available for use at the place of the deposit of the check, it was formerly a common practice to make a small charge, called "exchange," and to deduct the amount from the remittance. This charge of the drawee bank the Federal Reserve Board planned to eliminate, and in so doing to concentrate in the 12 Federal Reserve Banks the clearance of checks and the accumulation of the reserve balances used for that purpose. The board began by efforts to induce the banks to adopt par clearance voluntarily.² The attempt was not successful. The board then concluded to apply compulsion. Every national bank is necessarily a member of the Federal Reserve system, and every state bank with the requisite qualifications may become such. Over members the board has large powers, as well as influence. The first step in the campaign of compulsion was taken in the summer of 1916, when the board issued a regulation requiring every drawee bank which is a member of the Federal Reserve system to pay without deduction, all checks upon it presented through the mail by the Federal Reserve Bank of the district. The operation of this requirement was at first limited in scope by the fact that the original act (section 13) authorized the Reserve Banks to collect only those checks which were drawn on member banks and which were deposited by a member bank or

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another Reserve *Bank or the United States

¹ See Annual Reports of the Federal Reserve Board, 1914, pp. 19, 20, 174; 1915, pp. 14-17; 1916, pp. 9-12; Regulation I, Series of 1916, p. 169; 1917, pp. 23, 24; Regulation J, Series of 1917, pp. 181-183; 1918, pp. 74-77; 204-206; 810, 811, 817, 821; 1919, pp. 40-44; 222-228; 1920, pp. 63-69; 1921, 63-73; 228-230; Letter from the Governor of the Federal Reserve Board of January 26, 1920, Senate Document No. 184, 66th Congress, 2d Session; also "Par Clearance of Checks," by C. T. Murchison, 1 No. Car Law Review, 133.

² See Report, Federal Reserve Board, 1915, pp. 14-17; Id., 1916, pp. 9-11.

Few of the many state banks had then elected to become members. In September, 1916, section 13 was amended, so as to authorize a Reserve Bank to receive for collection from any member (including other Reserve Banks) also checks drawn upon nonmember banks within its district. Thereby the Federal Reserve Board was enabled to extend par clearance to a large proportion of all checks issued in the United States. But the regulation (J) then issued expressly provided that the Federal Reserve Banks would receive from member banks, at par, only checks on those of the nonmember banks whose checks could be collected by the Federal Reserve Bank at par. It was recognized that nonmembers were left free to refuse assent to par clearance. By December 15, 1916, only 37 of the state banks within the United States, numbering about 20,000, had become members of the system, and only 8,065 of the state banks had assented to par clearance.

Reserve Banks could not, under the then law, make collections for nonmembers. It was believed that if Congress would grant Federal Reserve Banks permission to make collection also for nonmembers, the board could offer to all banks inducements adequate to secure their consent to par clearance. A further amendment to section 13 was thereupon secured by Act of June 21, 1917, c. 32, § 4 (Comp. St. 1918, Comp. Ann. Supp. 1919, § 9796), which provided, among other things, that Federal Reserve Banks:

"Solely for the purposes of exchange or of collection, may receive from any nonmember bank * * * deposits of * * * checks * * * payable upon presentation: * * * Provided, such nonmember bank * * * maintains with the Federal Reserve Bank of its district a balance sufficient to offset the items in transit held for its account by the Federal Reserve Bank."

To this provision, which embodied the legislation proposed by the Federal Reserve

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Board, there was added, *while in the Senate, another proviso, relating to the exchange charge, now known in a modified form as the Hardwick Amendment, which declares:

"That nothing in this or any other section of this act shall be construed as prohibiting a member or nonmember bank from making reasonable charges, to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise; but no such charges shall be made against the Federal Reserve Banks."

Thus a Federal Reserve Bank was authorized to receive for collection checks from nonmembers who maintained with it the prescribed balance, and strenuous efforts were then made to induce all state banks to so arrange. But the law did not compel state

banks to do this. Many refused; and they continued to insist on making exchange charges. On March 21, 1918, the Attorney General (31 Op. Attys., Gen. 245, 251) advised the President:

"The Federal Reserve Act, however, does not command or compel these state banks to forego any right they may have under the state laws to make charges in connection with the payment of checks drawn upon them. The act merely offers the clearing and collection facilities of the Federal Reserve Banks upon specified conditions. If the state banks refuse to comply with the conditions by insisting upon making charges against the Federal Reserve Banks, the result will simply be, so far as the Federal Reserve Act is concerned, that since the Federal Reserve Banks cannot pay these charges they cannot clear or collect checks on banks demanding such payment from them."

The Federal Reserve Board and the Federal Reserve Banks were thus advised that they

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were prohibited from *paying an exchange charge to any bank. But they believed that it was their duty to accept for collection any check on any bank, and that Congress had imposed upon them the duty of making par clearance and collection of checks universal in the United States. So they undertook to bring about acquiescence of the remaining state banks to the system of par clearance.³ Some of the nonassenting state banks made stubborn resistance.⁴ To overcome it the Reserve Banks held themselves out as prepared to collect at par also checks on the state banks which did not assent to par clearance. This they did by publishing a list of all banks from whom they undertook to collect at par, regardless of whether such banks had agreed to remit at par or not. This resulted in drawing to the Federal Reserve Banks for collection the large volume of checks which theretofore had come to the drawee bank by mail from many sources and which had been paid by remittances drawn on the bank's balance in some reserve city. If a state bank persisted in refusal to remit at par, the Reserve Banks caused these checks to be presented, at the drawee bank, for payment in cash over the counter. The practice adopted by the Reserve Banks would, if pursued, necessarily subject country banks to serious loss of income. It would deprive them of their income from

³ North Carolina was placed on the par list on November 15, 1920. There were on January 1, 1921, in the United States, 30,523 banks, state and national. Of these 1,755 state banks had refused to enter the par list. About 250 of the banks so refusing were in North Carolina. During the year 1921 the number which refused to consent to par clearance increased to 2,353. Annual Report of Federal Reserve Board, 1921, p. 71.

⁴ See *American Bank & Trust Co. v. Federal Bank of Atlanta*, supra; *Brookings State Bank v. Federal Reserve Bank of San Francisco* (D. C.) 277 Fed. 430; (D. C.) 231 Fed. 222; *Farmers' & Merchants' Bank of Catlettsburg, Ky., v. Federal Reserve Bank of Cleveland* (D. C.) 236 Fed. 610.

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exchange charges; and it would reduce their income-producing assets by compelling them to keep in their vaults in cash a much larger part of their resources than theretofore. That such loss must result was admitted. That it might render the banks insolvent was clear. But the Federal Reserve Banks insisted that no alternative was left open to them, since they had to collect the checks and were forbidden to pay exchange charges. The state banks denied that the Federal Reserve Banks were obliged to accept these checks for collection, and insisted that Federal Reserve Banks should refrain from accepting for collection checks on banks which did not assent to par clearance.

It was to protect its state banks from this threatened loss, which might disable them, that the Legislature of North Carolina enacted the statute here in question.⁵ It made no attempt to compel the Federal Reserve Bank to pay an exchange charge. It made no attempt to compel a depositor to accept something other than cash in payment of a check drawn by him. It merely provided that, unless the drawer indicated by a notation on the face of the check that he required payment in cash, the drawee bank was at liberty to pay the check by exchange drawn on its reserve deposits. Thus the statute merely sought to remove (when the drawer acquiesced) the absolute requirement of the common law that a check presented at the bank's counter must be paid in cash. It gave the drawee bank the option to pay by exchange only in certain cases, namely, when the check was "presented by or through any Federal Reserve Bank, post of-

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fice or express company, or any respective agents thereof." The option was so limited, because the only purpose of the statute was to relieve state banks from the pressure which, by reason of the common-law requirement, Federal Reserve Banks were in a position to exert and thus compel submission to par clearance. It was expected that depositors would co-operate with their banks and refrain from making the prescribed notation, and that, when the Reserve Banks were no longer in a position to exert pressure by demanding payment in cash, they would cease to solicit, or to receive, for collection checks on nonassenting state banks. Thus these would be enabled to earn exchange charges as theretofore. Such was the occasion for the statute and its purpose. Whether this legislative modification of the common-law rule which requires payment in cash violates the federal Constitution is the

question for decision. That it does is asserted on five grounds.

[1-3] First. It is contended that in authorizing payment of checks by draft on reserve deposits section 2 violates the provision of article I, § 10, clause 1, of the federal Constitution, which prohibits a state from making anything except gold and silver coin a tender in payment of debts. This claim is clearly unfounded. The debt of the bank is solely to the depositor. The statute does not authorize the bank to discharge its obligation to its depositor by an exchange draft. It merely provides that, unless the depositor in drawing the check specifies on its face to the contrary, he shall be deemed to have assented to payment by such a draft. There is nothing in the federal Constitution which prohibits a depositor from consenting, when he draws a check, that payment may be made by a draft. And, as the statute is prospective in its operation (*Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. 134, 32 L. Ed. 491; *Abilene National Bank v. Dolley*, 228 U. S. 1, 5, 33 Sup. Ct. 409, 57 L. Ed. 707), there is no constitutional obstacle to a state's providing that, in the ab-

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sence of *dissent, consent shall be presumed. Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge. See *Ogden v. Saunders*, 12 Wheat. 213, 231, 6 L. Ed. 606; *Von Hoffman v. Quincy*, 4 Wall. 535, 550, 18 L. Ed. 403. If, therefore, the provision of section 2 authorizing payment by exchange draft is otherwise valid, it is binding upon the drawer of the check. Since it binds the drawer, it binds the payee and every subsequent holder, whether he be a citizen of North Carolina or of some other state, and wherever the transfer of the check was made. *Brabston v. Gibson*, 9 How. 263, 13 L. Ed. 131. For the holder of a check has, in the absence of acceptance by the drawee bank, no independent right to require payment under the general law. *Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. Ed. 897. He takes it subject to the construction and with rights conferred by the laws of North Carolina, the place of the bank's contract and of performance. *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254. Compare *Rouquette v. Overmann*, L. R. 10 Q. B. 525.

[4, 5] Second. It is contended that section 2 violates the due process clause. The argument is that defendant is a federal corporation authorized to engage in the business of collecting checks payable upon presentation within the district, a business common to all banking institutions; that the right to engage in this branch of the business is a

⁵ Statutes similar in purpose were enacted in Alabama, Florida, Georgia, Louisiana, Mississippi, South Dakota, and Tennessee. See Annual Report of Federal Reserve Board, 1921, p. 70; Alabama, Gen. & Loc. Acts 1920, No. 35; Florida, Laws 1921, c. 8532; Georgia, Laws 1920, p. 107; Louisiana, Acts 1920, No. 23; Mississippi, Laws 1920, c. 183; South Dakota, Laws 1921, c. 31; Tennessee, Pub. Acts 1921, c. 37.

valuable property right; that while defendant has, in the past, not made any charge for such collections, it has the right to do so, and could make this branch of its business an important source of revenue; that to compel defendant to accept in payment of checks exchange drafts on reserve deposits, whether good or bad, deprives it of liberty of contract, and in effect of an important

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branch *of its business, since that of collecting checks cannot be conducted under such limitations. To this argument the answer is clear. The purpose of the statute, as its title declares, was to promote the solvency of state banks. We should, in the absence of controlling decision of the highest court of the state to the contrary, construe the statute not as authorizing payment in a "bad" draft, but as authorizing payment in such exchange drafts only as had customarily been used in remitting for checks. So construed the statute is merely an exercise of the police power, by which the banking business is regulated for the purpose of protecting the public, and promoting the general welfare. *Noble State Bank v. Haskell*, 219 U. S. 104, 575, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. The regulation here attempted is not so extreme as inherently to deny rights protected by the due process clause. Compare *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549, 567, 568, 31 Sup. Ct. 259, 55 L. Ed. 328; *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 162, 33 Sup. Ct. 66, 57 L. Ed. 164. If the regulation exceeds the state's power to protect the public, it must be because some other provision of the federal Constitution is violated by the means adopted or by the manner in which they are applied.

[8, 7] Third. It is contended that the statute is obnoxious to the equal protection clause. The argument is that the Federal Reserve Bank of Richmond is obliged to accept payment in exchange drafts, whereas other banks with whom it might conceivably compete may demand cash, except in those cases where they present the check through an express company or the post office. It is well settled that the Legislature of a state may (in the absence of other controlling provisions) direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. If the Legislature finds that a particular instrument of trade war is be-

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ing used *against a policy which it deems wise to adopt, it may direct its legislation specifically and solely against that instrument. *Central Lumber Co. v. South Dakota*, supra, 226 U. S. p. 160, 33 Sup. Ct. 66, 57 L. Ed. 164. If it finds that the instru-

ment is used only under certain conditions, or by a particular class of concerns, it may limit its prohibition to the conditions and the concerns which it concludes alone menace what it deems the public welfare. The facts recited above disclose ample ground for the classification made by the Legislature. Hence, there was no denial of equal protection of the law. There remains to consider whether section 2 exceeds the state's power, because Congress has imposed specifically upon Federal Reserve Banks duties, the performance of which section 2 obstructs, and that in this way, it conflicts with the Federal Reserve Act. This is the ground on which the invalidity of the North Carolina act has been most strongly assailed.

[8-10] Fourth. One contention is that section 2 conflicts with the Federal Reserve Act, because it prevents the federal reserve banks from collecting checks of such state banks as do not acquiesce in the plan for par clearance. The argument rests on the assumption that the Federal Reserve Bank of Richmond is obliged to receive for collection any check upon any North Carolina state bank, if such check is payable upon presentation, and is obliged to collect the same at par without allowing deductions for exchange or other charge. But neither section 13, nor any other provision of the Federal Reserve Act, imposes upon reserve banks any obligation to receive checks for collection. The act merely confers authority to do so. The class of cases to which such authority applies was enlarged from time to time by Congress. But in each amendment, as in section 13, the words used were "may receive"—words of authorization merely. It is true that in statutes the word "may" is sometimes construed as "shall." But that is where the context, or the sub-

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ject-matter, compels *such construction. *Supervisors v. United States*, 4 Wall. 435. Here it does not. This statute appears to have been drawn with great care. Throughout the act the distinction is clearly made between what the board and the Reserve Banks "shall" do and what they "may" do.*

* In the original Federal Reserve Act (38 Stat. 251) "may" is used in sections 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 21, 22, 24, 25, 26, 28. "Shall" is used in those sections and also in sections 1, 6, 7, 20, 23, 27, 29. Thus: Section 2: "The Secretary * * * shall designate * * * cities to be known as Federal Reserve cities, and shall divide the continental United States * * * into districts. * * * The districts * * * may be readjusted. * * * Such districts shall be known as Federal Reserve Districts and may be designated by number." Section 3: "Each Federal Reserve Bank shall establish branch banks within the Federal Reserve District in which it is located and may do so in the district of any Federal Reserve Bank which may have been suspended." Section 5: "Outstanding capital stock shall be increased * * * as member banks increase their capital stock * * * and may be decreased as member banks reduce their capital stock. * * *" Section 13: "* * * May receive * * * deposits * * * may discount * * * shall at no time exceed." Section 16: "Every Federal Reserve

Moreover, even if it could be held that the Reserve Banks are ordinarily obliged to collect checks for authorized depositors, it is clear that they are not required to do so where the drawee has refused to remit except upon allowance of exchange charges which Reserve Banks are not permitted to pay. There is surely nothing in the act to indicate that Reserve Banks must undertake the collection of checks in cases where it is impossible to obtain payment except by incurring serious expense, as, in presenting checks by special messenger at a distant point. Furthermore, the checks which the act declares Reserve Banks may receive for collection are limited to those "payable on presentation." The expression would seem to imply that the checks must be payable either in cash or in such funds as are

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deemed by the Reserve Bank to be *an equivalent. A check payable at the option of the drawee by a draft on distant reserves would seem not to be within the limited class of checks referred to in the act. The argument for the Federal Reserve Bank is not helped by reference to the incidental power conferred by section 4. It is only "such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this [the Federal Reserve] Act" which are granted. No duty or right of the Federal Reserve Bank to collect checks is obstructed by the North Carolina statute, which merely gives to the drawee bank the right to pay in the customary exchange draft, where its depositor has, by the form used in drawing the check, consented that this be done.

[11] Fifth. The further contention is made that section 2 conflicts with the Federal Reserve Act, because it interferes with the duty of the Federal Reserve Board to establish in the United States a universal system of par clearance and collection of checks. Congress did not in terms confer upon the Federal Reserve Board or the Federal Reserve Banks a duty to establish universal par clearance and collection of checks, and there is nothing in the original act or in any amendment from which such duty to compel its adoption may be inferred. The only sections which in any way deal either with clearance or collection are 13 and 16. In neither section is there any suggestion that the Reserve Board and the Reserve Banks shall become an agency for universal clearance. On the contrary, section 16 strictly limits the scope of their clearance functions. It provides that the Federal Reserve Board—

"may at its discretion exercise the functions of a clearing house for such Federal Reserve Banks, * * * and may also require each such bank to exercise the functions of a clearing house for its member banks."

Bank shall maintain reserves. * * * "Every Federal Reserve Bank shall receive on deposit."

There is no reference whatever to "par" in section 13, either as originally enacted or

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as amended from time to time. *There is a reference to "par" in section 16; and it is so clear and explicit as to preclude a contention that it has any application to nonmember banks, or to the ordinary process of check collection here involved. Section 16 (38 Stat. 268) declares:

"Every Federal Reserve Bank shall receive on deposit at par from member banks or from Federal Reserve Banks checks and drafts drawn upon any of its depositors, and when remitted by a Federal Reserve Bank, checks and drafts drawn by any depositor in any other Federal Reserve Bank or member bank upon funds to the credit of said depositor in said reserve bank or member bank. Nothing herein contained shall be construed as prohibiting a member bank from charging its actual expense incurred in collecting and remitting funds or for exchange sold to its patrons."

The depositors in a Federal Reserve Bank are the United States, other Federal Reserve Banks, and member banks. It is checks on these depositors which are to be received by the Federal Reserve Banks. These checks from these depositors the Federal Reserve Banks must receive. And when received they must be taken at par. There is no mention of nonmember banks in this section. When, in 1916, section 13 was amended to permit Federal Reserve Banks to receive from member banks solely for collection other checks payable upon presentation within the district and when, in 1917, section 13 was again amended to permit such receipt solely for collection also from certain nonmember banks, section 16 was left in this respect unchanged. In other respects section 16 was amended both by the act of 1916 and by the act of 1917. The natural explanation of the omission to amend the provision in section 16 concerning clearance is that the section has no application to nonmember banks, even if affiliated.

Moreover, the contention that Congress has imposed upon the Board the duty of es-

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tablishing universal par *clearance and collection of checks through the Federal Reserve Banks is irreconcilable with the specific provision of the Hardwick Amendment which declares that even a member or an affiliated nonmember may make a limited charge (except to Federal Reserve Banks) for "payment of checks and * * * remission therefor by exchange or otherwise." The right to make a charge for payment of checks, thus regained by member and preserved to affiliated nonmember banks, shows that it was not intended, or expected, that the Federal Reserve Banks would become the universal agency for clearance of checks. For, since against these the final clause pro-

bhibited the making of any charge, then if the Reserve Banks were to become the universal agency for clearance, there would be no opportunity for any bank to make as against any bank a charge for the "payment of checks." The purpose of Congress in amending section 13 by the act of 1917 was to enable the Board to offer to nonmember banks the use of its facilities which it was hoped would prove a sufficient inducement to them to forego exchange charges, but to preserve in nonmember banks the right to reject such offer,⁷ and to protect the interests of member and affiliated nonmember banks (in competition with the nonaffiliated state banks) by allowing also those connected with the federal system to make a reasonable exchange charge to others than the reserve banks. The power of the Federal Reserve Board to establish par clearance was, thus, limited by the unrestricted right of unaffiliated nonmember banks to make a charge for

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exchange and the restricted right of members and affiliated nonmembers to make the charge therefor fixed as reasonable by the Federal Reserve Board. No bank could make such a charge against the Federal Reserve Banks—because these were prohibited from paying any such charge. Member and nonmember affiliated banks, because they were such, performed the service for the Federal Reserve Banks without charge. Unaffiliated nonmember banks were under no obligation to do so. Thus construed, full effect may be given to all clauses in the Hardwick Amendment as enacted. It in no way interferes with the right of a depositor in a nonaffiliated state bank to agree with his bank that the checks which he might draw should (unless otherwise indicated on their face) be payable, at the option of the drawee, in exchange in certain cases.

The North Carolina statute here in question does not obstruct the performance of any duty imposed upon the Federal Reserve Board and the Federal Reserve Banks. Nor does it interfere with the exercise of any power conferred upon either. It is therefore consistent with the Federal Reserve Act and with the federal Constitution.

Reversed.

Mr. Justice VAN DEVANTER and Mr. Justice SUTHERLAND dissent.

⁷ The Governor of the Federal Reserve Board stated in his letter to the Senate, January 26, 1920, Sen. Doc. 134, 66th Cong. 2d Session, p. 6: "That a relatively small number of nonmember banks should not want to become members of the clearing system, or should not want to remit at par is, of course, their own concern, and the Federal Reserve Board and the Federal Reserve Banks have not and will not dispute their right to decline to do so."

COMMONWEALTH OF PENNSYLVANIA v.
STATE OF WEST VIRGINIA.¹

STATE OF OHIO v. SAME.

(Reargued April 20, 1923. Decided June 11, 1923.)

Nos. 15, 16.

1. Commerce ⇨16—Surface owner, reducing gas to possession, becomes its owner, and it becomes subject of commerce.

When surface owner reduces natural gas to possession through drilling, he becomes its owner, and it becomes a subject of commerce, like any product of the forest, field, or mine.

2. Courts ⇨321—Suit by state to enjoin another state from enforcing law compelling gas companies to prefer consumers within the defendant state involves justiciable "controversy between states."

A suit by a state, in behalf of itself as a large consumer of gas and as representative of consumers within the state, to enjoin another state from enforcing a law in effect requiring companies handling natural gas to prefer consumers within the latter state to those receiving the supply through interstate commerce, on the ground that it constitutes a forbidden interference with interstate commerce, involves a justiciable "controversy between states," within the judiciary article of the Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Controversy between states.]

3. Constitutional law ⇨67—Whether state's withdrawal of article from interstate commerce is interference with such commerce is judicial question.

The question whether a state may withdraw a natural product, such as natural gas, from interstate commerce, by requiring companies handling it to prefer local consumers, is essentially a judicial question, and no less so in suits between states than in suits between private parties.

4. Courts ⇨321—State has recognized interest in withdrawal of gas jeopardizing health, comfort, and welfare of substantial portion of population.

Where withdrawal from interstate commerce of natural gas will jeopardize health, comfort, and welfare of private consumers within a state, constituting a substantial portion of its population, the state, as the representative of the public, has an interest apart from that of the individuals affected, which is not merely remote or ethical, but immediate and recognized by law.

5. Injunction ⇨12—Consummation of threatened injury not required, when injury certainly impending.

One does not have to await the consummation of threatened injury to obtain preventive relief, and it is enough that the injury is certainly impending.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ Rehearing granted 263 U. S. —, 44 Sup. Ct. 4, 68 L. Ed. —.

6. Injunction ⚡112—**Suit to enjoin statute interfering with interstate commerce in natural gas held not premature.**

The demand for natural gas produced in West Virginia being such that more cannot be supplied to consumers within that state without curtailing the supply of consumers in other states, Acts W. Va. 1919, c. 71, requiring companies handling such gas to supply all consumers in the section in which it is produced, through which it is transported, or in which it is supplied to others, and containing procedural, penal, and remedial provisions adequate to compel retention within the state of whatever gas may be required to meet local needs, would directly and immediately work curtailment of the volume of gas moving in interstate commerce, and a suit to enjoin its enforcement was not premature, though brought before any action had been taken by the Public Service Commission, or before it had been tested in actual practice.

7. Injunction ⚡114(3)—**In suit restraining state from interfering with interstate commerce in natural gas, pipe line companies held not necessary parties.**

In a suit by a state to enjoin another state from enforcing a statute compelling companies handling natural gas to prefer local customers over interstate customers, pipe line companies, against whom the complainant state makes no complaint and seeks no relief, and who will evidently continue to supply gas, if not restrained or prevented, are not necessary parties.

8. Injunction ⚡114(3)—**In suit against state to enjoin interference with interstate commerce in natural gas, consumers held not necessary parties.**

In suit to enjoin a state from enforcing a statute requiring companies handling natural gas to prefer local consumers over interstate consumers, such local consumers are represented by the state, and need not be brought in or specially represented.

9. Commerce ⚡16 — **Statute preventing or burdening interstate transmission of natural gas is prohibited interference with "interstate commerce."**

Natural gas is a lawful article of commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce, and a law of the state where it is produced, or where it is to be sold, which, by its necessary operation, prevents, obstructs, or burdens such transmission, is a prohibited interference with interstate commerce, under Const. art. 1, § 8, cl. 3.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate commerce.]

10. Commerce ⚡57—**Statute requiring companies handling natural gas to prefer local consumers held prohibited interference with interstate commerce.**

The demand for natural gas produced in West Virginia being such that more cannot be supplied to local consumers without curtailing the supply to consumers in other states, Acts W. Va. 1919, c. 71, in effect compelling persons or companies handling natural gas to prefer

local consumers to interstate consumers, constitutes a prohibited interference with interstate commerce.

11. Commerce ⚡57 — **That pipe line companies engaged in quasi public business gives state no right to require subordination of interstate or local business.**

That pipe line companies engaged in supplying natural gas to the public in West Virginia, and also transporting it in interstate commerce, are engaged in business of a quasi public character, gives the state no right to interfere with interstate commerce by requiring such companies to subordinate their interstate business, built up with the encouragement and sanction of the state, to the local business within the borders of the state, where the supply is insufficient to meet the needs of both, as the supply of gas necessarily limits the power of the state to require adequate service.

12. Commerce ⚡12—**State cannot regulate interstate commerce in natural gas because supply is waning.**

That natural gas produced in West Virginia has become a necessity therein, and that the supply is waning and no longer sufficient to satisfy the needs of local consumers, if consumers in other states are also supplied, affords no ground for assumption by the state of power to regulate interstate commerce by compelling pipe line companies to prefer local consumers to interstate consumers, on the theory that it is a legitimate measure of conservation in the interest of the people of the state.

13. Injunction ⚡22—**May be granted against unconstitutional interference with interstate commerce in natural gas, though court cannot regulate apportionment and use of the gas.**

An injunction may be granted against enforcement by a state of a statute requiring pipe line companies handling natural gas to prefer local to interstate consumers, though the court cannot prescribe and execute regulations respecting the apportionment and use of the gas among the different states involved.

Mr. Justice Holmes, Mr. Justice McReynolds, and Mr. Justice Brandeis, dissenting.

Original suits by the Commonwealth of Pennsylvania and by the State of Ohio against the State of West Virginia. Decrees for complainants.

See, also, 257 U. S. 620, 42 Sup. Ct. 187, 66 L. Ed. 401.

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*Messrs. John W. Davis, of New York City, John G. Price and Freeman T. Eagleson, both of Columbus, Ohio, R. G. Altizer, of Charleston, W. Va., and Edward E. Corn, of Ironton, Ohio, for the State of Ohio.

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*Messrs. G. M. Hoffheimer, of Clarksburg, W. Va., E. T. England and Fred O. Blue, both of Charleston, W. Va., Philip P. Steptoe, of Clarksburg, W. Va. and W. S. John, of Morgantown, W. Va., for the State of West Virginia.

Messrs. Geo. E. Alter, of Pittsburgh, Pa., W. I. Schaffer, of Chester, Pa., and A. Leo

Weil, of Pittsburgh, Pa., for the Commonwealth of Pennsylvania.

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*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

These are suits, one by the commonwealth of Pennsylvania and the other by the state of Ohio, to enjoin the state of West Virginia from enforcing an act passed by her Legislature (Acts 1919, c. 71) which the complainants believe will largely curtail or cut off the supply of natural gas heretofore and now carried by pipe lines from West Virginia into their territory and there sold and used for fuel and lighting purposes. Although distinct, the suits are so much alike that they have been presented at the bar substantially as a single case. They will be dealt with accordingly in this opinion.

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*The West Virginia act is set forth at length in the margin.¹ The complainants challenge its validity on the ground that it directly interferes with interstate commerce and there-

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fore contravenes the commerce clause of *the Constitution of the United States (article 1, § 8, cl. 3), and they rest their right to relief on the grounds that to enforce the act will subject them to irreparable injury in respect of

¹ The act was passed February 10, 1919, went into effect May 11, 1919, and reads as follows:

"Section 1. That every person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for public use, or for the use of the public, or any part of the public, whether for domestic, industrial or other consumption, within this state, shall to the extent of his supply of said gas produced in this state (whether produced by such person or by any other person), furnish for public use within the territory of this state, and for the use of the public and every part of the public within the territory of this state, in or from which such gas is produced, or through which said gas is transported, or which is served by such person, a supply of natural gas reasonably adequate for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed or desired to be consumed by the public, or any part of the public, within said territory in this state, and for which said consumer or consumers therein shall apply and be ready and willing to make payment at lawful rates.

"Sec. 2. That in case any person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for public use within this state, or for the use of the public or any part of the public within this state, shall have a production or supply of natural gas which is, or probably will be, insufficient to furnish for such use, (for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed by the public or any part of the public), within the territory in this state served by such person, then and in that event the public service commission shall have authority, and the same is hereby conferred on it, upon the application of any such person or any of his consumers within this state and after due hearing upon notice and proof to the satisfaction of the commission that public convenience and necessity so require, to order any other person engaged in furnishing or required by law (whether statutory or common law) to furnish, natural gas for public use within this state, and producing or furnishing natural gas for public use in said territory or transporting the same through said territory, to furnish to such person having such insufficient production or supply, natural gas for the pur-

many of their public institutions and govern-

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mental agencies, which *long have been and now are using this gas, and will subject them to further and incalculable injury, in that (a) it will imperil the health and comfort of thousands of their people who use the gas in

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their homes and are largely *dependent thereon; and (b) will halt or curtail many industries which seasonally use great quantities of the gas and wherein thousands of persons are employed and millions of taxable wealth are invested.

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*The conditions out of which the suits have arisen and the facts material to their disposal are as follows:

[1] Natural gas is found at pronounced depths in porous strata—usually sand rock—constituting a natural reservoir, and is brought to the surface and reduced to possession through wells drilled into the containing strata. When a surface owner thus reduces it to possession he becomes its owner, and it becomes a subject of commerce, like any product of the forest, field, or mine. In the inclosing strata it is under great pressure, called rock pressure, which causes it to flow out rapidly when the strata are penetrated. If one surface owner drills wells and

pose of supplying such deficiency, at and during such times, upon and at such just and reasonable terms, conditions and rates, and in such amounts, as the commission shall prescribe. And whenever, after such hearing upon notice and proof, the commission shall determine that public convenience and necessity so require, the commission shall have authority to provide for and compel the establishment of a reasonable physical connection or connections between the lines, pipes or conduits of such person having such excess supply of gas and the lines, pipes or conduits of the person having such deficiency of supply, and to require the laying and construction of such reasonable extensions of lines, pipes or conduits as may be necessary for the establishment of such physical connection or connections, and to ascertain, determine and fix the just and reasonable terms and conditions of such connection or connections, including just and reasonable rules and regulations and provisions for the payment of the costs and expense of making the same or for the apportionment of such cost and expense as may appear just and reasonable: Provided, however, that no person shall, by virtue of this section, be ordered to furnish natural gas to any other person so engaged in furnishing, or required by law to furnish, natural gas for public use, except to the extent that the person so ordered to furnish natural gas shall, at the time, have a production or supply of natural gas in excess of the quantity sufficient to furnish a reasonably adequate supply to his consumers within the state; nor shall any person, by virtue of this section, be ordered to furnish natural gas to any other person so engaged in furnishing or required by law to furnish, natural gas for public use in a territory within the state, if and when the said person having said excess shall, to the extent of such excess, be ready and willing to furnish, and within such time as the commission shall prescribe shall actually furnish, to the consumers within said territory a reasonably adequate supply of natural gas.

"Sec. 3. That in so far as the same shall not be in conflict with this act, all of the authority, powers, jurisdiction and duties conferred and imposed on the public service commission by the act entitled, 'An act to create a public service commission and to prescribe its powers and duties, and to pre-

begins to draw off the gas, others desiring to exercise their common right must take the same course, for otherwise the gas under their lands may be drained out by those wells. After the gas is drawn from the inclosing strata there is no practicable mode of storing and holding it. It must be used promptly. Its chief use consists in producing heat and light by burning it. The points of use generally are in centers of population or of industry more or less remote from the places of production. The intervening transmission is effected through pipe lines. The normal rock pressure will carry the gas considerable distances and when that pressure wanes or is inadequate it can be supplemented by using compressors.

In West Virginia the production of natural gas began as much as 30 years ago and for the last 14 years has been greater than in any other state. The producing fields include 32 of her 55 counties. At first the gas was produced only in the course of oil operations, was regarded as a nuisance and was permitted to waste into the air. But it soon came to be regarded as valuable for heating and lighting, and the economy and convenience attending its use made it a preferred fuel. Its

use within the state became relatively general, but was far less than the production, so

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the producers turned *to neighboring states, notably Pennsylvania and Ohio, for a further market.

West Virginia sanctioned that effort. She permitted the formation under her laws of corporations for the purpose of constructing pipe lines from her gas fields into other states and carrying gas into the latter and there selling it; she also permitted corporations of other states to come into her territory for that purpose; and she extended to all these companies the use of her power of eminent domain in acquiring rights of way for their pipe lines. In no way did she then require, or assert any power to require, that consumers within her limits be preferred over consumers elsewhere. The effort to find a further market succeeded, and the gas came to be extensively carried into Pennsylvania as far as Pittsburgh, and into Ohio as far as Cleveland, Toledo, and Cincinnati. In that way the entire production was made of value to the producers. Landowners and lessees in the gas fields were greatly benefited and the taxable wealth of the state was largely increased. Approximately \$300,000,000 were

scribe penalties for the violations of the provisions of this act,' passed February twenty-first, one thousand nine hundred and thirteen, as amended by the act entitled, 'An act to amend and re-enact sections one, two, three, four, five, nine, ten, fourteen, fifteen and twenty-two, of chapter nine of the Acts of one thousand nine hundred and thirteen, creating a public service commission, prescribing its powers and duties, and penalties for violation of the provisions of said chapter, and to add thereto six sections to be known as sections twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, enlarging the powers and duties of said public service commission, prescribing additional penalties and giving to the commission power to punish for contempt,' passed February tenth, one thousand nine hundred and fifteen, are hereby conferred and imposed on the public service commission in respect to the subject-matter of this act, or any other part thereof.

"Sec. 4. That in case of violation of any provision of this act any person aggrieved or affected thereby may complain thereof to the public service commission in like manner, and thereupon such procedure shall be had, as is provided in respect to other complaints to or before said commission, and all such proceedings and remedies may be taken or had for the enforcement or review of the order or orders of said commission, and for the punishment of the violation of such order or orders, as are provided by law in respect to other orders of said commission. In case of the violation of any provision of this act, the public service commission, or any person aggrieved or affected by such violation, in his own name, may apply to any court of competent jurisdiction by a bill for injunction, petition for writ of mandamus or other appropriate action, suit or proceeding, to compel obedience to and compliance with this act, or to prevent the violation of this act, or any provision thereof, pending the proceedings before said commission, and thereafter until final determination of any action, suit or proceeding for the enforcement or review of the final order of said commission; and such court shall have jurisdiction to grant the appropriate order, judgment or decree in the premises.

"Sec. 5. That if any person subject to the provisions of this act shall fail or refuse to comply

with any requirement of the commission hereunder, such person shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars for each offense; and such person, or the officers of the corporation, where such person is a corporation, may be indicted for their failure to comply with any requirement of the commission under the provisions of this act, and upon conviction thereof, may be fined not to exceed five hundred dollars, and in the discretion of the court, confined in jail not to exceed thirty days. Every day during which any person, or any officer, agent or employee of such person, shall fail to observe and comply with any order or direction of the commission, or to perform any duty enjoined by this act, shall constitute a separate and distinct violation of such order or direction of this act, as the case may be.

"Sec. 6. That any person claiming to be damaged by any violation of this act may bring suit in his own behalf for the recovery of the damage from the person or persons so violating the same in any circuit court having jurisdiction. In any such action the court may compel the attendance of the person or persons against whom said action is brought, or any officer, director, agent or employee of such person or persons, as a witness, and also require the production of all books, papers and documents which may be useful as evidence, and in the trial thereof such witness may be compelled to testify, but any such witness shall not be prosecuted for any offense concerning which he is compelled hereunder to testify.

"Sec. 7. That the word 'person' within the meaning of this act shall be construed to mean, and to include, persons, firms and corporations.

"Sec. 8. That the sections, provisions and clauses of this act shall be deemed separable each from the other, and also in respect to the persons, firms, corporations and consumers mentioned therein or affected thereby, and if any separable part of this act be, or be held to be unconstitutional or for any reason invalid or unenforceable, the remaining parts thereof shall be and remain in full force and effect.

"Sec. 9. That all acts and parts of acts in conflict with this act are hereby repealed."

invested in the business—fully one-half in West Virginia. More than 7,000 miles of the pipe lines are in that state—2,000 miles being trunk lines.

Some of the pipe lines reach from the producing fields to the areas of consumption in Pennsylvania and Ohio. Some connect at or near the state line with others leading to the consuming areas. All are so operated that there is a continuous flow of gas from points of production to points of use. Branch lines divert some of the gas at intervening points, but without changing the general flow. Several lines cross and recross the state boundary repeatedly.

The pipe lines are all operated as public utilities, that is, in supplying gas to the public, and this is true in Pennsylvania and Ohio as well as in West Virginia. The lines long have been and now are supplying gas to

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the *three states for use in their charitable, educational, and penal institutions, to their counties and municipalities for use in county, city, and school buildings, to local utilities serving particular communities, to the people generally in many cities and towns for use in their homes, places of business, and offices, and, in seasons when there is an adequate supply, to industrial plants for use in their operation. The predominant use is for fuel purposes; that for lighting being relatively small. All gas going into Pennsylvania and Ohio is carried and supplied under prior engagements respecting its disposal—most of it under long time contracts exacted or preferred by the purchasers or consumers.

Experience in other gas fields has shown that multiplied and prolonged drafts on the natural supply will exhaust it. Since 1916 it has been apparent that the older portions of the West Virginia fields are approaching exhaustion and that production in those fields has reached and passed its maximum. The newer portions, however, in the judgment of informed operators, will make the fields commercially productive for several years more.

Latterly during the colder months—from November 1 to May 1—the combined needs of domestic and industrial consumers have been largely in excess of the production, and the pipe line companies generally have adopted and are pursuing the policy of preferring domestic consumers during those months. All the long-time contracts contain provisions admitting of such a preference. During other months, when there is little occasion for heating homes and offices, the needs of domestic consumers drop so materially that much gas may be and is supplied for industrial use without affecting the domestic use. But increased population, enlarged industry—particularly in West Virginia—and the advantages inhering in the gas as a fuel have finally resulted in a gross demand, which cannot

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be satisfied even in the *summer months. The present actual consumption is all that the production will sustain. The pipe line

companies cannot supply more gas in West Virginia without cutting down what they carry into Pennsylvania and Ohio; nor can they carry more into Pennsylvania and Ohio without cutting down what they supply in West Virginia. In short, the situation is such that to constrain the companies to supply more gas in any one of the three states necessarily will constrain them to supply less in the other two.

In 1918, 265 billion cubic feet of gas were produced in West Virginia, 38 billion were consumed within the state without becoming available to the public, and 227 billion became available in the hands of the pipe line companies. The companies supplied 70 billion to consumers in the state and carried 157 billion to consumers outside. They also brought 4 billion into the state from gas fields outside and to that extent enlarged the amount supplied to local consumers. Of that amount, 21 billion went into domestic use and 53 billion into industrial use. The major part of the gas carried into Pennsylvania went to industrial consumers, and the major part of that carried into Ohio went to domestic consumers.

The gas carried outside the state is sold for more than that used therein, but this naturally would be so, considering the additional pipe lines, compressors, and labor employed in the longer transmission. The proportion marketed beyond the state has not varied much. It now is practically what it was 10 years ago. Nor has there been any discrimination against consumers inside the state. They have been dealt with on the same plane as others. The companies have declined to quit the existing service to communities and consumers outside and to serve only those inside, but there is nothing invidious in this. It is in the line of fair treatment rather than discrimination.

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*The gas carried into Pennsylvania and Ohio, respectively, and there supplied to the state and her municipal agencies for strictly public use, is not negligible, but amounts to billions of cubic feet per year. It is the fuel with which food is cooked and water heated for thousands of dependents in charitable and penal institutions, with which hundreds of schoolhouses are heated and made comfortable for thousands of children, and with which municipal waterworks are operated in several cities, notably Cincinnati and Toledo. The heating and other appliances have been adjusted to its use, and to make the changes incident to substituting other fuel would involve an expenditure in each state of a very large sum of public money.

In Pennsylvania the gas is used by 300,000 domestic consumers caring for 1,500,000 people, and in Ohio by 725,000 domestic consumers caring for 3,625,000 people. This is where no other natural gas service is avail-

able. To change to other fuel would require an adjustment of heating and cooking appliances at an average cost of more than \$100 for each domestic consumer, or an aggregate cost exceeding \$30,000,000 in Pennsylvania and \$72,500,000 in Ohio.

The act whose enforcement is sought to be enjoined was passed by the Legislature of West Virginia February 10, 1919, and went into effect May 11th following.² These suits were brought eight days thereafter, by direction of the Legislatures of the complainant states, and by leave of this court. Interlocutory injunctions were prayed and granted at the outset and are still in force.

Three questions bearing on the propriety of entertaining the suits were raised soon

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after the suits were begun, *and consideration of them was postponed to the final hearing.

[2, 3] The first question is whether the suits involve a justiciable controversy between states in the sense of the judiciary article of the Constitution. We are of opinion that they do and that every element of such a controversy is present.

Each suit presents a direct issue between two states as to whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other. The complainant state asserts and the defendant state denies that such a withdrawal is an interference with interstate commerce forbidden by the Constitution. This is essentially a judicial question. It concededly is so in suits between private parties, and of course its character is not different in a suit between states.

What is sought is not an abstract ruling on that question, but an injunction against such a withdrawal presently threatened and likely to be productive of great injury. The purpose to withdraw is shown in the enactment of the defendant state before set forth and is about to be carried into effect by her officers acting in her name and at her command. The state is the principal, and the action of her officers rightly may be imputed to her, even though a suit for an injunction might lie against them.

The attitude of the complainant states is not that of mere volunteers, attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a twofold interest—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly

affected. Both interests are substantial and both are threatened with serious injury.

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*Each state uses large amounts of the gas in her several institutions and schools—the greater part in the discharge of duties which are relatively imperative. A break or cessation in the supply will embarrass her greatly in the discharge of those duties and expose thousands of dependents and school children to serious discomfort, if not more. To substitute another form of fuel will involve very large public expenditures.

[4] The private consumers in each state not only include most of the inhabitants of many urban communities but constitute a substantial portion of the state's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.

In principle these views have full support in prior decisions, such as *Missouri v. Illinois*, 180 U. S. 208, 241, 21 Sup. Ct. 331, 45 L. Ed. 497, Id., 200 U. S. 496, 518, 26 Sup. Ct. 268, 50 L. Ed. 572; *Kansas v. Colorado*, 185 U. S. 125, 141-143, 22 Sup. Ct. 552, 46 L. Ed. 838; Id., 206 U. S. 46, 95-99, 27 Sup. Ct. 655, 51 L. Ed. 956; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488; *New York v. New Jersey*, 256 U. S. 296, 301, 41 Sup. Ct. 492, 65 L. Ed. 937; and *Wyoming v. Colorado*, 259 U. S. 419, 464, 42 Sup. Ct. 552, 66 L. Ed. 999. The defendant state relies on such cases as *New Hampshire v. Louisiana*, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656; *Louisiana v. Texas*, 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347; *Kansas v. United States*, 204 U. S. 331, 27 Sup. Ct. 388, 51 L. Ed. 510; *Oklahoma v. Atchison, Topeka & Santa Fé Ry. Co.*, 220 U. S. 277, 31 Sup. Ct. 434, 55 L. Ed. 465, and *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 162, 42 Sup. Ct. 261, 66 L. Ed. 531; but the facts on which they turned, as the opinions show, were so widely different from those here that they are not in point.

[5, 6] The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commis-

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sion; nor *had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant states apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.

² Under the state Constitution the act went into effect on the expiration of 90 days after its "passage" by the Legislature, as distinguished from its approval by the Governor. *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

Turning to the act, we find that by its first section it lays on every pipe line company a positive duty—to the extent of its supply of gas produced in the state, whether produced by it or others—to satisfy the needs, whether for domestic, industrial or other use, of all intending consumers, whether old or new, who are willing to pay for the gas and want it for use within the section of the state in which it is produced, in that through which it is transported, or in that wherein it is supplied to others. This is a substantive provision, whose terms are both direct and certain, and to which immediate obedience is commanded. No order of the commission is required to give it precision or make it obligatory, and it leaves nothing to the discretion of those who are to enforce it. On the contrary, it prescribes a definite rule of conduct and in itself puts the rule in force. It imposes an unconditional and mandatory duty, as counsel for the state admit, and obviously is intended to enforce a preferred recognition and satisfaction of the needs of consumers within the state, present and prospective, regardless of the effect on the interstate stream or on consumers outside the state.

The second section invests the commission with authority—on finding after notice and hearing that a company supplying gas for local needs is or probably will be without an adequate supply for the purpose—to order another company having gas in excess of what is required for its “consumers within

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this state” to furnish *the company whose supply is or will be inadequate with gas to make up the deficiency, or in the alternative to undertake itself to supply such local needs “to the extent of such excess.” This provision, like the first, shows the purpose to give local consumers, present and prospective, a preferred status and to permit surplus gas only to be carried into other states.

The fourth section empowers the commission to entertain complaints by persons aggrieved or affected by any “violation” of the act and to require that the violation be discontinued and the act obeyed, subject to a right of review in the courts, and also provides means of compelling obedience to the act pending the proceedings before the commission and until the decision on review.

Other sections contain penal and remedial provisions designed to make those just described effective. One in the fifth section declares that “every day” during which any company, or any of its officers, agents or employees, “shall fail to observe and comply with any order or direction of the commission, or to perform any duty enjoined by this act, shall constitute a separate and distinct violation.” Another in the sixth section subjects any company violating the act to an ac-

tion for damages by any one claiming to have been wronged by the violation.

We regard it as entirely clear that the act is intended to compel the retention within the state of whatever gas may be required to meet the local needs for all purposes, and that its procedural, penal and remedial provisions are amply adequate to accomplish that result. And we think it equally clear from the allegations in the bills now established by the evidence, that the situation when the suits were brought was such that the act directly and immediately would work a large curtailment of the volume of gas moving into the complainant states. Indeed, the conclusion is unavoidable that, with the increasing demand in West Virginia and the

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decreasing production, *the act in a few years would work a practical cessation of the interstate stream.

It must be held therefore that the suits were not brought prematurely.

[7, 8] The third question is whether the requisite parties have been brought into the suits. It is objected that the pipe line companies have not been brought in. But there is nothing which makes their presence essential. The complainant states make no complaint and seek no relief against them. They are supplying gas in those states, and evidently will continue to do so, if not restrained or prevented by the defendant state. It is only with her that the complainant states are in controversy. It also is objected that the consumers in the defendant state who will be benefited if the act is enforced have no representation in the suits. But this is a misconception. They are represented by that state, and there is nothing in the situation requiring that they be specially represented or brought in. With equal basis it could be objected in a suit to prevent the enforcement of a statute reducing railroad freight rates, or in one to prevent the enforcement of a municipal ordinance reducing telephone or electric light rates, that shippers or users who would be benefited by the reduction must be specially represented or brought in. Such an objection would, of course, be untenable; and so of the objection here.

We turn now to the principal issue, whether a state wherein natural gas is produced and is a recognized subject of commercial dealings may require that in its sale and disposal consumers in that state shall be accorded a preferred right of purchase over consumers in other states—when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other states to consumers there. Of course, in the last analysis, the question is whether

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the enforced withdrawal for the benefit of local consumers is such an interference with interstate commerce as is forbidden to a

state by the Constitution. The question is an important one; for what one state may do others may, and there are 10 states from which natural gas is exported for consumption in other states. Besides, what may be done with one natural product may be done with others, and there are several states in which the earth yields products of great value which are carried into other states and there used. But notwithstanding the importance of the question, its solution is not difficult. The controlling principles have been settled by many adjudications—some so closely in point that the discussion here may be relatively brief.

[9, 10] By the Constitution (article 1, § 8, cl. 3) the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it. Even their power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against such commerce. *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449; *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347; *Webber v. Virginia*, 103 U. S. 344, 350, 26 L. Ed. 565; *Coe v. Errol*, 116 U. S. 517, 525, 526, 6 Sup. Ct. 475, 29 L. Ed. 715; *Guy v. Baltimore*, 100 U. S. 434, 442–443, 25 L. Ed. 743; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 498, 7 Sup. Ct. 592, 30 L. Ed. 694.

Natural gas is a lawful article of commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which

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by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; *Public Utilities Co. v. Landon*, 249 U. S. 236, 245, 39 Sup. Ct. 268, 63 L. Ed. 577; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 42 Sup. Ct. 105, 66 L. Ed. 234; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, 291, 42 Sup. Ct. 106, 66 L. Ed. 239; *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 42 Sup. Ct. 244, 66 L. Ed. 458; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 38 Sup. Ct. 438, 62 L. Ed. 1006, 1 A. L. R. 1278; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862. The West Virginia act is such a law. Its provisions

and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant states, and therefore will work a serious interference with that commerce.

But it is urged that there are special considerations which take the act out of the general rule and sustain its validity, even though there be an interference.

[11] One of these is that the pipe line companies are engaged in supplying the gas to the public in West Virginia, that this is a quasi public business, and that the act does no more than require the companies to furnish a reasonably adequate service within reasonable territorial limits. It is true that the business is of a quasi public character, but it is so in Pennsylvania and Ohio as well as in West Virginia. The obligations inhering in it and the power to insist on an adequate service are the same in all three states. The supply of gas necessarily marks the extent of the service that can be rendered. Much of the business is interstate and has grown up through a course of years. West Virginia encouraged and sanctioned the development of that part of the business and has profited greatly by it. Her present effort, rightly understood, is to subordinate that part to the local business within her borders. In other words, it is in effect an

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attempt to *regulate the interstate business to the advantage of the local consumers. But this she may not do. A direction to one of her railroads when short of facilities for moving coal to haul intrastate coal to the exclusion of interstate coal would not be different in kind or force.

[12] Another consideration advanced to the same end is that the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the state. If the situation be as stated, it affords no ground for the assumption by the state of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere. A contention, in essence the same, was presented and considered in *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, a case involving the validity of an Oklahoma statute designed to accomplish the retention of natural gas within the state. In the District Court the case had been heard on bill and answer, a proceeding in which the allegations of fact in the answer are taken as true. The hearing resulted in a decree adjudging the statute invalid and enjoining its enforcement. The decree was affirmed here. In the answer, as the opinion shows, it was

alleged that physical conditions made it apparent that the gas field was of relatively short duration, that cities were near the field and their people needed the gas, that the state embodied only prairie land devoid of timber and there was no local fuel supply excepting coal and natural gas, that the production of coal was growing rapidly more costly, that "substantially the only natural, practical, usable fuel, both for domestic and industrial use, is natural gas," and that if pipe lines, such as the plaintiffs were intending to construct and put in operation, were permitted to carry gas into other states the

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supply would be speedily *exhausted. Referring to these allegations and to a contention that the ruling principle of the statute was conservation of a needed natural resource, the court said (221 U. S. 255, 31 Sup. Ct. 571, 55 L. Ed. 716, 35 L. R. A. [N. S.] 1193):

"The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare, a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those

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of every *other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court."

[13] Finally, it is urged that this court cannot prescribe and execute regulations respecting the apportionment and use of the gas among the three states, and therefore that the bills should be dismissed. The conclusion does not follow from the premise. The object

of the suits is not to obtain decretal regulations, but to enjoin the enforcement of the West Virginia act on the ground that it is an unconstitutional enactment and its intended enforcement will subject the complainant states to injury of serious magnitude. On full consideration, we reach the conclusion that the act is unconstitutional, that the apprehensions of the complainant states respecting the injury which will ensue from its enforcement are well founded and that it obviously will operate most inequitably against those states. In this situation the appropriate decree is one declaring the act invalid and enjoining its enforcement. To dismiss the bills and leave the act to be enforced would be quite inadmissible. If there be need for regulating the interstate commerce involved, the regulation should be sought from the body in whom the power resides.

Decrees for complainants.

Mr. Justice HOLMES, dissenting.

The statute seeks to reach natural gas before it has begun to move in commerce of any kind. It addresses itself to gas hereafter to be collected and states to what uses it first must be applied. The gas is collected under and subject to the law, if valid, and at that moment it is not yet matter of commerce among the States. I think that the products of a State until they are actually started to a point outside it may be regulated by the

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*State notwithstanding the commerce clause. In *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 43 Sup. Ct. 526, 67 L. Ed. —, May 7, 1923, it was held that the State might levy an occupation tax upon the mining of iron ore equal to six per cent. of the value of the ore produced during the previous year, although substantially all the ore left the State and was put upon cars for that purpose by the same single movement by which it was severed from its bed. There could not be a case of a State's product more certainly destined to interstate commerce. It was put upon the cars by the same act by which it was produced. But as it was not yet in interstate commerce the tax was sustained. I know of no relevant distinction between taxing and regulating in other ways. *McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L. Ed. 579.

But the States have been held authorized to regulate in other ways more closely resembling the present. In *Sligh v. Kirkwood*, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835, a state law was sustained that made it criminal to sell or offer for shipment citrus fruits that were immature or otherwise unfit for consumption. That, upon grounds of local policy, intercepted before it got into the stream, what would have been an object of interstate commerce. The local interest in the present case is greater and more obvious than in that of green oranges. Again, the power of the State to preserve a food supply

for its people by game laws notwithstanding an indirect interference with interstate commerce is established. *Geer v. Connecticut*, 161 U. S. 519, 534, 16 Sup. Ct. 600, 40 L. Ed. 793; *Silz v. Hesterberg*, 211 U. S. 31, 42, 29 Sup. Ct. 10, 53 L. Ed. 75. If there is any difference between the property rights of the State in game and in gas still in the ground it does not concern the plaintiffs and it is plain from the decisions cited that they do not depend upon a speculative view as to title. See *Missouri v. Holland*, 252 U. S. 416, 434, 40 Sup. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984. The right of the State so to regulate the use of natural gas as to prevent

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waste was sustained as against the *Fourteenth Amendment in *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 Sup. Ct. 118, 65 L. Ed. 276, and I do not suppose that the plaintiffs would have fared any better had they invoked the commerce clause. I need do no more than refer to prohibition of manufacture of articles intended for export, such as colored oleomargarine, *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245, 22 Sup. Ct. 120, 46 L. Ed. 171, or spirits. The result of that and other cases has been expressed by this Court more than once in the form of a general recognition of the right of a State to make "reasonable provision for local needs," *Minnesota Rate Cases*, 230 U. S. 352, 402, 410, 411, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; and the right has been recognized even when the interference with interstate commerce is direct, as when an interstate train is required to stop to accommodate passengers who do not leave the State, *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 246 U. S. 58, 38 Sup. Ct. 236, 62 L. Ed. 574.

I see nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages. If the gas were used only by private persons for their own purposes I know of no power in Congress to require them to devote it to public use or to transport it across state lines. It is the law of West Virginia and of West Virginia alone that makes the West Virginian gas what is called a public utility, and how far it shall be such is a matter the that law alone decides. I am aware that there is some general language in *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, 255, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, a decision that I thought wrong, implying that Pennsylvania might not keep its coal, or the northwest its timber, etc. But I confess I do not see what is to hinder. Certainly if the owners of the mines or the forests saw fit not to export their products the Constitution would not make them do it. I see nothing in that instrument that would

produce a different result if the State

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gave the owners *motives for their conduct, as by offering a bonus. However far the decision in the case referred to goes it cannot outweigh the consensus of the other decisions to which I have referred and that seem to me to confirm what I should think plain without them, that the Constitution does not prohibit a State from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its boundaries that otherwise would have passed outside. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560.

I agree substantially with my brothers McREYNOLDS and BRANDEIS, but think that there is jurisdiction in such sense as to justify a statement of my opinion upon the merits of the case. I think that the bill should be dismissed.

Mr. Justice McREYNOLDS, dissenting.

It seems to me quite clear that the record presents no justiciable controversy; certainly none within the original jurisdiction of this court.

For the manifest purpose of protecting local consumers, West Virginia commanded her public service corporations not to transport natural gas beyond the borders of the state until they had satisfied the reasonable requirements of the people therein. Thereupon, complainants came here by original bills and alleged that if the statute were enforced they and their inhabitants could not obtain enough gas for their imperative demands from the divers pipe lines theretofore accustomed to supply them. They ask us to declare the enactment invalid because of conflict with the commerce clause of the federal Constitution and to restrain its enforcement. If the pipe lines hereafter fail to comply with their contracts, of course, they may be proceeded against in a proper forum; but to say that they probably will

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fail because *of the statute and then to demand that the law-making power be enjoined is not to set up a real controversy cognizable in any court.

If West Virginia should prohibit the drilling of new gas wells, I hardly suppose complainants could demand an injunction here even if it were admitted that their supplies would be cut off. But why not, under the doctrine announced. Production has been permitted for years and appealing hardships would follow its cessation. And suppose West Virginia should repeal the charters of all her public service corporations now transporting gas and thereby disable them, could we interfere upon the demand of another state who claimed that she would suffer?

As originally adopted, the Constitution provided:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction."

Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440, declared that a citizen of one state could proceed against another state by original action here. In *Louisiana v. Texas*, 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347, Mr. Chief Justice Fuller pointed out the character of controversies between states over which this court has original jurisdiction. With emphasis he declared that vindication of the freedom of interstate commerce is not committed to any state as *parens patriae*. Unless this ruling is to pass into the discard, it follows that neither of the complainants has any higher standing than one of her citizens with a contract for gas would have if there were no Eleventh Amendment. It is unnecessary to argue that the framers of the Constitution never intended to empower this court, at the suit of an individual, to enjoin a state from enforcing regulations prescribed for her own public service corporations. And yet, that possibility must be affirmed under the doctrine now announced.

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*Concluding his opinion in *Chisholm v. Georgia* (1793) Mr. Justice Iredell exclaimed:

"I pray to God that, if the Attorney General's doctrine, as to the law, be established by the judgment of this court, all the good he predicts from it may take place, and none of the evils with which, I have the concern to say, it appears to me to be pregnant."

A like prayer seems not inappropriate here and now.

Mr. Justice BRANDEIS, dissenting.

The statement made by Mr. Justice HOLMES seems to me unanswerable. But, like Mr. Justice McREYNOLDS, I think that there are reasons why the bills should be dismissed without passing upon the constitutional question presented.

Natural gas in quantity is produced in 32 of the 55 counties of West Virginia. One-half of the inhabitants of that state have for years been dependent upon it for domestic uses, and it has been supplied to nearly 2,000 industrial establishments. Sixty-seven concerns are engaged in the business of distributing this natural gas to the public. Most of them are corporations organized under the laws of West Virginia. A few are organized under the laws of some other state. Some are unincorporated. Each had, prior to the Act of February 17, 1919, hereinafter referred to, been declared by statute to be a public service corporation,³ endowed with the

power of eminent domain. Each was under the common-law duty of furnishing to the

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public, *throughout the West Virginia territory in which it does business adequate service. *Carnegie Natural Gas Co. v. Swiger*, 72 W. Va. 557, 79 S. E. 3, 46 L. R. A. (N. S.) 1073; *Clarksburg Light & Heat Co. v. Public Service Commission*, 84 W. Va. 638, 100 S. E. 551. And as to each this duty has been confirmed by the legislation of that state.

Prior to the World War the production of natural gas in West Virginia and the demand were such that large quantities could be exported by its public service corporations to other states without thereby lessening the ability of these concerns to give adequate service to their West Virginia customers. During the war the demand, both within and without the state, increased greatly, and thereafter the supply became smaller. Of the net supply of West Virginia natural gas available for distribution by its public service corporations, 77.1 per cent. was exported in the year 1916; 80.1 per cent. in 1917; 76.7 per cent. in 1918.⁴ The West Virginia consumers complained that the amount furnished them was inadequate, and that they were being discriminated against by West Virginia gas companies, in the interest of residents of

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other states.⁵ *Some of the companies which exported gas sought to justify the inadequacy of their service to West Virginia customers by asserting that they were under contract, or other duty, to supply West Virginia gas to distributing companies or consumers in other states, and that the aggregate demand of their customers in the several states exceeded the available supply. Only 12 of the 67 West Virginia public service corporations took part in the export business. The remaining 55 were engaged solely in distribution within the state, and many of these were dependent largely upon the other 12 for their gas supply. Some of these 55 companies sought to justify their inadequate service by the fact that, because of the demands for gas to be exported to the other states, the corporations on which they were dependent denied them their full supply.

⁴ A large part of the gas produced is not available for distribution to the public. Much is consumed within the state for field purposes—such as drilling and cleaning out wells or the operation of compressor or pump stations to transport the gas. The producer must also, under reservations in the leases, ordinarily deliver to the landowner free gas service.

⁵ The temptation to discriminate may have been great. For Pennsylvania and Ohio communities formerly supplied from local production of natural gas could, if this is no longer possible, afford to pay a very high price for gas rather than to discard existing gas appliances and to install new ones which would be required if oil or coal were to be substituted as fuel. In 1921 the average price per M cubic feet for domestic consumption was 28 cents in West Virginia, 44 cents in Pennsylvania, and 42 cents in Ohio. For industrial consumption it was 16 cents in West Virginia, 32 cents in Pennsylvania, and 34 cents in Ohio. United States Geological Survey, "Natural Gas in 1919-1921," published May 22, 1923.

³ "The words 'public service corporation' used in this act shall include all persons, associations of persons, firms, corporations, municipalities and agencies engaged or employed in any business herein enumerated, or in any other public service business whether above enumerated or not, whether incorporated or not." Acts 1913, c. 9, § 3; Acts 1915, c. 8, § 3; Acts 1921, c. 150, § 3. See Acts 1919, c. 71, § 3.

West Virginia consumers insisted that the common law forbade its public service companies to so disable themselves from performing their duty to give adequate service within the state, and contended that the exporting public service corporations which habitually supplied the local distributing companies could not justify furnishing a reduced supply by setting up their contracts to furnish supplies to concerns in other states. These contentions were denied by the exporting companies, and it was asserted that they could not legally be controlled in this respect by the Public Service Commission of West Virginia. To remove all doubt concerning the statutory powers of the commission and to insure adequate service to West Virginia consumers, the Legislature of the state enacted chapter 71 of the Acts of 1919 approved on February 17 of that year, to take effect 90 days after its passage. That statute declared these rules of substantive law:

(a) That no public service corporation engaged in distributing natural gas produced within the state shall, by exporting its supply

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to other states, disable itself from *performing its duty to give adequate service within West Virginia.

(b) That any such public service corporation whose gas supply is insufficient to afford such service to its customers may, under prescribed conditions, call upon any other public service corporation within the same territory, which has a surplus supply, to furnish to it such part of this surplus as may be required to enable it to give adequate service.

Before the effective date of that act, the state of Pennsylvania and the state of Ohio each filed in this court a bill in equity against the state of West Virginia, in which it prayed that the act be declared void, because obnoxious to the federal Constitution, and that all West Virginia officials be enjoined from attempting in any way to enforce the statute. As a basis for the relief each bill set forth the extensive use of natural gas by state institutions, by their several municipalities, and by millions of residents, and it alleged that serious injury would result if these consumers were deprived of the West Virginia supply. The Ohio bill alleged also that cutting off the West Virginia supply of natural gas would greatly reduce the value of public service properties, would reduce taxable values of these and other properties, and would thereby deprive the state of important revenues. It prayed, specifically, that the plaintiff state, and its residents, be declared to have no adequate remedy at law; that West Virginia and its officials be enjoined from interfering with the transportation of natural gas for use in Ohio; and that pending the suit an injunction be granted against their instituting in any court of the state of West Virginia any suit under the statute against any "person, company or corporation which is engaged in the production or transporta-

tion of natural gas out of the state of West Virginia into the state of Ohio." No public official or producer, exporter, or distributor

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of gas or consumer (other than *these states) was made party plaintiff or defendant in either bill. A temporary injunction issued in each case upon the filing of the bill. In each a motion to dismiss, an answer, and a replication was filed. Without disposing of the motions to dismiss, the parties proceeded to take the evidence and, thereafter, submitted the cases for final hearing.

Several objections made to the maintenance of these suits may be passed without discussion. It will be assumed that the constitutional question submitted is not to be deemed merely a political one, as in *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721, and *Massachusetts v. Mellon*, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. Ed. —, decided June 4, 1923. It will be assumed that the alleged right to acquire by purchase and to bring into a state natural gas produced elsewhere is—despite a fundamental difference⁶—to be treated as similar legally to the right asserted in *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838; *Id.*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, to have the water of an interstate stream continue to flow into a state, or the right recognized in *Missouri v. Illinois*, 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497; *New York v. New Jersey*, 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937, and *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488, to have the waters and the air within one state kept reasonably free from pollution originating in another. It will be assumed, further, that the use of

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natural gas in Pennsylvania and in Ohio is shown to be so general as to bring these suits within the rule acted upon in the cases just cited and to render inapplicable the rule declared in *Kansas v. United States*, 204 U. S. 331, 27 Sup. Ct. 388, 51 L. Ed. 510, and *Oklahoma v. Atchison, Topeka & Santa Fé Railway Co.*, 220 U. S. 277, 286, 289, 31 Sup. Ct. 434, 55 L. Ed. 465, where the suits were dismissed because brought in aid of interests deemed private. And finally it will be assumed—although this is still more doubt-

⁶ The state has a property interest in running water naturally flowing into it and in the public waters and air within its boundaries. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488. If the running water is withheld, its property is taken. If the public waters or the air is polluted, its territorial integrity is invaded. But the alleged right to purchase in interstate commerce and to import a natural resource is, in no sense, a right of the state. It would be described appropriately as a privilege of citizens of the United States. Compare *Louisiana v. Texas*, 176 U. S. 1, 24, 25, 20 Sup. Ct. 251, 44 L. Ed. 347. Such privileges the state is not charged by the federal Constitution with the duty to enforce, and the fact that the institution of these suits was specially authorized by the Legislatures of Pennsylvania and of Ohio can be of no legal significance.

ful—that a state which has permitted one of its natural resources to be freely dealt in as an article of interstate commerce may not thereafter prohibit all export thereof, although it appears that the whole of the remaining supply will be required to satisfy the needs of its own citizens. These objections raised by defendant will not be considered, because there are other objections which, in my opinion, present insuperable obstacles to the maintenance of the suits.

First. This court is without jurisdiction of the subject-matter.

The bills present neither a "case," nor a "controversy," within the meaning of the federal Constitution. *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60; *Muskraat v. United States*, 219 U. S. 346, 356, 359, 31 Sup. Ct. 250, 55 L. Ed. 246; *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 42 Sup. Ct. 261, 66 L. Ed. 531. They are not proceedings "instituted according to the regular course of judicial procedure" to protect some right of property or personal right. They are, like *McChord v. Louisville & Nashville Railroad*, 183 U. S. 483, 495, 22 Sup. Ct. 165, 46 L. Ed. 289, an attempt to enjoin, not executive action, but legislation. They are instituted frankly to secure from this court a general declaration that the West Virginia Act of February 17, 1919, is unconstitutional. Compare *Giles v. Harris*, 189 U. S. 475, 486, 23 Sup. Ct. 639, 47 L. Ed. 909. The well-settled rule that the court is without power to entertain such a proceeding applies equally, whether the party invoking its aid is a state or a private person. And the rule cannot be over-

come by giving to *pleadings the form of a bill in equity for an injunction. Compare *Fairchild v. Hughes*, 258 U. S. 126, 42 Sup. Ct. 274, 66 L. Ed. 499; *Atherton Mills v. Johnston*, 259 U. S. 13, 15, 42 Sup. Ct. 422, 66 L. Ed. 814; *Texas v. Interstate Commerce Commission*, supra.

Moreover, it is not shown that there is, in a legal sense, danger of invasion of the alleged rights. It is shown that the states of Pennsylvania and Ohio are, in their public institutions, themselves consumers of West Virginia gas—a "makeweight" as suggested in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488. And it is shown that these and many other consumers within the plaintiff states would suffer serious injury if the West Virginia supply were cut off. But it is not shown that discontinuance of the supply is threatened or that there is, in a legal sense, danger that the supply will be stopped. The mere enactment of the statute, obviously, does not constitute a threat to interrupt the flow of gas into the plaintiff states. The importation into Ohio and Pennsylvania is conducted, not by the state of West Virginia, but wholly by 12 privately owned public service corporations. If the importation ceases it will be,

primarily at least, because of acts or omissions of these 12 corporations. Yet there is not even an allegation that these corporations threaten, or intend, to discontinue the importation, or that they will be compelled to do so unless the state of West Virginia is enjoined from enforcing the statute.

On the other hand, it clearly appears that, under the laws of West Virginia, there can be no present danger that any of these 12 corporations will be summarily prevented by that state from continuing in full volume the export of gas or will be compelled to reduce it. The only restriction, if any, imposed by the act of 1919 upon exportation of gas is that which may result from the requirement that West Virginia public service corporations shall not, by means of export, disable themselves from performing their duties to

*612 consumers and to other distributing companies within the state. Before there can be, in a legal sense, danger that restriction will result, it must appear that one or more of the 12 exporting companies is disabling itself by such exportation, or is about to do so, and also that some state official is about to take effective action to prevent the exportation. But under the legislation of West Virginia many things would have to happen and much time must elapse before any of the exporting corporations would be under any legal duty to discontinue or lessen their exports, and still more time before it could actually be prevented from exporting gas. For, under West Virginia legislation, no executive officer and no court has power or jurisdiction to declare, or to enforce performance of, such alleged duty of a public service corporation until primary resort has been had to the Public Service Commission and the application to it has been acted upon, either by granting or by denying relief. *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 80 S. E. 931; *State v. Bluefield Water Works Co.*, 86 W. Va. 260, 103 S. E. 340; *Kelly Axe Manufacturing Co. v. United Fuel Gas Co.*, 87 W. Va. 368, 105 S. E. 152. The act establishing the commission prescribes the methods and the remedies which are to be pursued in order to enforce the duty to give adequate service. Chapter 9, Acts of 1913, §§ 11 and 18; chapter 8, Acts of 1915, §§ 23, 24; chapter 71, Acts of 1919; chapter 150, Acts of 1921; *Manufacturers' Light & Heat Co. v. Ott* (D. C.) 215 Fed. 940. If it is claimed that there is failure to give adequate service, a petition may be filed before the commission to secure it. After notice to and hearing of the corporation by the commission an order may be made. Until the commission issues some order which purports to restrict in some way the discretion theretofore exercised by a corporation in respect to exports, every such concern is, under the act of 1919, legally as free to continue the transportation of gas to

Pennsylvania and to Ohio as if that statute had not been passed.

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"It is possible that the commission would never be called upon to act.⁷ It is possible that, if called upon, the commission would refuse to make an order. It is possible that, if the commission made an order, the order would be of such a character as not to affect seriously the interests which plaintiff seeks to protect. And it is possible that if any order were made, the state court would suspend its operation and would eventually annul it. The act makes such careful provision for judicial review of the orders of the commission and for postponing the incidence of

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penalties or other liabilities until *after such review can be had, that there could never be occasion for invoking in respect to this statute the doctrine of *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R.

⁷ The Attorney General of Ohio states in his brief: "The supply of gas was adequate, both for consumption inside the state of West Virginia and for transportation to other states, until during the time of the World War in 1917 and 1918. Record, pp. 331 and 334. By reason of the vast demand for gas for industrial consumption, which occurred as a result of the war, and which drew upon the lines of the gas companies during the summer as heavily as or more heavily than during the winter, the gas companies had no opportunity to rest their wells or to accumulate a surplus of gas, as they had been in the habit of doing, in accord with good practice, under normal conditions. The federal government, through the Fuel Administration, gave orders to the gas companies to supply essential industrial plants with all the gas possible. Wells were drilled and turned into lines which, under normal conditions, would have been held in reserve, to assure a future supply. Record, pp. 333, 334. The supply of gas has never been adequate for all purposes, during periods of maximum demand, since that time."

It may be that production will increase. The war has closed. The excessive post-war activities of 1919 and early 1920 ceased, and were followed by a period of industrial depression. There may again be opportunity for periodic rest which gas wells, as well as human beings, appear to need, and thus seemingly exhausted wells may be restored. Furthermore, hitherto undeveloped gas areas may be worked, or more wells may be drilled in areas already developed, or new areas may be opened. For of the 2,725,798 acres of the gas territory held by the 67 public service corporations of the state in 1919, a large part are still undeveloped.

Moreover, the demand may lessen. Except in times of emergency, use of natural gas by the industries will be determined largely by its relative cost as compared with coal or oil. The demands of economy in manufacture may alone compel a reduction of its use in industry and thus, for some time, leave the supply ample for domestic purposes. In 1920 Pennsylvania used for manufacturing purposes three times as much natural gas as it imported from West Virginia in 1921. U. S. Geological Survey, "Natural Gas, 1919-1921," published May 22, 1923, pp. 347, 355. Domestic consumption amounts to only 30 or 40 per cent. of the total consumption. U. S. Geological Survey, "Natural Gas, 1919-1921," *supra*, p. 352. Moreover, the present large waste may be stopped. The waste in Ohio in 1919 was 12 per cent.; in 1920 it was 18 per cent.; in 1921 it was 19 per cent. On the other hand, in West Virginia the waste in 1919 was only 1 per cent.; in 1920 and 1921, only 2 per cent. "Natural Gas," *supra*, p. 352.

A. (N. S.) 932, 14 Ann. Cas. 764.⁸ For the commission is without power to enforce an order or to impose a penalty. To overcome disobedience, or disregard, of an order, resort must, under the West Virginia statutes, be had to the courts, and to this end an original proceeding must be instituted. Whether the suit to enforce obedience is brought by the commission or by others, the corporation is given opportunity to defend on the ground that the

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order is, for any reason, invalid; or it may itself inaugurate the proceeding by bringing suit to have the order annulled. *Randall Gas Co. v. Star Glass Co.*, 78 W. Va. 252, 256, 88 S. E. 840; *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 80 S. E. 931. Moreover, a final order of the commission is not enforceable, even by a court, until 30 days after entry have elapsed. That period is allowed within which any party feeling aggrieved may apply to the court for suspension of the order; and if such application is made, a speedy hearing must be given (section 16).

Up to the time when these suits were begun no action of any kind had been taken in relation to matters dealt with by the Act of February 17, 1919, either by the commission, by any other board or official of the state, by any corporation, or by any other person who could ever be affected by any provision of the statute. And no action could have been taken, for the act was then not yet in effect. How, then, can it be said that, in any legal sense, the Pennsylvania and Ohio consumers were in present danger of irreparable injury? Plaintiffs' fears were at best premature. This court held in *Oregon v. Hitchcock*, 202 U. S. 60, 70, 26 Sup. Ct. 568, 50 L. Ed. 935, that it would not, even at the instance of a state, take upon itself the decision of questions committed to another department of our government and thus anticipate the action of the federal executive. The reasons are equally strong against our interfering, in advance of decision, with the executive of a state in a matter committed to its determination. If these

⁸ The situation is wholly unlike that presented in *Savage v. Jones*, 225 U. S. 501, 520, 521, 32 Sup. Ct. 715, 56 L. Ed. 1182, which is relied upon by plaintiffs. There the suit was against the state chemist, the executive official vested with power to act, and he had "threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the article within the state and had distributed broadcast throughout the state warning circulars."

Moreover, even if the West Virginia statute were construed as imposing penalties for disobedience so severe and menacing as to require the interposition of a federal court, it would be the public service corporations of West Virginia—not the states of Pennsylvania and Ohio—which would thereby be denied due process of law under the doctrine of *Ex parte Young*. And it is those corporations which would have to sue, as in *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 40 Sup. Ct. 338, 64 L. Ed. 596, here relied upon by plaintiffs.

were private suits relief would necessarily be denied. Compare *First National Bank of Albuquerque v. Albright*, 208 U. S. 548, 28 Sup. Ct. 349, 52 L. Ed. 614; *South Carolina v. Georgia*, 93 U. S. 4, 14, 23 L. Ed. 782. As the suit is that of one state against another, even greater caution should be exercised by this court before assuming to act. *Missouri v. Illinois*, 200 U. S. 496, 520, 521, 26 Sup. Ct. 268, 50 L. Ed. 572; *Kansas v. Colorado*, 206 U. S. 46, 117, 27 Sup. Ct. 655, 51 L. Ed. 956;

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New York v. New Jersey, *256 U. S. 296, 309, 41 Sup. Ct. 492, 65 L. Ed. 937. The objection here is not, as in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 238, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488, that those interested should be left to an action at law for redress of any injuries which may be suffered. It is that the "judicial stage" of the controversy had not been reached when these suits were begun, and, indeed, has not been since. See *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 228, 29 Sup. Ct. 67, 53 L. Ed. 150, 43 L. R. A. (N. S.) 1015; *Bacon v. Rutland R. R. Co.*, 232 U. S. 134, 137, 34 Sup. Ct. 283, 58 L. Ed. 538.

Second. There is a fatal lack of necessary parties. It is only by failure of the 12 exporting companies to continue the exportation of gas that the plaintiffs, and other consumers or the distributing companies in Pennsylvania or Ohio, can be injured. Primarily at least, it is the rights of these 12 corporations, if of any one, which would be invaded by enforcing the statute, and rights of consumers and of distributing corporations of Pennsylvania and of Ohio are derivative merely. Whether the West Virginia corporations may furnish gas to the plaintiff states and whether those corporations may be regulated as the statute attempts, are at most controversies between West Virginia and those corporations. They have not submitted their rights to adjudication in these suits. It is intimated that these corporations wish to have the act declared void. But we may not assume that such is their wish. Conceivably a decision holding the act valid might benefit them; since it might relieve them from improvident contracts with distributing companies in Pennsylvania and Ohio. Or it may be that some of the 12 corporations would be benefited and others injured by any decision made of the question presented. Unless the 12 corporations are legally represented either by the plaintiff or the defendant, they would not be bound by a decree in either of these suits. *New Orleans Water Works Co. v. New Orleans*, 164 U. S. 471, 480, 17 Sup. Ct. 161, 41 L. Ed. 518. That

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neither plaintiff nor defendant legally *represents them is clear.⁹ And since they would

not be bound, this court should not entertain a suit to decide the question presented; for, as was held in *California v. Southern Pacific Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683, and *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 246, 22 Sup. Ct. 308, 46 L. Ed. 499, it does not comport with the gravity and finality which should characterize an adjudication in the exercise of the original jurisdiction of this court to proceed, at the instance of a state, in the absence of parties whose rights would be actually passed upon and be in effect determined, even though they might not be technically bound in subsequent litigation in this, or some other tribunal. Compare *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 42 Sup. Ct. 261, 66 L. Ed. 531.

The remaining 55 West Virginia gas corporations which do not export any gas are also vitally interested in the question submitted. So far as their interest is the general one qua consumer, it might be represented by the Public Service Commission, and to that end the commission (not the state) should, perhaps, have been made party defendant. But many of these gas corporations appear to have specific interests which a decision might affect directly. They have contracts with the exporting companies for their supply of gas; and the obligations under these contracts would be different if the act is held valid than if it were held to be void. A decision to the effect that the prohibition of exports declared in the act is void might seriously impair their contract rights.

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*Moreover, section 8 of the act provides:

"That the sections, provisions and clauses of this act shall be deemed separable each from the other, and also in respect to the persons, firms, corporations and consumers mentioned therein or affected thereby, and if any separable part of this act be, or be held to be unconstitutional or for any reason invalid or unenforceable, the remaining parts thereof shall be and remain in full force and effect."

Surely the statute may be valid as to some exporting companies, for the action in exporting may be ultra vires; or certain West Virginia distributing companies may have acquired preferential rights to the supply of gas. How can the court determine, in view of this provision, that the act is void, in toto, when it has not before it the parties to be affected thereby and the facts which only they as litigants would be able to present? Therefore, even if it appeared that rights of the plaintiffs—or of those whom they legally represent—were in present danger of irreparable injury resulting from wrongful acts of defendant, these suits should not be maintained.

⁹ "It is not sufficient to say that the Attorney General, or the Governor, or even the Legislature of the state, can be conclusively deemed to represent the public interests in such a controversy as that presented by the bill. Even a state, when it vol-

untarily becomes a complainant in a court of equity, cannot claim to represent both sides of the controversy." *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 246, 22 Sup. Ct. 308, 46 L. Ed. 499.

Third. But if all other obstacles could be overcome, this court, sitting as a court of equity, should dismiss the bills, because it would be unable to grant the only relief appropriate. This court, sitting in equity, clearly should not lend its aid to enable West Virginia public service corporations to discriminate against West Virginia consumers in the interest of Ohio and Pennsylvania consumers. Therefore an appropriate decree should be framed so as to require each of the West Virginia corporations to treat West Virginia customers at least as well as it does those outside of the state and the decree should not leave any West Virginia public service corporation free to export gas in disregard of the duty not to discriminate against

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the public of that state. But *natural gas is produced also in Pennsylvania and Ohio, and the local production furnishes a large part of the supplies consumed in those states.¹⁰ Furthermore, West Virginia gas is exported also to Maryland, Indiana, and Kentucky, and in two of those states natural gas is produced in quantity.¹¹ Clearly the court should, in no event, go further than to compel West Virginia to share its production equitably with other states now dependent upon it for a part of their gas supply. But in order to determine what is equitable (that is, what part of the West Virginia production that state might require its public service corporations to retain and what part they should be free to export to other states) it would obviously be necessary to marshal the resources and the demands, or needs, of the six states, and to consider, in respect to each, both the conduct of the business therein and the circumstances attending its development. The factors necessary to be considered in determining what division of the West Virginia production would be fair, the conditions under which the determination would have to be made, and the character of the questions to be decided are such that this court would be obliged to refuse to undertake the task. For this reason, the bills should be dismissed, even if it were held both that rights legally represented by plaintiffs were in present danger of irreparable injury by wrongful acts of defendant and that there was not a fatal lack of necessary parties. To

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*do justice as between the several states the following inquiries would be essential:

(a) The potential as well as the actual production in each state would have to be as-

certained. The actual production during earlier years, and approximately the current production, could be ascertained from data which are regularly collected by the United States Geological Survey and by the public utility commissions of the several states. But to ascertain the potential production, searching inquiry would have to be made into the methods of production pursued, and, among other things, to what extent recent production has been secured by forcing the wells, what the likelihood is that production lessened by forcing wells will be restored by allowing periods of rest, and to what extent recent reduced outputs may have been attributable to failure to sink enough wells or to open additional territory.¹² It would be necessary to inquire also into the extent and character of the existing gas reserves, wherever situated and by whomsoever owned. In ascertaining the extent of the gas territory not yet developed, it would be necessary to inquire to what extent the reserve is controlled by, or is otherwise available to, the several public service corporations of the several states; the cost of developing particular fields and of marketing the supply therefrom; what the relation of such undeveloped territory is to that then being worked and to that already exhausted; and to what extent and how rapidly the development of new areas and new sources of supply should properly proceed.

(b) The demand, actual and potential, in each state would have to be determined. In determining the demand, the court could not

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confine its inquiry to ascer*taining the amount then used or called for. The rates charged in the several communities must also be considered. For upon these, as well as upon the relative cost of other kinds of fuel, would depend in large part the extent of the demand, particularly by the industries. The character of the use and the circumstances under which it had been developed would likewise be important factors in deciding what distribution would be equitable. Among other things, it would be necessary to determine to what extent there was, as in Ohio, a high percentage of waste, and what investment had been made in distributing mains and in customers' appliances and when and under what circumstances these investments had been made. For, while a long-established local distributing company might reasonably be required to restrict its business to existing customers and even to the existing needs of such, a like restriction would be a great hardship, if applied to new companies which had not yet brought their business to a paying basis.

(c) No determination concerning production

¹⁰ In 1920 the production in Pennsylvania was 125,-787,000 M cubic feet, and the consumption 161,397,000 M. In 1920 Ohio production was 58,938,000 M cubic feet and the consumption 136,872,000 M. U. S. Geological Survey, "Natural Gas 1919-1921," p. 345, published May 22, 1923.

¹¹ The 1920 production in Kentucky was 3,345,000 M cubic feet; the consumption 15,297,000 M. The Indiana production 1,779,000 M; the consumption 4,-635,000 M. The Maryland production is negligible. U. S. Geological Survey Bulletin, "Natural Gas in 1919-1921," supra, p. 345.

¹² Some idea may be formed of the scope of this inquiry by examining the data concerning the natural gas operations collected by the United States Geological Survey.

and none concerning demand could afford a stable basis for future action; for no factor entering into the determination would be constant. Investigations into supply and demand would have to be pursued continuously, and recurrent decisions as to distribution would be required. Thus, the estimate of the undeveloped gas territory must be ever changing; for new discovery may open territory theretofore unknown, and the sinking of test wells may establish the fact that territory previously deemed valuable will be wholly unproductive. In no other field of public service regulation is the controlling body confronted with factors so baffling as in the natural gas industry, and in none is continuous supervision and control required in so high a degree.

(d) The decisions to be made would be of the character which calls for the informed

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judgment of a board of *experts. The tribunal would have to determine, among other things, whether inadequate service was due in the several states to inadequate supply or to improvident use by some consumers; whether to overcome inadequacy of supply new territory should be developed or more wells be sunk in old territory; whether, in view of prospective needs of the several communities, it would not be better that the reserves should be husbanded and that the uses to which gas may be put be curtailed. It would thus be called upon to review—and perhaps to control—the business judgment of those managing the companies. Pro rata distribution among all users of the gas from time to time available would obviously not result in equitable distribution; for domestic users, and also many industrial ones, would, if their gas supply were uncertain, find it necessary to assure themselves of an adequate supply for heating, cooking, and power, of either oil or some other kind of fuel, and the expense of producing the necessary alternative appliances would be large. The tribunal would have to decide, also, many other serious questions of the character usually committed for determination to public utility commissions, and the difficulties involved in these decisions would be much enhanced by differences in the laws, rules and practices of the several states regarding the duties of natural gas companies to furnish adequate service.¹³

¹³ For instance: If it should appear that the potential supply in Pennsylvania is ample for all present needs, but that its concerns prefer to husband their resources for the remoter future, would it be unjust discrimination on the part of the West Virginia companies to deny to their customers within the state an adequate supply while supplying to Pennsylvania distributing companies an amount of gas which these might have produced from reserves within Pennsylvania? Or if Kentucky had ample supplies and undeveloped fields, but sought gas from West Virginia because the Kentucky companies did not have the funds, or the inclination, to make, at the time, a large investment required to secure a supply within that state, would, under those cir-

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*Clearly this court could not undertake such determinations. To make equitable distribution would be a task of such complexity and difficulty that even an interstate public service commission, with broad powers, perfected administrative machinery, ample resources, practical experience, and no other duties, might fail to perform it satisfactorily. As this court would be powerless to frame a decree and provide machinery by means of which such equitable distribution of the available supply could be effected, it should, according to settled practice, refuse to entertain the suits. Compare *Marble Co. v. Ripley*, 10 Wall. 339, 358, 19 L. Ed. 955; *Texas & Pacific Railway Co. v. Marshall*, 136 U. S. 393, 406, 10 Sup. Ct. 846, 34 L. Ed. 385; *Giles v. Harris*, 189 U. S. 475, 487, 488, 23 Sup. Ct. 639, 47 L. Ed. 909.

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PER CURIAM. *These suits having been heretofore submitted on the pleadings and the evidence, and the court being now fully advised in the premises,

It is considered, ordered and decreed as follows:

1. That the act passed by the Legislature of the defendant state February 10, 1919, which is set forth in the bills of complaint in these suits and known as chapter 71 of the West Virginia Acts of 1919, is a void and inoperative enactment, because it contravenes the limitations which the Constitution of the United States places upon state action in respect of commerce among the several states.

2. That the defendant state, and her several officers, agents and servants, are hereby severally enjoined from enforcing, or attempting to enforce, that act.

3. That the aggregate costs in these suits be apportioned among and paid by the parties thereto as follows: The state of West Virginia one-half; the commonwealth of Pennsylvania one-fourth and the state of Ohio one-fourth.

4. That Levi Cooke, Esq., the commissioner by whom the evidence in these suits was taken and reported to this court, shall receive and be paid the sum of \$6,000 in full compensation for the services rendered and the expenses incurred by him in that connection, and that this sum be taxed as part of the aggregate costs in the two suits and be paid by the parties in the proportions just named.

circumstances, West Virginia companies be justified in supplying the Kentucky demand while leaving that of its West Virginia customers unsatisfied? Should distributing companies in Pennsylvania, Ohio, Kentucky and Indiana be permitted to extend their mains or add new customers after West Virginia had recognized the insufficiency of the supply to satisfy the needs of consumers within the state? And what shall be deemed the existing demand of a state? Is existing demand to be limited to customers already connected? And does it mean the amount theretofore taken by such customers, or that which they may wish to take through existing appliances.

5. That the clerk of this court transmit to the Chief Magistrates of the commonwealth of Pennsylvania and the states of Ohio and West Virginia copies of this decree, duly authenticated under the seal of this court.

(262 U. S. 679)

BLUEFIELD WATERWORKS & IMPROVEMENT CO. v. PUBLIC SERVICE COMMISSION OF WEST VIRGINIA et al.

(Argued January 22, 1923. Decided June 11, 1923.)

No. 256.

1. Courts $\S$ 394(6) — Confirmation of state commission's rate order against objection it was confiscatory is reviewable on writ of error.

A proceeding in a state court, attacking an order of a public service commission fixing rates, on the ground that the rates were confiscatory and the order void under the federal Constitution, is one where there is drawn in question the validity of authority exercised under the state, on the ground of repugnancy to the federal Constitution, and therefore is reviewable by writ of error.

2. Waters and water courses $\S$ 203(10)—Increased cost of construction must be considered in determining base for water company's rates.

It was error for a state public service commission, in arriving at the value of the property used in public service, for the purpose of fixing the rates, to fail to give proper weight to the greatly increased cost of construction since the war.

3. Constitutional law $\S$ 298(3)—Company is entitled to judgment of court on law and facts as to sufficiency of rates fixed by public service commission.

Under the due process clause of the Fourteenth Amendment of the Constitution, a waterworks company is entitled to the independent judgment of the court as to both law and facts, where the question is whether the rates fixed by a public service commission are confiscatory.

4. Constitutional law $\S$ 298(1)—Rates which do not yield fair return on present value of property used in public service are confiscatory.

Rates which are not sufficient to yield a reasonable return on the value of the property used in public service at the time it is being so used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property, in violation of the Fourteenth Amendment of the Constitution.

5. Waters and water courses $\S$ 203(12)—Evidence held to show valuation of water company's property for rate basis was too low.

On writ of error to review a judgment of the state Supreme Court sustaining an order of the Public Service Commission fixing rates of waterworks company, evidence held to show that the valuation of the company's property adopted as the rate basis by the commission and state court was too low, in view of the greatly increased cost of construction since the war.

6. Waters and water courses $\S$ 203(10)—Public utility entitled to rate of return made on investments in other business of like safety.

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties, but it has no constitutional right to such profits as are realized or anticipated in highly profitable enterprises or speculative ventures.

7. Waters and water courses $\S$ 203(10)—6 per cent. rate for waterworks company, which had previously operated at very small rate, held too low.

Since the investors take into account the result of past operations as well as present rates in determining whether they will invest, a waterworks company which had been earning a low rate of returns through a long period up to the time of the inquiry is entitled to return of more than 6 per cent. on the value of its property used in the public service, in order to justly compensate it for the use of its property.

In Error to the Supreme Court of Appeals of West Virginia.

Proceedings by the Bluefield Waterworks & Improvement Company against the Public Service Commission of the State of West Virginia and others to suspend and set aside an order of the Commission fixing rates. From a judgment of the Supreme Court of West Virginia, dismissing the petition, and denying the relief (89 W. Va. 736, 110 S. E. 205), the Waterworks Company bring error. Reversed.

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*Messrs. Alfred G. Fox and Jos. M. Sanders, both of Bluefield, W. Va., for plaintiff in error.

Mr. Russell S. Ritz, of Bluefield, W. Va., for defendants in error.

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*Mr. Justice BUTLER delivered the opinion of the Court.

Plaintiff in error is a corporation furnishing water to the city of Bluefield, W. Va.,

and its inhabitants. September 27, 1920, the Public Service Commission of the state, being authorized by statute to fix just and reasonable rates, made its order prescribing rates. In accordance with the laws of the state (section 16, c. 15-O, Code of West Virginia [sec. 651]), the company instituted proceedings in the Supreme Court of Appeals to suspend and set aside the order. The petition alleges that the order is repugnant to the Fourteenth Amendment, and deprives the company of its property without just compensation and without due process of law, and denies it equal protection of the laws. A final judgment was entered, denying the company relief and dismissing its petition. The case is here on writ of error.

[1] 1. The city moves to dismiss the writ of error for the reason, as it asserts, that there was not drawn in question the validity of a statute or an authority exercised under the state, on the ground of repugnancy to the federal Constitution.

The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the state. The prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be a like enactment by the Legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this court. The motion to dismiss will be denied. See *Oklahoma Natural*

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*Gas Co. v. *Russell*, 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. —, decided March 5, 1923, and cases cited; also *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908.

2. The commission fixed \$460,000 as the amount on which the company is entitled to a return. It found that under existing rates, assuming some increase of business, gross earnings for 1921 would be \$80,000 and operating expenses \$53,000, leaving \$27,000, the equivalent of 5.87 per cent., or 3.87 per cent. after deducting 2 per cent. allowed for depreciation. It held existing rates insufficient to the extent of \$10,000. Its order allowed the company to add 16 per cent. to all bills, excepting those for public and private fire protection. The total of the bills so to be increased amounted to \$64,000; that is, 80 per cent. of the revenue was authorized to be increased 16 per cent., equal to an increase of 12.8 per cent. on the total, amounting to \$10,240.

As to value: The company claims that the value of the property is greatly in excess of \$460,000. Reference to the evidence is necessary. There was submitted to the commission evidence of value which it summarized substantially as follows:

a. Estimate by company's engineer on basis of reproduction new, less depreciation, at prewar prices.....	\$ 624,548 00
b. Estimate by company's engineer on basis of reproduction new, less depreciation, at 1920 prices.....	1,194,663 00
c. Testimony of company's engineer fixing present fair value for rate making purposes	900,000 00
d. Estimate by commission's engineer on basis of reproduction new, less depreciation at 1915 prices, plus additions since December 31, 1915, at actual cost, excluding Bluefield Valley waterworks, water rights, and going value	397,964 35
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*e. Report of commission's statistician showing investment cost less depreciation	365,445 13
f. Commission's valuation, as fixed in case No. 363 (\$360,000), plus gross additions to capital since made (\$92,520.53)	452,520 53

It was shown that the prices prevailing in 1920 were nearly double those in 1915 and pre-war time. The company did not claim value as high as its estimate of cost of construction in 1920. Its valuation engineer testified that in his opinion the value of the property was \$900,000—a figure between the cost of construction in 1920, less depreciation, and the cost of construction in 1915 and before the war, less depreciation.

The commission's application of the evidence may be stated briefly as follows:

As to "a," supra: The commission deducted \$204,000 from the estimate (details printed in the margin),¹ leaving approximately \$421,000, which it contrasted with the estimate of its own engineer, \$397,964.35 (see "d," supra). It found that there should be included \$25,000 for the Bluefield Valley waterworks plant in Virginia, 10 per cent. for going value, and \$10,000 for working capital. If these be added to \$421,000, there results \$500,600. This may be compared with the commission's final figure, \$460,000.

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*As to "b" and "c," supra: These were given no weight by the commission in arriving at its final figure, \$460,000. It said:

"Applicant's plant was originally constructed more than twenty years ago, and has been added to from time to time as the progress and development of the community required. For this reason, it would be unfair to its consumers to use as a basis for present fair value the abnormal prices prevailing during the recent war period; but, when, as in this case, a part of the plant has been constructed or added to during that period, in fairness to the applicant, consideration must be given to the cost of such expenditures made to meet the demands of the public."

¹ Difference in depreciation allowed.....	\$ 49,000
Preliminary organization and development cost	14,500
Bluefield Valley waterworks plant.....	25,000
Water rights.....	50,000
Excess overhead costs.....	39,000
Paving over mains.....	28,500
\$204,000	

As to "d," supra: The commission, taking \$400,000 (round figures), added \$25,000 for Bluefield Valley waterworks plant in Virginia, 10 per cent. for going value, and \$10,000 for working capital, making \$477,500. This may be compared with its final figure, \$460,000.

As to "e," supra: The commission, on the report of its statistician, found gross investment to be \$500,402.53. Its engineer, applying the straight line method, found 19 per cent. depreciation. It applied 81 per cent. to gross investment and added 10 per cent. for going value and \$10,000 for working capital, producing \$455,500.² This may be compared with its final figure, \$460,000.

As to "f," supra: It is necessary briefly to explain how this figure, \$452,520.53, was arrived at. Case No. 368 was a proceeding initiated by the application of the company for higher rates, April 24, 1915. The commission made a valuation as of January 1, 1915. There were presented two estimates of reproduction cost less depreciation, one by a valuation engineer engaged by the com-

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*pany, and the other by a valuation engineer engaged by the city, both "using the same method." An inventory made by the company's engineer was accepted as correct by the city and by the commission. The method "was that generally employed by courts and commissions in arriving at the value of public utility properties under this method," and in both estimates "five year average unit prices" were applied. The estimate of the company's engineer was \$540,000 and of the city's engineer, \$392,000. The principal differences as given by the commission are shown in the margin.³ The commission disregarded both estimates and arrived at \$360,000. It held that the best basis of valuation was the net investment, i. e., the total cost of the property less depreciation. It said:

"The books of the company show a total gross investment, since its organization, of \$407,882, and that there has been charged off for depreciation from year to year the total sum of \$83,445, leaving a net investment of

² As to "e": \$365,445.13 represents investment cost less depreciation. The gross investment was found to be \$500,402.53, indicating a deduction on account of depreciation of \$134,957.40, about 27 per cent., as against 19 per cent. found by the commission's engineer.

	Company Engineer.	City Engineer.
*1. Preliminary cost.....	\$14,455	\$1,000
2. Water rights.....	50,000	Nothing
3. Cutting pavements over mains	27,744	233
4. Pipe lines from gravity springs	22,072	15,442
5. Laying cast iron street mains	19,252	15,212
6. Reproducing Ada springs...	18,558	13,027
7. Superintendence and engi- neering	20,515	13,621
8. General contingent cost.....	16,415	5,448
	\$189,011	\$63,983

\$324,427. * * * From an examination of the books * * * it appears that the records of the company have been remarkably well kept and preserved. It therefore seems that, when a plant is developed under these conditions, the net investment, which, of course, means the total gross investment less depreciation, is the very best basis of valuation for rate making purposes and that the other meth-

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ods above referred to should *be used only when it is impossible to arrive at the true investment. Therefore, after making due allowance for capital necessary for the conduct of the business and considering the plant as a going concern, it is the opinion of the commission that the fair value for the purpose of determining reasonable and just rates in this case of the property of the applicant company, used by it in the public service of supplying water to the city of Bluefield and its citizens, is the sum of \$360,000, which sum is hereby fixed and determined by the commission to be the fair present value for the said purpose of determining the reasonable and just rates in this case."

In its report in No. 368, the commission did not indicate the amounts respectively allowed for going value or working capital. If 10 per cent. be added for the former, and \$10,000 for the latter (as fixed by the commission in the present case), there is produced \$366,870, to be compared with \$360,000, found by the commission in its valuation as of January 1, 1915. To this it added \$92,520.53, expended since, producing \$452,520.53. This may be compared with its final figure, \$460,000.

The state Supreme Court of Appeals holds that the valuing of the property of a public utility corporation and prescribing rates are purely legislative acts, not subject to judicial review, except in so far as may be necessary to determine whether such rates are void on constitutional or other grounds, and that findings of fact by the commission based on evidence to support them will not be reviewed by the court. City of Bluefield v. Waterworks, 81 W. Va. 201, 204, 94 S. E. 121; Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 678, 100 S. E. 557, 7 A. L. R. 108; Charleston v. Public Service Commission, 86 W. Va. 536, 103 S. E. 673.

In this case (89 W. Va. 736, 738, 110 S. E. 205, 206) it said:

"From the written opinion of the commission we find that it ascertained the value of the petitioner's property for rate making [then

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quoting the commission] 'after *maturely and carefully considering the various methods presented for the ascertainment of fair value and giving such weight as seems proper to every element involved and all the facts and circumstances disclosed by the record.' "

[2, 3] The record clearly shows that the commission, in arriving at its final figure, did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontra-

dicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous. *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. —, decided May 21, 1923. Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts. *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287, 289, 40 Sup. Ct. 527, 64 L. Ed. 908, and cases cited.

We quote further from the court's opinion (89 W. Va. 739, 740, 110 S. E. 206):

"In our opinion the commission was justified by the law and by the facts in finding as a basis for rate making the sum of \$460,000.00. * * * In our case of *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, it is said: 'It seems to be generally held that, in the absence of peculiar and extraordinary conditions, such as a more costly plant than the public service of the community requires, or the erection of a plant at an actual, though extravagant, cost, or the purchase of one at an exorbitant or inflated price, the actual amount of money invested is to be taken as the basis, and upon this a return must be allowed equivalent to that which is ordinarily received in the locality in which the business is done, upon capital invested in similar enterprises. In addition to this, consideration must be given to the nature

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of the investment, a higher rate *being regarded as justified by the risk incident to a hazardous investment.'

"That the original cost considered in connection with the history and growth of the utility and the value of the services rendered constitute the principal elements to be considered in connection with rate making, seems to be supported by nearly all the authorities."

[4] The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary:

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." *Smyth v. Ames* (1893) 169 U. S. 467, 547, 18 Sup. Ct. 418, 434 (42 L. Ed. 819).

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * * * And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was ac-

quired, the company is entitled to the benefit of such increase." *Willcox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 41, 52, 29 Sup. Ct. 192, 200 (53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. [N. S.] 1134).

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." *Minnesota Rate Cases* (1913) 230 U. S. 352, 434, 33 Sup. Ct. 729, 754 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18).

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"*And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property." *Smyth v. Ames*, 169 U. S., 546, 547, 18 Sup. Ct. 434, 42 L. Ed. 819.

"* * * The making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." *Minnesota Rate Cases*, 230 U. S. 454, 33 Sup. Ct. 762, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

In *Missouri ex rel. Southwestern Bell Telephone Co., v. Public Service Commission of Missouri*, supra, applying the principles of the cases above cited and others, this court said:

"Obviously, the commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914, and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum. * * * It is impossible to ascertain what will amount to a fair return upon properties devoted to public service, without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day."

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[5] *It is clear that the court also failed to give proper consideration to the higher cost of construction in 1920 over that in 1915 and before the war, and failed to give weight to cost of reproduction less depreciation on the basis of 1920 prices, or to the testimony of the company's valuation engineer, based on present and past costs of construction, that the property in his opinion, was worth \$900,000. The final figure, \$460,000, was arrived

at substantially on the basis of actual cost, less depreciation, plus 10 per cent. for going value and \$10,000 for working capital. This resulted in a valuation considerably and materially less than would have been reached by a fair and just consideration of all the facts. The valuation cannot be sustained. Other objections to the valuation need not be considered.

3. Rate of return: The state commission found that the company's net annual income should be approximately \$37,000, in order to enable it to earn 8 per cent. for return and depreciation upon the value of its property as fixed by it. Deducting 2 per cent. for depreciation, there remains 6 per cent. on \$460,000, amounting to \$27,600 for return. This was approved by the state court.

[6] The company contends that the rate of return is too low and confiscatory. What annual rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are real-

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ized or anticipated in *highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

In 1909, this court, in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 48-50, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134, held that the question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality and risk, and that no proper rate can be established for all cases; and that, under the circumstances of that case, 6 per cent. was a fair return on the value of the property employed in supplying gas to the city of New York, and that a rate yielding that return was not confiscatory. In that case the investment was held to be safe, returns certain and risk reduced almost to a minimum—as nearly a safe and secure investment as could be imagined in regard to any private manufacturing enterprise.

In 1912, in *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 670, 32 Sup. Ct. 389,

56 L. Ed. 594, this court declined to reverse the state court where the value of the plant considerably exceeded its cost, and the estimated return was over 6 per cent.

In 1915, in *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 172, 35 Sup. Ct. 811, 59 L. Ed. 1244, this court declined to reverse the United States District Court in refusing an injunction upon the conclusion reached that a return of 6 per cent. per annum upon the value would not be confiscatory.

In 1919, this court in *Lincoln Gas Co. v. Lincoln*, 250 U. S. 256, 268, 39 Sup. Ct. 454, 458 (63 L. Ed. 968), declined on the facts of that case to approve a finding that no rate

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yielding as much as 6 per cent. on the invested capital could be regarded as confiscatory. Speaking for the court, Mr. Justice Pitney said:

"It is a matter of common knowledge that, owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

In 1921, in *Brush Electric Co. v. Galveston*, the United States District Court held 8 per cent. a fair rate of return.*

In January, 1923, in *City of Minneapolis v. Rand*, the Circuit Court of Appeals of the Eighth Circuit (285 Fed. 818, 830) sustained, as against the attack of the city on the ground that it was excessive, 7½ per cent., found by a special master and approved by the District Court as a fair and reasonable return on the capital investment—the value of the property.

[7] Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain, or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it. In

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*this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved. For example, the average rate of return on the total cost of the property from 1895 to 1915, inclusive, was less than 5 per cent.; from 1911 to 1915, inclu-

* This case was affirmed by this court June 4, 1923, 262 U. S. 443, 43 Sup. Ct. 606, 67 L. Ed. —.

sive, about 4.4 per cent., without allowance for depreciation. In 1919 the net operating income was approximately \$24,700, leaving \$15,500, approximately, or 3.4 per cent. on \$460,000 fixed by the commission, after deducting 2 per cent. for depreciation. In 1920, the net operating income was approximately \$25,465, leaving \$16,265 for return, after allowing for depreciation. Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent. upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service.

The judgment of the Supreme Court of Appeals of West Virginia is reversed.

Mr. Justice BRANDEIS concurs in the judgment of reversal, for the reasons stated by him in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, supra.

(262 U. S. 625)

GEORGIA RY. & POWER CO. et al. v. RAILROAD COMMISSION OF GEORGIA et al.

(Argued November 29, 1922. Decided June 11, 1923.)

No. 298.

1. Public service commissions — 7—Property of utility need not be valued at replacement cost, less depreciation.

It is not necessary to value the property of a public utility for rate-making purposes at its replacement cost, less depreciation; but that is only one of several relevant facts to be considered in arriving at a fair valuation of the property used in the public service.

2. Gas — 14(1)—Franchise not exclusive is properly excluded in fixing rate base.

Where a gas company's franchise to do business is not a monopoly, but merely a perpetual permit to maintain its mains in the streets and public places, without necessity of securing the consent of the city, the value of that franchise was properly excluded in fixing the rate base.

3. Gas — 14(1)—Past losses are not to be capitalized as property on which fair rate is allowed.

Past losses of a gas company are not to be capitalized as property on which a fair return is based, especially where it was obvious that the losses were not a part of development cost, but were due to insufficiency of previous rates.

4. Gas — 14(1)—Federal income tax is to be deducted in computing net income for rate purposes.

In computing the net income of a gas company for rate-making purposes, the amount of

the federal income tax paid by it is to be deducted from the gross returns.

5. Gas — 14(1)—7¼ per cent. held not confiscatory rate.

A rate of 7¼ per cent. on the value of property of a gas company used in the public service cannot be deemed confiscatory, in view of the fact that dividends from the corporation are not included in the income on which the normal federal tax is payable by stockholders, and a tax exemption is in effect an additional return on the investment, and therefore such return will not be held inadequate, especially on review of a merely interlocutory decree.

Mr. Justice McKenna dissenting.

Appeal from the District Court of the United States for the Northern District of Georgia.

Suit by the Georgia Railway & Power Company and others against the Railroad Commission of Georgia and others, to enjoin the enforcement of an order fixing gas rates. From an order refusing an interlocutory injunction against the enforcement of the rates (278 Fed. 242), complainants appeal. Affirmed.

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Messrs. L. Z. Rosser, of Atlanta, Ga., Robert G. Dodge, of Boston, Mass., and W. T. Colquitt, of Atlanta, Ga., for appellants.

*Mr. E. J. Reagan, of McDonough, Ga., for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The gas supply of Atlanta is furnished by the Georgia Railway & Power Company. Authority to fix public utility rates is vested by law in the Railroad Commission. On September 20, 1921, the commission called upon the Georgia Company to show cause why the then maximum rate, \$1.65 per 1,000 cubic feet, should not be reduced, and hearings were duly had. The company insisted that under the proposed rate the net income would be less than 3 per cent. on what it claimed to be the fair value of the property. The commission concluded that the net income under the proposed rate would be about 8 per cent. on the value found by it. This difference in their views as to the percentage of probable return arose mainly from their difference as to the value of the property.

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The company claimed that it was at least \$9,500,000. The commission found that it was \$5,250,000. On December 30, 1921, it ordered that the price of gas be reduced to \$1.55.

The Georgia Company and the Atlanta Gas-light Company, its lessor, then brought, in the federal court for the Northern district of Georgia, this suit to enjoin enforcement of the order, claiming that the rate prescribed is confiscatory. The case was heard upon application for an interlocutory injunction

by three judges under section 266 of the Judicial Code (Comp. St. § 1243). The court did not approve in all respects the views expressed by the commission; but it found that, "even were there considerable error in fixing values by the commission, the rate would not appear to be clearly confiscatory," and that enforcement of the order ought not be enjoined until the reduced rate had been tried. It therefore refused the interlocutory injunction, and the case is here on appeal under section 238 of the Judicial Code (Comp. St. § 1215).

[1] First. The objections mainly urged relate to the rate base, and one of them is of fundamental importance. The companies assert that the rule to be applied in valuing the physical property of a utility is reproduction cost at the time of the inquiry less depreciation. The 1921 construction costs were about 70 per cent. higher than those of 1914 and earlier dates, when most of the plant was installed. So much of it as was in existence January 1, 1914, was valued at an amount which was substantially its actual cost or its reproduction cost as of that date. The companies claim that it should have been valued at its replacement cost in November, 1921, the time of the rate inquiry, and that the great increase in construction costs was ignored in determining the rate base.

The case is unlike *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission* (No. 158) 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. —, decided May 21, 1923. Here the commission gave careful con-

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sideration to the cost of reproduction; but it refused to adopt reproduction cost as the measure of value. It declared that the exercise of a reasonable judgment as to the present "fair value" required some consideration of reproduction costs as well as of original costs, but that "present fair value" is not synonymous with "present replacement cost," particularly under abnormal conditions. That part of the rule which declares the utility entitled to the benefit of increases in the value of property was, however, specifically applied in the allowance of \$125,000 made by the commission to represent the appreciation in the value of the land owned. The lower court recognized that it must exercise an independent judgment in passing upon the evidence, and it gave careful consideration to replacement cost. But it likewise held that there was no rule which required that in valuing the physical property there must be "slavish adherence to cost of reproduction less depreciation." It discussed the fact that since 1914 large sums had been expended annually on the plant; that part of this additional construction had been done at prices higher than those which prevailed at the time of the rate hearing; and it concluded that "averaging results and remembering that values are * * * matters

of opinion * * * no constitutional wrong clearly appears."

The refusal of the commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation was clearly correct. As was said in *Minnesota Rate Cases*, 230 U. S. 352, 434, 33 Sup. Ct. 729, 754 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18):

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

What these relevant facts are had been stated in *Smyth v. Ames*, 169 U. S. 466, 546, 547, 18 Sup. Ct. 418, 434, 42 L. Ed. 819.

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"* * * (*) The original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

And in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52, 29 Sup. Ct. 192, 200 (53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. [N. S.] 1134), it had been made clear—

"that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase."

The rule laid down in these cases was expressly recognized as controlling, both by the commission and by the lower court. Evidence bearing on most of the facts there declared to be relevant facts was before them. The court states, and the record establishes, that—

"The opinion of the * * * commission * * * evinces a full and conscientious consideration of the evidence."

The opinion of the court shows that it also made careful examination of the evidence submitted and that it recognized the applicable rules of law. While it differed from the commission in some matter of detail, it sustained the latter's finding that the value was \$5,250,000. The question on which this

court divided in the Southwestern Bell Telephone Case, supra, is not involved here.

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[2, 3] *Second. Two objections to the valuation relate to the exclusion of items from the rate base, namely, the franchise to do business in Atlanta, said to be worth \$1,000,000, and so-called losses from operations during recent years, alleged to aggregate \$1,000,000. These items were properly excluded. The franchise in question is not a monopoly. It is merely a perpetual permit, granted by the Legislature in 1856, to maintain gas mains in the streets, alleys and public places of Atlanta without the necessity of securing the consent of the municipality. That such franchises are to be excluded in fixing the rate base was settled by Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 669, 32 Sup. Ct. 389, 56 L. Ed. 594, Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 169, 35 Sup. Ct. 811, 59 L. Ed. 1244, and Galveston Electric Co. v. Galveston, 258 U. S. 388, 42 Sup. Ct. 351, 66 L. Ed. 678. The allowance for the franchise made in Willcox v. Consolidated Gas Co., 212 U. S. 19, 43, 44, 48, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134, was rested on special grounds which do not exist in this case. That past losses are not to be capitalized as property on which the fair return is based was held in Knoxville v. Knoxville Water Co., 212 U. S. 1, 14, 29 Sup. Ct. 148, 53 L. Ed. 371; Galveston Electric Co. v. Galveston, 258 U. S. 388, 42 Sup. Ct. 351, 66 L. Ed. 678. Here this conclusion seems even clearer than it was in those cases. The losses under consideration in the case at bar were obviously not a part of development cost. They were due to insufficiency of previous rates.

Third. Two further objections to the rate base relate to items of property included in it, which are alleged to have been undervalued. The companies contend that the working capital required was \$420,000, whereas only \$266,677 was allowed. They also contend that the "going concern" value is at least \$750,000, whereas only \$441,629 was allowed. These are findings of fact made by the commission and approved by the lower court. We are not satisfied that either finding is erroneous.

[4] Fourth. The companies contend that there was error, also, in estimating the

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amount of the probable net income. One objection relates to the federal corporate income tax (10 per cent.) assumed to be \$45,364. The commission treated the tax as a proper operating charge. The court disallowed it, and thus increased its estimate of probable net income. In this the court erred. Galveston Electric Co. v. Galveston, 258 U. S. 388, 42 Sup. Ct. 351, 66 L. Ed. 678. Its estimate of "\$424,150 as the probable income per year under the new rate, with no allowance made for increased consumption or reduced cost of production that seem quite probable," should therefore be reduced to about \$380,000. This

is the amount indicated by the commission's findings.

The other objections relate to the amount of the depreciation charge. The companies say the rate should be $2\frac{1}{2}$ per cent. The commission and the court allowed only 2 per cent. This question is one of fact, and we are not convinced that it was wrongly decided below. The amount of the depreciation charge is also objected to on the ground that the percentage should have been figured on a larger value. This objection depends upon the value to be placed upon the physical property which has already been discussed.

[5] Fifth. The probable return based on the value and the probable income found by the commission would be nearly $7\frac{1}{4}$ per cent. It must be borne in mind, as pointed out in Galveston Electric Co. v. Galveston, supra, that, since dividends from the corporation are not included in the income on which the normal federal tax is payable by stockholders, the tax exemption is, in effect, an additional return on the investment. A return of $7\frac{1}{4}$ per cent.—in addition to this tax exemption—cannot be deemed confiscatory. The solicitude of the commission to secure to the companies a fair return is shown by its treatment of them during the three years preceding the order here in question. Long prior

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to 1918, the gas rate had been fixed by the utility at \$1. Operating and construction costs having risen owing to the World War, the commission raised the rate to \$1.15, effective September 1, 1918; to \$1.35, effective October 1, 1920; to \$1.90, effective March 1, 1921. After costs had fallen materially, the rate was reduced to \$1.65 June 1, 1921, and the order to reduce it to \$1.55 was entered, effective January 1, 1922. In making each of these changes the commission fixed a rate which it estimated would permit the company to earn a return of about 8 per cent. on the fair value of the property. Each change of rate was made upon careful consideration. If there was error, it was error in prophecy or error of judgment in passing upon the evidence. We cannot say that the evidence compelled a conviction that the rate would prove inadequate. Compare San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 19 Sup. Ct. 804, 43 L. Ed. 1154; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892; Knoxville v. Knoxville Water Co., 212 U. S. 1, 17, 29 Sup. Ct. 148, 53 L. Ed. 371; Galveston Electric Co. v. Galveston, 258 U. S. 388, 401, 402, 42 Sup. Ct. 351, 66 L. Ed. 678. Moreover, the decree is merely interlocutory.

Affirmed.

Mr. Justice McKENNA, dissenting.

I am constrained to dissent on the authority of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri et al., 262 U. S. 276, 43 Sup. Ct.

544, 67 L. Ed. —, decided May 21, 1923, and Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia, 262 U. S. 679, 43 Sup. Ct. 675, 67 L. Ed. —, decided to-day.

These two cases follow other cases which they cited, including that of Smyth v. Ames, decided a quarter of a century ago, declaring the rule of regulation to be that, in order to fix a rate for the use of property devoted to the public service, the property must be estimated "at the time it is being used for the public," and again, "that the value of the property is to be determined as of the time when the inquiry is made regarding rates."

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*The commission in the present case conceded the rule, and violated it, and upon a unique justification. It said:

"The human race is only recovering from an experience the like of which the world never before endured—a world war—a world upheaval—an economic cataclysm. There are no stable measures of value to-day."

Upon this the commission departed from the values which then prevailed, and from those that the rule of law prescribed, that is, the values prevailing at the time the property was being used for the public, and reverted to the values which obtained January 1, 1914—values that had not existed for over seven years, and no prophecy could say when, if ever, they would exist again.¹

To separate the company from the conditions which existed at the time of regulation was arbitrary, and condemned it, the company, to accept an inadequate return upon the value of its property, not only for the then time, but for an indefinite future time. Similar action was condemned in the Telephone Case—no "economic cataclysm" repelling. Similar action was condemned in the Bluefield case—no "economic cataclysm" repelling.² May I ask what had become of the "cataclysm"? Had it settled in Georgia in

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conscious indulgence to life and *business in other parts of the country from its bewildering influence?

¹ An expert witness of the commission testified as follows: "I do not incline to the extreme high value of the war-time period, but believe that when business does resume prices will again stabilize at figures considerably lower than the peak of 1920, but far above any pre-war level."

² The lower federal courts have not felt the bewildering effect—impotent effect, I might say—that the commission discovered in the post-war conditions. *St. Joseph Railway, etc., Co. v. Public Service Commission* (D. C.) 268 Fed. 267; *Landon et al. v. Court of Industrial Relations of the State of Kansas et al.* (D. C.) 269 Fed. 433, 444; *Potomac Electric Power Co. v. Public Utilities Commission*, 276 Fed. 327, 51 App. D. C. 77; *Public Service Railway Co. v. Board of Public Utilities Commissioners* (D. C.) 276 Fed. 979. And a state court has been equally free from confusion. *Petersburg Gas, Co. v. Petersburg*, 132 Va. 82, 110 S. E. 533, 20 A. L. R. 542.

The contrariety of decision cannot be reconciled. To anticipate a possible criticism, however, I should say a distinction is attempted to be made between this case and the Telephone Case, a distinction, I think, not sustained by the record. It is said that the present case is unlike the Telephone Case, in that "here the commission gave careful consideration to the cost of reproduction; but it refused to adopt reproduction cost as the measure of value." The omission was the commission's error; it was in disregard to the rule of the cases—disregard of the value of the utility at the time of its regulation—the time it was being used by the public and such value was available. The problem was direct and simple, with no baffling element in it. It was only to find the reproduction cost of the utility, and this, necessarily, was constituted of the cost of its materials, and the cost of their fabrication, less an estimate of depreciation from the new; these costs and depreciations representing its value at the moment of time it was being regulated and being used by the public, such moment being the time prescribed by the law for the determination of its value—the determination of that upon which the rate for its use was to be based.

There was nothing obscure or puzzling about it. The cost of the materials and of their fabrication was as much a measure of the value of the utility when reproduced as the cost of materials and their fabrication were a measure of the value of the utility when it was produced—a measure of value of reproduction and production. A measure, it is true, of different degree, which it was the duty of the commission to regard, and because the commission did not regard it—that is, because it did not consider the values at the time it was acting—its action was

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condemned. There are words in the *Telephone Case that are pertinent here. Here, as there, a commission undertook to value the property of a utility without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing at a prior time. And it may be said here, as it was said there, "as a matter of common knowledge these increases were large."

The error in this case being of like kind as that which was committed by the commission in that case, it should be visited by the same treatment; that is, a reversal of its action.

It is supposed that this case and the Telephone Case cannot coexist as declarations of law, without explanation. No attempt, however, is made to justify this case and the Bluefield Case. It seems to be taken for granted that they can coexist in the books in harmonious association. Can they?

For answer, it is worth one's while to inquire what the Bluefield Case decides. It is said in the opinion that—

"The record [in the case] clearly shows that the commission [whose action is reviewed] in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted evidence, and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous"—citing the Telephone Case as well as other cases.

From this error, all of the other errors in the case followed, and it and they constituted the mistake of the Supreme Court of West Virginia in sustaining the action of the commission, and the ground of reversal of the Supreme Court.

The cases, this and the Bluefield Case, are identical in errors. In this case the

values that existed at the time ^{*638}of regulation were wholly disregarded, and those of seven years before, those which existed in 1914—that is, before the war—were deliberately selected. This action was affirmed, as I have pointed out, by the District Court, from whose decree this appeal was taken. The decree is affirmed, which is the affirmance of the action of the commission.

In the Bluefield Case the values of the utility at the time of regulation "appears," according to the declaration of the court, "to have been wholly disregarded."

The Supreme Court of West Virginia affirmed the action of the commission. This court in its opinion of to-day reverses that judgment, which is a reversal of the action of the commission.

It will be observed the commissions did exactly the same thing, and yet the action of one is affirmed, and the action of the other reversed. This contrariety of decision I cannot reconcile. There should be reversal of both, or the affirmance of both, if their identities are to be observed. I, therefore must dissent from one or the other of the cases, and, as the Bluefield Case has the support of the Telephone Case, I dissent from the present case; there being a majority against it, and those cases, besides, expressing my view of the law.

It may be said that, if I get rid of the commission's action, I must take account of the District Court's judgment of it upon an independent consideration of the record. I realize that the challenge has serious strength, but, as the court's opinion is very long, I can only meet the challenge by what I consider the error of the opinion. The court disregarded, as the commission did, the rule of law that the value of the company's utility should be at the time it was being regulated; that is, at the time it was being used. The court, however, did not entirely agree with the commission. It said:

"In ascertaining the present values of physical ^{*639}properties, though correct *rules were announced by the commission, we do not think they were exactly followed."

And again:

"The commission did not allow the appreciation claimed on the investment since 1914, nor did it deduct from the investments of 1919 and 1920 and 1921, which were nearly a million dollars over their admitted reproduction loss, but it did allow the appreciation in market price of real estate."

The last observation I do not pass upon, as it has no consequential bearing on the question in the case. And I proceed to say that I have the impression that the court's decision of the commission's action was influenced by the court's constitutional views. The court said that "a rate established as reasonable, whether by the company or by the commission, is not guaranteed by the commission or by the public. Whether it will actually yield more or less than a fair return during its continuance is a risk of the business" to which the company had devoted its property.

If this is an intimation that the court was of the view that, even if the action of the commission resulted in a return to the utility of less than that which would be fair and reasonable, it would not encounter the opposition of the Constitution, such view was error, and, laboring under the error, I can understand that the court was not anxiously concerned to investigate the grounds of the commission's action—not concerned with the "risk of the business."

There are questions upon other elements of value upon which I do not consider it necessary to pass.

I think the order denying the preliminary injunction should be reversed.

(262 U. S. 668)

JOSLIN MFG. CO. v. CITY OF PROVIDENCE et al.

No. 219.

SCITUATE LIGHT & POWER CO. v. SAME.

No. 220.

JOSLIN v. SAME.

No. 221.

(Argued April 19 and 20, 1923. Decided June 11, 1923.)

I. Constitutional law ¶227, 280—Eminent domain ¶3—Statute providing for water supply not unconstitutional, because authorizing other communities to take water at wholesale.

Laws R. I. 1915, c. 1278, providing for condemnation of water rights and other prop-

erty for the purpose of a water supply for the city of Providence, so far as it provides that other communities within the drainage area of the water authorized to be taken shall be allowed to take water from the city waterworks at wholesale rates or charges, without requiring them to bear a proportionate part of the cost of acquisition, construction, and maintenance, does not violate the rights of taxpayers of such city under Const. U. S. Amend. 14.

2. Constitutional law ☞213, 254—Municipal corporation may be compelled to recognize equitable and moral obligations.

Municipalities are political subdivisions of the state, and, subject to the will of the Legislature and without violation of Const. U. S. Amend. 14, may be compelled, not only to recognize their legal obligations, but to discharge obligations of an equitable and moral nature.

3. Constitutional law ☞225(1) — Burden on one municipality not precluded, because resulting in incidental benefit to another.

The Legislature is not precluded from putting a burden on one municipality because it may result in an incidental benefit to another.

4. Constitutional law ☞48—Not assumed that wholesale rates to be paid city for water from its system will not be just compensation.

In passing on the validity, under Const. U. S. Amend. 14, of Laws R. I. 1915, c. 1278, providing for the acquisition of a water supply by the city of Providence, and providing that certain municipalities and districts shall be allowed to take water from the city's waterworks at fair wholesale rates or charges, it cannot be assumed that such wholesale rates will be less than just compensation for what they get.

5. Statutes ☞64(4)—Provision authorizing city to furnish water to water companies held separable.

The provision of Laws R. I. 1915, c. 1278, permitting the city of Providence to furnish water to water companies for use within the drainage area of the water which it is thereby authorized to take, is separable, and its constitutionality need not be considered, until some attempt is made to carry it into effect.

6. Constitutional law ☞227—Statute providing compensation for injury to business established prior to its enactment from appropriation of property held not to deny the equal protection of the laws.

Laws R. I. 1915, c. 1278, authorizing the city of Providence to obtain water supply by condemnation, so far as it provides for payment of compensation for injury to a business established prior to its passage, does not deny the equal protection of the laws to those whose business is established subsequent to its passage, as the classification is not clearly arbitrary or unreasonable.

7. Eminent domain ☞107—Injury to business not ordinarily element of compensation, unless so provided by statute.

Injury to a business carried on on lands taken for public use does not generally constitute an element of just compensation, in the absence of a statute expressly allowing it.

8. Constitutional law ☞227—Statute providing for payment of cost of removing mill from property appropriated to new location within certain limits does not deny equal protection.

Laws R. I. 1915, c. 1278, authorizing the city of Providence to obtain a water supply by condemnation, so far as it provides for payment of the cost of removing a mill from property appropriated to a new location within the New England States, does not deny the equal protection of the laws.

9. Eminent domain ☞95—Cost of removing personal property from land taken not ordinarily an element of damage.

Ordinarily the cost of removing personal property from land taken for a public use is not a proper element of damage, unless made so by express statute.

10. Constitutional law ☞280—Statute extending right of compensation for taking of property for public use does not deny taxpayers due process of law.

Laws R. I. 1915, c. 1278, authorizing city of Providence to obtain water supply by condemnation, so far as it extends the right to compensation to include damages to established business or cost of removing mill to new location, does not deprive taxpayers of the city of their property without due process of law.

11. Eminent domain ☞75—Taking by state or municipality need not be accompanied or preceded by payment.

The taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, and the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment and there is adequate provision for enforcing the pledge.

12. Eminent domain ☞71—Statute held to provide sufficiently for ascertainment and payment of compensation for property taken for public use.

Laws R. I. 1915, c. 1278, § 23, providing that, in case of disagreement on compensation for property taken by the City of Providence, the owner may proceed in the superior court for assessment of compensation, and for one year may not be deprived of possession without his consent, and may have execution against the city on his judgment, sufficiently provides for ascertainment and payment of just compensation to satisfy Const. U. S. Amend. 14.

13. Eminent domain ☞3—Provision authorizing city, appropriating property, to remove buildings or lease property not needed, held not to affect validity.

Laws R. I. 1915, c. 1278, authorizing city of Providence to obtain water supply by condemnation, so far as it authorizes the city to lease, sell, or dispose of lands taken to protect the water supply and not needed for its waterworks, and to remove buildings or improvements interfering with the progress of the work, relates simply to incidents in the administration of the statute and the manage-

ment of the property, which are of no concern to the former owner, and which do not affect its validity.

14. Eminent domain ☞67—Necessity of taking is legislative and not judicial question.

The necessity and expediency of taking property for public use is a legislative and not a judicial question, and requires no hearing, and is not the subject of judicial inquiry.

15. Eminent domain ☞68—Determination of necessity of taking may be conferred upon municipality.

The Legislature may confer on a municipality the authority to determine for itself the necessity of taking property for a public use.

In Error to the Superior Court of the State of Rhode Island.

Three suits, by the Joslin Manufacturing Company, by the Scituate Light & Power Company, and by Theresa B. Joslin against the City of Providence and others. Decree dismissing the bills pursuant to the decision of the Supreme Court of Rhode Island (Joslin Mfg. Co. v. Clarke, 114 Atl. 185), and plaintiffs bring error. Affirmed.

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*Messrs. Robert H. McCarter, of Newark, N. J., and Francis I. McCanna and Alfred G. Chaffee, both of Providence, R. I., for plaintiffs in error.

Mr. Albert H. McCarter, for defendants in error.

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*Mr. Justice SUTHERLAND delivered the opinion of the Court.

These are suits in equity brought by the several plaintiffs in error in the superior court of Rhode Island, to enjoin the defendants in error from taking possession of or interfering with their property. The proceedings complained of, were taken under an act of the state Legislature, purporting to authorize the city of Providence to obtain a supply of pure water. Public Laws, chapter 1278, approved April 21, 1915. The water supply board, whose members are made parties defendant, is directed by the act to investigate and determine whether a part of the north branch of the Pawtuxet river and the tributary watershed would be the most available and desirable source of water supply for the city of Providence and for any territories now supplied or hereafter supplied, under the provisions of the act by means of the waterworks of said city. The board, if it approve the source, is to make a plan, locating storage reservoirs and an aqueduct to carry water therefrom to the city waterworks. Section 3.

Thereupon the board is authorized to purchase for and in the name of the city such lands and interests and water rights as may be necessary, when the city council shall have made provision for the necessary funds. Section 4.

The city is authorized to acquire by condemnation any lands and interests included within a definitely limited area, which the city council shall deem necessary for the purposes stated in the act. Section 5.

The city is further authorized by condemnation to acquire the waters or any part thereof, included within the area, and any water or flowage rights or privileges appurtenant thereto. Section 6.

The owner of any mill upon land taken, may surrender the machinery therein to the city within six months after the taking, whereupon the city shall become liable to pay its fair value at the time of delivery as part

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of the dam*ages for such taking; or such special damages as may be suffered as a result of a compulsory removal before the expiration of a reasonable time. If the machinery be not surrendered, the reasonable cost of removing it to a new location within the New England States and setting it up is to be paid by the city as part of the damages. Section 12.

The city is also required to pay the fair market value of furniture and building equipment, contained in any building belonging to the town of Scituate, which may be surrendered (section 11); the cost of additional police protection in any town or city in consequence of carrying on construction work (section 14); damages for decrease in value of lands not taken but contiguous to lands which are taken (section 15); and limited damages in certain cases for loss of employment due to the taking of the manufacturing establishment in which claimant is employed (section 17).

The owner of any business, on lands within certain localities, established prior to the passage of the act is given the right to recover for injury thereto. Section 16.

Certain municipalities and districts within the drainage areas described, when necessary are allowed to take and receive water from the city waterworks for domestic and municipal purposes upon payment therefor at fair wholesale rates or charges, which, in case of disagreement, are to be determined by arbitration. The city is also authorized, under specified limitations, to furnish water to any incorporated water company, for use in any territory included within the drainage areas where there is no public water supply. Section 18.

In case any lands purchased or condemned are not required for waterworks purposes, but are held to protect and preserve the waters from pollution, the city is authorized to lease them under specified restrictions. Section 21.

Whenever the city council shall resolve to condemn any property it is required to have filed, in the office of the clerk of the town or

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city where any of the lands lie, a *statement giving a description of the property taken. Thereupon the title shall vest in the city in

fee simple, except where a less estate is specified. The city is authorized to take possession, but not to do so without the consent of the owner, until after the expiration of a year from the date of filing such statement. Payment for the property taken is to be made forthwith if the city and the owner agree upon the price. If not, the owner is authorized within one year after notice of the taking, or, if not notified, within two years from the date of filing the statement, to have an assessment of damages by a jury, or at his option, by a commission, upon petition to the superior court. Upon the entry of judgment the owner may have execution issued against the city. Section 23.

Buildings or improvements on lands actually taken may be sold, disposed of or removed when necessary to prevent obstruction to the work. Section 25.

The city is given power to borrow all money necessary to secure such water supply, including lands, etc., either by purchase or condemnation and to issue bonds and notes therefor. Section 26.

The plaintiff in error in No. 219 has a number of cotton mills and other property interests within the area sought to be condemned, and is taxpayer in the city of Providence. The plaintiff in error in No. 220 has, within the same area, water powers and privileges, and numerous parcels of land, upon which are power plants, transmission lines, fixtures, and machinery, used in the business of generating and distributing electricity for light, heat, and power. Plaintiff in error in No. 221 has a residence and numerous buildings and improvements, together with water rights and privileges connected therewith, situated in the same area, and is a taxpayer in the city of Providence.

The water supply board, acting under this statute, prepared a description and plat of

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the lands proposed to *be taken, which was submitted to the city council for action. The council adopted a resolution asserting a taking of lands and interests within the defined area, including property of the plaintiffs in error, the title so taken, so far as material here, being in fee simple.

Plaintiffs in error having challenged the constitutionality of the act the superior court certified the three cases to the state Supreme Court for a determination of the questions, in accordance with the provisions of the state statute. General Laws, c. 298, § 1. The Supreme Court decided that the statute was not in conflict with the Constitution of the United States, and thereupon the record, with its decision certified thereon, was sent back to the superior court for further proceedings. The last-named court dismissed the bills, and from its decree the case comes here on writ of error.

The legislation is assailed as contravening the provisions of the Fourteenth Amendment of the federal Constitution.

[1-4] First. It is contended that the statute imposes a burden upon the taxpayers of the city of Providence by authorizing an expenditure, which in part is for the benefit of other municipalities or of companies outside the city, that are either not required to contribute to such expenditure or whose contributions do not constitute just compensation. The basis of this complaint, in so far as it relates to other municipalities and districts is that they are giving the right to take water upon payment of fair wholesale rates therefor, and that these rates need bear no relation to the additional cost incident to the contingency of their coming in.

That the taxpayers of one municipality may not be taxed arbitrarily for the benefit of another may be assumed; but that is not the case here presented. The communities to be supplied are those within the drainage area of the waters authorized to be taken.

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These waters *are under the primary control of the state and in allowing the city of Providence to appropriate them, it was entirely just and proper for the Legislature to safeguard the necessities of other communities who might be dependent thereon, and to that end to impose upon the city of Providence such reasonable conditions as might be necessary and appropriate. Municipalities are political subdivisions of the state, and are subject to the will of the Legislature (Trenton v. New Jersey, 262 U. S. 182, 43 Sup. Ct. 534, 67 L. Ed. — May 7, 1923), and may be compelled not only to recognize their legal obligations but to discharge obligations of an equitable and moral nature as well (Guthrie National Bank v. Guthrie, 173 U. S. 528, 537, 19 Sup. Ct. 513, 43 L. Ed. 796). The requirement here in question is one well within the rule. Specifically, it is objected that the act does not require these other communities to bear a proportionate part of the cost of acquisition, construction and maintenance. The special facts which led the Legislature to direct payment at wholesale rates, instead of upon the basis of sharing in the cost of the enterprise, or of some other, we need not consider. It may have been, as suggested, that there were inherent difficulties in the way of making such an apportionment. But it is enough to say that the method selected is one within the scope of legislative discretion and not obnoxious to the federal Constitution. See *County of Mobile v. Kimball*, 102 U. S. 691, 703-704, 26 L. Ed. 238; *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047; *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616. The Legislature is not precluded from putting a burden upon one municipality because it may result in an incidental benefit to another. *County of Mobile v. Kimball*, supra, 102 U. S. at pages 703, 704, 26 L. Ed. 238. Moreover, we cannot assume that the fair wholesale rates to be paid by these outside communities will be less than just compensation for what they get.

[5] The provision in respect of furnishing water to water companies within the area de-

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fined is not compulsory, but *permissive, and leaves the city free to fix terms and conditions. It simply gives the city an opportunity to dispose of water, which for the time being it may not need, for compensation; something that is purely incidental to the main purposes of the legislation. No constitutional objection to it is now perceived. *Kaukauna v. Green Bay, etc., Canal*, 142 U. S. 254, 273, 12 Sup. Ct. 173, 35 L. Ed. 1004; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 72, 73, 33 Sup. Ct. 667, 57 L. Ed. 1063; *City of Rochester et al. v. Briggs*, 50 N. Y. 553, 563. In any event, it is a separable provision and it will be time enough to consider the question of its constitutionality when some attempt is made to carry it into effect.

[6, 7] Second. The act, it is asserted, denies the equal protection of the laws, among other things, by permitting the owner of a business established prior to the passage of the act to recover for injury thereto while withholding such compensation from one whose business has been established since, and by allowing a mill owner to recover the cost of removing his machinery to a new location within the New England States, while denying a similar right to one desiring to move to a location elsewhere. It is further asserted by plaintiffs in error, in their capacity as taxpayers, that the effect of allowing these and other consequential damages is to deprive them of their property without due process of law.

Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation (*Cox v. Philadelphia, etc.*, R. R. Co., 215 Pa. 506, 64 Atl. 729, 114 Am. St. Rep. 979; 2 Lewis on Eminent Domain [3d Ed.] § 727), in the absence of a statute expressly allowing it (*Whiting v. Commonwealth*, 196 Mass. 468, 82 N. E. 670; *Oakland v. Pacific Coast Lumber Co.*, 171 Cal. 392, 398, 153 Pac. 705). This statute therefore does not deny a right; it grants one, and limits it to a business already established. We cannot say that such a classification is unreasonable or

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*arbitrary—and certainly, it is not clearly so. The law-making body legislated with reference to an existing situation. One who came after the enactment and established a business did so with notice that the extra-constitutional compensation provided for would not apply to him. In the difference between an owner who had established a business without notice that his property would be required for public use and one who proceeds in the face of such notice, the Legislature evidently found a sufficient and proper basis for classification, and we are not prepared to say that its conclusion was so palpably arbitrary as to fall within the prohibitions of the Fourteenth Amendment. See *Arkansas Natural Gas Co. v. Arkansas Railroad Com-*

mission, 261 U. S. 379, 43 Sup. Ct. 387, 67 L. Ed. —, March 19, 1923, and cases cited.

[8, 9] If the geographical limitation upon the liability to pay for the removal of machinery could be said to bring about a classification, the principles just discussed would control; but, in fact, there is no classification. The right is extended to all millowners, who choose to avail themselves of it, to recover the cost of removal within the defined territory. Ordinarily, the cost of removing personal property from land taken is not a proper element of damage unless made so by express statute (2 Lewis on Eminent Domain [3d Ed.] § 728), and it was not an unconstitutional exercise of power for the Legislature, in creating the right, to define its extent. Other provisions of the statute alleged to be discriminatory cannot be differentiated in principle from those just discussed.

[10] In respect of the contention that the statute extends the right to recover compensation, so as to include these and other forms of consequential damages, and thus deprives plaintiffs in error, as taxpayers of the city, of their property without due process of law, we need say no more than that, while the Legislature was powerless to diminish the constitutional measure of just compensation, we are aware of no rule which stands in the

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way of an extension *of it, within the limits of equity and justice, so as to include rights otherwise excluded. As stated by the Supreme Judicial Court of Massachusetts in *Earle v. Commonwealth*, 180 Mass. 579, 583, 63 N. E. 10 (57 L. R. A. 292, 91 Am. St. Rep. 326), speaking through Mr. Justice Holmes, who was then a member of that court:

"Very likely the * * * rights were of a kind that might have been damaged if not destroyed without the constitutional necessity of compensation. But some latitude is allowed to the Legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law."

[11, 12] Third. We next consider the contention that the act permits the taking of property and grants the power to lease, sell, or dispose of it without an offer to pay compensation therefor or a determination of it in advance. It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge. *Sweet v. Rechel*, 159 U. S. 380, 400, 404, 407, 16 Sup. Ct. 43, 40 L. Ed. 188; *Williams v. Parker*, 188 U. S. 491, 502, 503, 23 Sup. Ct. 440, 47 L. Ed. 559; *Crozier v. Krupp*, 224 U. S. 290, 306, 32 Sup. Ct. 488, 56 L. Ed. 771; *Bragg v. Weaver*, 251 U. S. 57, 62, 40 Sup. Ct. 62, 64 L. Ed. 135; *Hays v. Port of Seattle*, 251

U. S. 233, 238, 40 Sup. Ct. 125, 64 L. Ed. 243; Adirondack Railway v. New York State, 176 U. S. 335, 349, 20 Sup. Ct. 460, 44 L. Ed. 492. Under the provisions of section 23 of the statute, if the owner and the city agree upon the amount, payment is to be made forthwith. If they do not agree, the owner at any time within a year after notice of the taking, or, if not notified, at any time within two years after the public filing of the statement thereof, may proceed in the superior court by petition to have the compensation assessed by a jury, or, at his option, by a commission. For a year in the meantime, he may not be deprived of possession without

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his consent. As an additional guaranty that the judgment obtained will be paid—and paid promptly—the owner under the statute may have execution issued against the city. These provisions adequately fulfill the requirement in respect of the ascertainment and payment of just compensation, within the principles established by the decisions of this Court last above cited.

[13] Nor is there anything in the complaint that the city, after taking but before payment, is authorized to lease, sell or dispose of any lands taken and held to protect the purity of the water supply, and to remove buildings or improvements which interfere with the progress of the work. That these are simply incidents in the administration of the statute and in the management of property, title to which has passed to the city, which are of no concern to plaintiffs in error and which in no manner affect the validity of the act, is too clear to require anything beyond statement. See *Sweet v. Rechel*, supra, 159 U. S. pp. 404, 407, 16 Sup. Ct. 43, 40 L. Ed. 188.

[14, 15] Fourth. Finally, the validity of the act is challenged as denying due process of law, on the ground that the question of the necessity for taking the property has not been determined by the Legislature itself, but is relegated to the city to decide ex parte, without appeal or opportunity for hearing and decision by an impartial tribunal. That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. *Adirondack Railway v. New York City*, supra, 176 U. S. at p. 349, 20 Sup. Ct. 460, 44 L. Ed. 492; *Shoemaker v. United States*, 147 U. S. 282, 298, 13 Sup. Ct. 361, 37 L. Ed. 170; *United States v. Gettysburg Electric Railway*, 160 U. S. 668, 685, 16 Sup. Ct. 427, 40 L. Ed. 576; *Boom Company v. Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206. Neither is it any longer open to question in this court that the Legislature may confer upon a municipality the authority to determine such necessity for itself. *Bragg v. Weaver*, supra, 251, U. S. at page 58, 40 Sup. Ct. 62, 64 L. Ed. 135; *Sears v. City of Akron*, 246 U. S. 242, 251, 38 Sup. Ct. 245, 62 L. Ed. 688.

The question is purely political, does not require a hearing, and is not the subject of

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judicial inquiry. The Legislature here, while investing the city with the authority to determine it, in each instance, has carefully circumscribed the power by limiting its exercise within a definitely restricted area. The city may take less than this area, but cannot take more.

The decree of the state court is Affirmed.

(262 U. S. 700)

RINDGE CO. et al. v. LOS ANGELES COUNTY.

RINDGE CO. v. SAME.

(Argued April 26, 1923. Decided June 11, 1923.)

No. 237.

1. Eminent domain ☞66—Whether use public or private is judicial question.

The nature of a use, whether private or public, is ultimately a judicial question.

2. Courts ☞394(11)—Supreme Court should regard with great respect judgment of state court as to what are public uses.

Whether a use is public or private is influenced by local conditions, and the Supreme Court, in enforcing Const. Amend. 14, should keep in view the diversity of such conditions, and regard with great respect the judgments of state courts as to what should be deemed public uses.

3. Eminent domain ☞19—Taking for highway and branch held "taking for public use," though extending through a single ranch and not connecting with public roads.

Though a highway and a branch thereof extended through a single ranch, and the main highway terminated within its boundary, and neither of them connected with any other public road at one terminus, the main highway extended to the county line, and the branch road connected with certain private roads and ways. The main road furnished a way to and from such ranch, and the branch road a way to and from the homes of persons using such private roads, and in addition the main highway constituted a scenic highway of great beauty 20 miles long. Held, that the taking of land for such highway was a taking for public use, and authorized, under Code Civ. Proc. Cal. § 1238.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking (in Eminent Domain).]

4. Eminent domain ☞14—Not necessary that entire public or considerable portion thereof should directly enjoy or participate in improvement; "public use."

It is not essential that an entire community, or even any considerable portion, should

directly enjoy or participate in an improvement in order to constitute a "public use."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Use (in Eminent Domain).]

5. Eminent domain ⇨19—Highway may be laid out, terminating at state or county line, and not making connection with another road.

A highway can be legally laid out, terminating at a state or county line, though there be no connecting highway in the adjoining state or county, and no definite official action has been taken to establish such connecting highway.

6. Eminent domain ⇨13—Future demands of public may be considered in determining whether taking is for "public use."

In determining whether the taking of property is necessary for public use, not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered.

7. Eminent domain ⇨17—Public uses extends to matters of public health, recreation and enjoyment.

Public uses are not limited to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation, and enjoyment.

8. Eminent domain ⇨19—Road for pleasure travel may be "public use."

A road need not be for a purpose of business to create a public exigency, and pleasure travel may be accommodated as well as business travel.

9. Eminent domain ⇨262(5)—Striking out special defenses not prejudicial, when defendants entitled and permitted to introduce evidence on the question.

In condemnation proceeding, the striking out of special defenses alleging that a road would furnish no way of necessity or convenience for public use or travel was not prejudicial, where defendants were entitled under the general issues, and were permitted, to introduce all their evidence bearing on that question.

10. Courts ⇨394(11)—Supreme Court bound by state court's holding as to construction and validity, under state Constitution, of state statute.

The holdings of the state court that Code Civ. Proc. Cal. § 1241, as amended in 1913, makes the resolution of the county legislative body conclusive as to the necessity of a proposed highway and the necessity of taking designated property therefor, and, as so construed, does not violate the state Constitution, is controlling on the Supreme Court.

11. Constitutional law ⇨281—Eminent domain ⇨3—Statute making resolution of county board conclusive as to necessity of taking property for particular use is constitutional.

Code Civ. Proc. Cal. § 1241, as amended in 1913, construed as making resolutions of coun-

ty legislative body conclusive as to necessity of proposed public improvement and necessity of taking designated property, does not conflict with Const. U. S. Amend. 14, because failing to provide for a hearing or otherwise.

12. Eminent domain ⇨66—Necessity of appropriation is not judicial question.

The necessity for appropriating private property for public use is not a judicial question, and may be determined by the Legislature, or its determination may be delegated by it to public officers.

13. Constitutional law ⇨227—Statute making determination of county legislative body conclusive only when adopted by two-thirds vote does not make unreasonable classification.

Code Civ. Proc. Cal. § 1241, as amended in 1913, does not provide an unjust or unreasonable classification, because making resolution of county legislative body conclusive evidence of necessity of proposed public improvement and necessity of taking designated property therefor only when adopted by two-thirds vote.

14. Eminent domain ⇨262(5)—Defendants not prejudiced by ruling that resolution was only prima facie evidence, when it was conclusive.

As resolution of county board of supervisors was conclusive evidence as to necessity for taking defendants' land for public highway, they were not prejudiced by ruling treating the resolution as prima facie evidence only, and allowing them full opportunity to introduce their evidence on the subject.

15. Constitutional law ⇨42—Litigant can only question validity of statute so far as applied to his disadvantage.

A litigant can be heard to question the validity of a statute only when and in so far as it is applied to his disadvantage.

In Error to the District Court of Appeal of the State of California, Second Appellate District, Division 1.

Condemnation proceedings by the County of Los Angeles against the Rindge Company and others and against the Rindge Company. Judgments for plaintiff were affirmed by the California District Court of Appeal (53 Cal. App. 166, 200 Pac. 27), and defendants bring error. Affirmed.

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*Messrs. Edward Stafford, of Washington, D. C., and Nathan Newby and J. A. Anderson, both of Los Angeles, Cal., for plaintiffs in error.

Mr. Paul Vallee, of Los Angeles, Cal., for defendant in error.

Mr. Justice SANFORD delivered the opinion of the Court.

This record includes two cases which were tried together in the State courts and have been heard together here.

The writs of error are brought to review judgments of the District Court of Appeal affirming judgments of the Superior Court of Los Angeles County, California, condemning lands of the plaintiffs in error for use by the County as public highways; which they insist have deprived them of their property without due process of law and in violation of the Fourteenth Amendment.¹

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*The two fundamental questions involved are whether the uses for which these lands have been taken are public uses authorized by law; and whether the taking was necessary to such uses.

Section 1238 of the California Code of Civil Procedure includes "highways" among the "public uses" for which the right of eminent domain may be exercised. Section 1241, as amended in 1913, provides that before property can be taken it must appear that the use to which it is to be applied is one authorized by law and that the taking is necessary to such use: Provided, *inter alia*, that when the legislative body of a county has, by resolution adopted by vote of two-thirds of its members, found and determined that the public interest and necessity require the construction by the county of any proposed public improvement located within its limits and that designated property is necessary therefor, such resolution shall be "conclusive evidence" of the public necessity for such improvement, that such property is necessary therefor, and that such improvement is located in the manner most compatible with the greatest public good and the least private injury. Stats. 1913, p. 549.

The plaintiffs in error are the owners of a large tract of land lying on the shore of the Pacific Ocean, known as the Malibu Ranch, extending in an easterly and westerly direction about twenty-two miles and varying in width from one-half mile to one and one-half miles. It lies at the base of a high and rugged mountain range which parallels the shore at a distance of from three to four miles, its northern line extending along the slope and foothills of this mountain range, and is traversed by many ridges and intervening canyons leading from the mountains toward the shore. It lies about ten miles west of Santa Monica, one of the principal cities of Los Angeles County, situated on the coast to the southwest of the City of Los Angeles, and is mainly in Los Angeles Coun-

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ty, but extends *about a mile and a half into Ventura County, the adjoining county on the west. It is traversed lengthwise by a private road of the ranch owners which was formerly used by farmers and settlers living north of the ranch on the slope of the mountains and west of the ranch in Ventura Coun-

ty, but which has been for several years closed by the ranch owners to the public.²

In 1916 and 1917 the Board of Supervisors, the legislative body of Los Angeles County, without notice to the ranch owners, adopted, by the required vote, two resolutions declaring that the public interest and necessity required the construction of the two highways now in controversy "for public highway purposes" and that it was necessary for such "public uses" that the lands included therein be acquired by the county; and directing that condemnation proceedings be instituted for such purposes. One of these proposed highways, which is known in the record as the "main road," commences at the eastern boundary of the ranch, where it connects with and forms a continuation of a much traveled public county highway running along the shore of the ocean from Santa Monica, and extends lengthwise through the ranch in a westerly direction to the Ventura County line where it terminates within the boundaries of the ranch. The other is a branch from this main road, extending to the northern boundary of the ranch, where it terminates. There are no connecting public roads either at the western termination of the main road or the northern termination of the branch road.

These condemnation proceedings were thereupon instituted in the Superior Court

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of the County. They were *vigorously resisted by the ranch owners, who denied the County's right of condemnation. Certain special defenses which they interposed, alleging that the main road would furnish no way of necessity or convenience for public use or travel, were stricken out by the court. Upon a preliminary trial as to the right of condemnation, the trial judge, after the resolutions of the Board had been introduced in evidence by the County, ruled that while they were not conclusive evidence of the matters specified in the proviso to section 1241 of the Code, they were *prima facie* evidence thereof. And the ranch owners then, without objection or limitation, introduced a large mass of evidence in support of all of their defenses, including the matters which had been alleged in the special defenses that had been stricken out; and a large mass of rebuttal evidence was then introduced by the County, the testimony on both sides relating to all the matters which had been or now are in issue in the cases.

The trial judge reviewed the evidence, and, manifestly without reference to any presumption arising under his ruling as to the *prima facie* evidence furnished by the resolu-

¹After these judgments of affirmance petitions to have the cases heard and determined by the Supreme Court of California were denied by that court.

²There has been much litigation between the ranch owners and the county and federal authorities as to the public use of roads and ways across this ranch, in which, prior to these proceedings, the ranch owners have been successful. In this litigation are *United States v. Rindge* (D. C.) 208 Fed. 611, and *People v. Rindge*, 174 Cal. 743, 164 Pac. 633.

tions, decided all the questions submitted in favor of the County, and made specific findings that the public interest and necessity required the acquisition of these public highways; that the use to which they were to be applied was authorized by law; that they would afford accommodation to the traveling public; and that they were located as required. Thereafter, the amount of landowners' compensation and damages having been determined by a jury—as to which no question is made—judgments condemning these lands for public highways were entered.

On appeals taken by the ranch owners the District Court of Appeal held that the taking of the property for these highways was for a public use; that the proviso to section 1241 of the Code was not obnoxious to any provi-

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sion of *the State or Federal Constitutions, and under it the resolutions were conclusive evidence of the matters specified; that in any event the ranch owners had not been prejudiced by the rulings of the trial court as to the effect of this proviso as they had been permitted to introduce full and complete evidence on these subjects; and that they had not been prejudiced by the striking out of their special defenses not only because the resolutions were conclusive evidence that the taking was necessary, but also because every material issue tendered by these special defenses was otherwise raised by the pleadings and they had been permitted to offer evidence touching every matter contained therein; and it thereupon sustained the findings of the trial court and affirmed the judgments of condemnation. Los Angeles County v. Rindge Co., 53 Cal. App. 166, 200 Pac. 27.

The ranch owners urge here, in substance: That the use for which their property was taken was not a public use authorized by law, and their special defenses raising this question as to the main road were erroneously stricken out; that their property was taken without any public necessity, and, the proviso to section 1241 of the Code purporting to make the resolutions conclusive evidence thereof being in violation of the State Constitution and of the Fourteenth Amendment and constituting neither conclusive nor prima facie evidence, the burden of disproving this public necessity was erroneously cast upon them; and that in consequence the judgments of condemnation deprived them of their property in violation of the due process and equal protection clauses of the Fourteenth Amendment.

[1, 2] 1. *Authorized Public Use.* The nature of a use, whether public or private, is ultimately a judicial question. However the determination of this question is influenced by local conditions; and this court, while enforcing the Fourteenth Amendment, should

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keep in *view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed

public uses in any state. Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 158, 160, 17 Sup. Ct. 56, 41 L. Ed. 369; Hairston v. Danville Railway, 208 U. S. 598, 606, 607 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial. The California Code specifically declares "highways" to be "public uses" for which the right of eminent domain may be exercised. Here, the Board of Supervisors, familiar with local conditions, has declared these highways to be for public uses; and the local and appellate state courts have likewise held them to be for public uses authorized by law.

[3-6] The ranch owners concede that a genuine highway, in fact adapted as a way of convenience or necessity for public use and travel, is a public use. Their real contention is that these particular roads, while called highways are "highways" in name merely, that is, that they are shams under the name of public improvements, which cannot, in fact, furnish ways of convenience or necessity to the traveling public. This argument is based upon the fact that they extend through the ranch alone, the main road terminating within its boundaries, and connect with no other public roads at their western and northern ends. These roads will, however, be open to the general public to such extent as it can and may use it. The people to the eastward in Santa Monica, Los Angeles and other cities will have access to them and to the people living on the ranch through the connecting road from Santa Monica. The people living on the ranch will have egress over them. The people living north of the terminus of the crossroad, who now have no adequate outlet will have access to it through private roads and ways and may then travel over these two roads to Los Angeles and other cities for marketing

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produce and other purposes; and the *people in these cities will have reciprocal access to them for purposes of trade and otherwise. It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use. Fallbrook Irrigation District v. Bradley, supra, 164 U. S. 161, 17 Sup. Ct. 56, 41 L. Ed. 369. In like manner, if Ventura County should hereafter extend the main road to the western end of the ranch the people living beyond it, who now have no practical outlet, would be furnished a similar means of egress, with reciprocal ingress to them by the people living in the cities to the east. A highway can be legally laid out terminating at a state line even though there be no connecting highway in the adjoining State and no definite official action has been taken to establish such connecting highway; otherwise great embarrassment and difficulty

would be experienced in establishing highways across state lines. *Rice v. Rindge*, 53 N. H. 530, 531. So, as to county highways. Public road systems, it is manifest, must frequently be constructed in instalments, especially where adjoining counties are involved. In determining whether the taking of property is necessary for public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered. *Central Pacific Railway v. Feldman*, 152 Cal. 303, 309, 92 Pac. 849.

[7, 8] But aside from these considerations, these roads, especially the main road, through its connection with the public road coming along the shore from Santa Monica, will afford a highway for persons desiring to travel along the shore to the county line, with a view of the ocean on the one side, and of the mountain range on the other, constituting, as stated by the trial judge, a scenic highway of great beauty. Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. Thus,

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the con*demnation of lands for public parks is now universally recognized as a taking for public use. *Shoemaker v. United States*, 147 U. S. 282, 297, 13 Sup. Ct. 361, 37 L. Ed. 170. A road need not be for a purpose of business to create a public exigency; air, exercise and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery. *Higginson v. Nahant*, 11 Allen (Mass.) 530, 536. The *Riverside Drive* in New York is essentially a highway for public use as Broadway; the *Speedway* in this city, as *Pennsylvania Avenue*. And manifestly, in these days of general public travel in motor cars for health and recreation, such a highway as this, extending for more than twenty miles along the shores of the Pacific at the base of a range of mountains, must be regarded as a public use.

For these reasons we conclude that these highways will, as found by the trial judge, afford accommodation to the traveling public, and that the taking of land for them is a taking for a public use authorized by the laws of California.

[9] The ranch owners were not prejudiced by the action of the trial court in striking out their special defenses in this behalf, since, under the general issues, they were entitled, as held by the District Court of Appeal, and were in fact permitted, to introduce all their evidence bearing upon this question.

[10-13] 2. *Public necessity for the taking.* We necessarily accept, as a matter of state law, the holding of the District Court of Appeal that the proviso to section 1241 of the Code made the resolutions of the Board of

Supervisors conclusive evidence as to the necessity of taking these particular highways and the other matters therein specified. So construed it was held by that court not to be objectionable to any provision of the State or Federal Constitutions. By this we are

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controlled so far as the provisions *of the State Constitutions are concerned. *Fallbrook Irrigation District v. Bradley*, supra, 164 U. S. 155, 17 Sup. Ct. 56, 41 L. Ed. 369; *Georgia Railway v. Town of Decatur*, 262 U. S. 432, 43 Sup. Ct. 613, 67 L. Ed. —, decided to-day. And so construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before such resolution is adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the Legislature, and may either be exercised by the Legislature or delegated by it to public officers.

"Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." *Bragg v. Weaver*, 251 U. S. 57, 58, 40 Sup. Ct. 62, 64 L. Ed. 135.

"That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. * * * Neither is it any longer open to question in this court that the Legislature may confer upon a municipality the authority to determine such necessity for itself. * * * The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." *Joslin Mfg. Co. v. City of Providence*, 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. —, decided to-day.

And, clearly, the fact that the resolutions are made conclusive evidence by the statute only when adopted by a two-thirds vote, and as applied to an improvement lying within the county, does not constitute an unjust or unreasonable classification.

[14, 15] And since the resolutions were conclusive evidence as to the necessity for the taking of these public highways, the ranch owners were not prejudiced by the ruling of the trial judge which treated them as prima facie evidence merely and allowed them full opportunity to introduce their evidence upon

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the subject. A litigant can *be heard to question the validity of a statute only when and in so far as it is applied to his disadvantage. *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 289, 42 Sup. Ct. 106, 66 L. Ed. 239.

We therefore conclude that the property of the ranch owners has been taken for highways constituting a public use authorized by law, and upon a public necessity for the taking duly established, and that they have not been deprived of their property in violation

of the Fourteenth Amendment. The judgments of the District Court of Appeal are accordingly

Affirmed.

Mr. Justice SUTHERLAND took no part in the consideration or decision of this case.

(262 U. S. 710)

MILHEIM et al. v. MOFFAT TUNNEL IMPROVEMENT DIST. et al.

(Submitted on Motion to Dismiss or Affirm Feb. 20, 1923. Decided June 11, 1923.)

No. 791.

1. Courts — 391(3)—Federal question requiring analysis is not frivolous.

When the federal question presented on writ of error to a state court is one which requires analysis and exposition for its decision, it is not frivolous, and the writ of error will not be dismissed.

2. Courts — 400—Judgment affirmed on motion, when questions wanting in substance.

A judgment of the state court will be affirmed on motion, under Supreme Court rule 6, § 5 (32 Sup. Ct. vi), when the questions on which the decision depends are so wanting in substance as not to need further argument.

3. Constitutional law — 67—Whether use of tax is public or private is judicial question.

The nature of a use for which taxes are being imposed, whether public or private, within Const. Amend. 14, is ultimately a judicial question.

4. Courts — 394(11)—Great respect accorded judgment of state court or declaration of legislative body on question whether use is public.

The question whether a use is public, so as to support the imposition of taxes, is influenced by local conditions, and the Supreme Court, in enforcing Const. Amend. 14, should keep in view the diversity of such conditions, and regard with great respect the judgments of state courts, or the declarations of state legislative bodies, as to what should be deemed public uses.

5. Taxation — 23—For tunnel intended to be leased to public transportation agencies is for "public purpose."

A tunnel which, though serving no useful purpose as an isolated transportation unit, is intended to furnish an avenue or highway to be leased to public transportation agencies, is a public improvement for a public use, for which taxes may be imposed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Purpose.]

6. Taxation — 23—For construction of tunnel intended for use by particular road is for "public purpose."

Though a tunnel intended to be leased to public transportation agencies is so located as

to be practically a part of the line of a particular railroad, and is designed for its use, where such railroad serves as an avenue of communication between different portions of the state, which will be lost, without such tunnel, because of the loss from the operation of such railroad over steep grades and heavy curves and its own financial inability to build the tunnel, it constitutes a public improvement for a "public purpose," for which taxes may be imposed, especially where other railroads may use the tunnel, and it may also be used for transporting water to a city, for telegraph, telephone, and power lines, and for the transportation of automobiles and vehicles.

7. Constitutional law — 233, 290(1)—Legislative determination of property benefited conclusive, unless unwarranted and arbitrary.

If a proposed improvement is one which the state has authority to make and pay for by assessments on property benefited, the Legislature, in the exercise of the taxing power, has authority to determine by the statute imposing the tax what lands are benefited thereby, and its determination is conclusive, and cannot be assailed under Const. Amend. 14, unless wholly unwarranted and a flagrant abuse, and, by reason of its arbitrary character, a mere confiscation of the particular property.

8. Courts — 394(11)—Legislative determination that property to be assessed for tunnel would be benefited upheld, when not shown arbitrary, capricious, or confiscatory.

Where the evidence did not show that the action of the state Legislature in creating a district to be assessed for the construction of a tunnel lying on both sides of a railroad, for whose use it was designed, was arbitrary, capricious, or confiscatory, and the trial court and state Supreme Court had sustained the legislative classification, it must be upheld.

9. Constitutional law — 43(1)—Landowners, not appearing or objecting to tentative basis for appraisal of benefits, not entitled to complain, in suit for injunction, that basis was unconstitutional.

Where the governing board of a tunnel improvement district had merely adopted a tentative ad valorem basis for the appraisal of benefits, subject to modification and corrections, before final confirmation, after the hearing of objections of which public notice was given, landowners, who did not seek to have it modify or correct such tentative basis, or file objections to the appraisal of benefits to their properties, could not complain that such tentative basis was unconstitutional.

In Error to the Supreme Court of the State of Colorado.

Suit by Mary L. Milheim and others against the Moffat Tunnel Improvement District and others. A judgment dismissing the complaint was affirmed by the Supreme Court of Colorado (211 Pac. 649), and plaintiffs bring error. Affirmed.

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*Messrs. Edwin H. Park and Barnwell S. Stuart, both of Denver, Colo., for plaintiffs in error.

Mr. Norton Montgomery, of Denver, Colo., for defendants in error.

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*Mr. Justice SANFORD delivered the opinion of the Court.

The defendants in error move to dismiss the writ of error or affirm the judgment.

This is a suit challenging the constitutionality of an act of the State of Colorado creating a tunnel improvement district (Sess. Laws Ex. Sess. 1922, c. 2, p. 88), and the proceedings thereunder.

This Act, which is known as the Moffat Tunnel Act, declares that to provide an avenue of communication by a transportation tunnel through the Continental Divide at or near James Peak will reduce the barrier to commercial intercourse between the eastern and western portions of the State, facilitate communication in all seasons, and promote the health, comfort, safety, convenience and welfare of the people of the State, and will be of especial benefit to the property in certain designated boundaries within which such tunnel is to be located. To that end it creates "The Moffat Tunnel Improvement District," a body corporate, comprising all of the territory thus designated, and being all or portions of nine counties east and west of the Divide, extending between and including the City and County of Denver on the east and Routt County in the northwestern corner of the State, a total distance of about two hundred and fifty miles. The District is to be managed by a Board, called the "Moffat Tunnel Commission," which is required to construct such a tunnel through the Divide, with its equipment and approaches, at about 9,200 feet above sea level, in such manner that it may be used for standard gauge railroads, telegraph and telephone lines, the transmission of power, and the transportation of water, automobiles and other vehicles.

The Commission is authorized to issue District bonds to the amount of \$6,720,000 to pay for the cost of the tunnel, expenses, and interest on the bonds during its construction;

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to maintain the tunnel; and to contract *with persons and corporations for its use for the specified purposes, without monopoly by any use, person or corporation, until its capacity has been reached, at annual rentals apportioned to the respective values of the separate uses, and constituting a fair and just proportion of the total amount required to pay interest on the bonds, provide for their retirement and maintain the tunnel; prior users to be reimbursed by subsequent users in an equitable proportion of the amount previously paid for retirement of the bonds and interest.

The Commission is authorized to levy special assessments upon all real estate within

the District—except governmental property which is exempted—for the purpose provided in the Act, such special assessments to be made in proportion to the benefits to each piece of real estate accruing by reason of the improvements and in accordance with the rules of apportionment adopted by the Commission. It may at any time appraise the benefits which will result to such several parcels of real estate from the organization of the District and the construction of the tunnel, and, after such appraisal of benefits, levy special assessments, to the extent of such benefits upon all such real estate; and may for such purposes adopt rules providing, *inter alia*, for notice and hearing to all owners affected thereby. And if the revenues from the tunnel are not sufficient to pay interest due on the bonds in any year, provide for their retirement, pay expenses and maintain the tunnel, in order to prevent the occurrence of a deficit, the Commission is required to levy special assessments sufficient in amount, annually if necessary, upon all such real estate, in the manner provided.

It is expressly declared that the special benefits accruing to the assessable real estate within the District are in excess of the cost of the improvements and of the assessments provided for against such real estate.

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*In each year in which an assessment is made the Commission is required to appoint a time and place at which it will hear objections to the assessments, giving prior notice thereof by publication in two issues a week apart in a newspaper of general circulation published in each county. Any real estate owner claiming that his property has been assessed too highly, erroneously or illegally, may before such hearing file written objections to such assessment. At the hearing the Commission shall hear such evidence as may be offered concerning the correctness or legality of such assessments, and may modify or amend the same. Any property owner may appeal from the finding of the Commission as to such assessments to the District Court of the County; but the court shall not disturb the findings of the Commission unless manifestly disproportionate to the assessments imposed upon other property in the District. The findings of the Commission if not appealed from, or the findings of the District Court in case of an appeal, shall be final and conclusive evidence that such assessments have been made in proportion to the benefits conferred upon each tract of real estate by reason of the improvements, and constitute a lien thereon until paid.

The Commission, having been duly organized under the Act, fixed the definite location of the tunnel, adopted preliminary plans for its construction in such manner as to provide for the various specified uses, estimated its cost, and resolved to issue District bonds in the authorized amount to pay for its con-

struction. After making an investigation and examination of the real estate in the District, and taking the testimony of a great many witnesses from all parts of the District, engaged in various kinds of business, it determined the aggregate value of the real estate within the District subject to assessment to be \$298,544,966—mainly in accordance with the assessed valuations for taxes—and

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further determined, sub*ject to correction and confirmation after hearing the property owners affected, that the value of each parcel of such real estate would by reason of the organization of the District and the construction of the tunnel be increased at least to the extent of fifteen per cent. And it thereupon appraised the benefits to the several parcels of such real estate at such percentage of their value, as the basis of special assessments to be thereafter made under the provisions of the Act. It also fixed a time and place at which it would hear objections filed by any property owner to the appraisal of benefits thus made, upon evidence and argument, before confirmation thereof, and gave public notice of such hearing by publication in the manner specified in the Act. This notice recited the proceedings which the Commission had taken, including the appraisal of benefits which it had made as the basis for special assessments, and stated that any appraisal of benefits found upon such hearing to be incorrect or inequitable, would be modified or amended, and that, after making all proper corrections, the appraisals would be confirmed.

Thereupon, before the date set for such hearing, two of the plaintiffs in error, owning lands within the District, without filing with the Commission any objections to the appraisal of benefits, filed their complaint in a District Court of the State, in behalf of themselves and all similar landowners, against the Improvement District and the Tunnel Commission; alleging, inter alia, that the tunnel was not intended as a public highway for the use of the general public, but for the benefit of the Denver & Salt Lake Railroad, commonly known as the Moffat Road; that the benefits to their real estate and the other real estate in the District had been arbitrarily appraised and that no special benefits would accrue to their property or other property similarly situated; that the Act and the proceedings taken and threatened by the

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Commission *thereunder violated various provisions of the State Constitution and would deprive them of their property without due process in violation of the Fourteenth Amendment; and praying that the defendants be enjoined from proceeding with the enforcement of the Act and that all the proceedings of the Commission be declared null and void. The defendants in their answers denied these allegations. The other plaintiffs in error, also owning lands within the District,

who likewise had filed no objections with the Commission, subsequently intervened as plaintiffs in the action.

The case was heard by the District Court upon the pleadings and proof. The issues, both of fact and law, including those relating to the appraisal of benefits, were found for the defendants; and the complaint was accordingly dismissed.

Upon writ of error taken, the Supreme Court of Colorado sustained the District Court in all respects and affirmed its judgment. 211 Pac. 649.

The landowners urge here, as grounds of error, in substance, that the Act and the proceedings taken and permitted thereunder violate the Fourteenth Amendment in that: (a) The purpose of the Act is not public in the sense warranting the exercise of the power of taxation, but is essentially private; (b) the Act authorizes the imposition of the entire taxes upon the lands within the District, without regard to their relation to the tunnel or the benefit to be derived from it, and, there being no special benefits to such lands justifying such taxation, such classification is entirely arbitrary; and (c) the Commission has arbitrarily and unreasonably adopted an ad valorem basis for the appraisal and apportionment of benefits to the several parcels of land within the District, without reference to the actual benefits to each.

[1] The federal question presented, being one which requires analysis and exposition

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for its decision, is not friv*olous; and the motion to dismiss the writ of error is accordingly denied. *Louisville Railroad v. Melton*, 218 U. S. 36, 39, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84.

[2] The motion to affirm the judgment should, however, be granted if the questions on which the decision depends are found to be so wanting in substance as not to need further argument. Rule 6, § 5 (32 Sup. Ct. vi) *Hodges v. Snyder* (April 9, 1923) 261 U. S. 600, 43 Sup. Ct. 435, 67 L. Ed. —, and cases therein cited.

[3, 4] 1. *Public Purpose*. The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any state. *Rindge Co. v. County of Los Angeles*, 262 U. S. 700, 43 Sup. Ct. 689, 67 L. Ed. —, decided to-day, and cases therein cited. And like respect should be accorded to the declarations of the legislative body of the State. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369. Here the legislature, familiar with the local conditions, has declared that the construction of the tunnel

will benefit the people of the State; and both the local court of the State and its Supreme Court have held its construction to be for a public purpose.

[5] It is urged by the landowners that the tunnel, considered as an isolated transportation unit, will serve no useful public purpose. This is obvious, but not to the point. It is intended to furnish an avenue or highway which shall be leased to public transportation agencies. A structure intended for such use is unquestionably a public improvement for a public use. Thus subway tunnels constructed by municipalities for lease to street railway and rapid transit lines for use as common carriers are public improvements for public purposes, for which the power of taxation may be exercised. *Sun Printing Co. v. City of New York*, 152 N. Y. 257, 265, 46

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N. E. 499, 37 L. R. A. 788; *Prince v. *Crocker*, 166 Mass. 347, 361, 44 N. E. 446, 32 L. R. A. 610; *Browne v. Turner*, 176 Mass. 9, 12, 56 N. E. 969; *Larsen v. San Francisco*, 182 Cal. 1, 9, 186 Pac. 757. And see, by analogy, as to ship canals, *Cook v. Port of Portland*, 20 Or. 580, 27 Pac. 263, 13 L. R. A. 533.

[6] They, however, contend that the tunnel must be deemed for a private, rather than a public purpose, because it is located so as to be practically a part of the line of the Moffat Road, and is intended for its use, the real object of the Act being, as expressed by the Governor, to save this railroad to the people of the State.¹ There is virtually no denial of this; and evidently this was the motive which led to the passage of the Act and is the primary purpose for which the tunnel is to be constructed. This, however, is not a private purpose. The use of the tunnel by the Moffat Road will be for a beneficial public purpose. This railroad runs from Denver, on the east of the Continental Divide, to Routt County in the northwestern corner of the State, a distance of 255 miles. It crosses the Divide by a circuitous route above this tunnel, with steep grades and heavy curves. In the winter seasons this portion of its line is almost impassable. Its operations result in heavy losses, and it is now in an embarrassed financial condition and unable to build the tunnel. Without the use of the tunnel, the railroad must, it seems, be abandoned; and this avenue of communication between different portions of the State will be lost. The use of the tunnel will reduce the elevation, grades and curvature of the

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railroad, shorten its line about *23 miles, and

¹ The Governor, in his message to the special session of the legislature which passed this Act, in stating the two matters for which he had called the session, said: "Conditions have arisen which threaten the complete abandonment of a transportation line upon which several counties of the State depend, and your immediate action authorizing the issuance of bonds for the construction of a tunnel through the mountain range is necessary if the Moffat railroad is to be saved to the people of this State."

save it large amounts annually. Evidently the preservation of this railroad, a common carrier of persons and property, as a means of communication between the eastern and northwestern portions of the State, is a matter of great public importance; and a tunnel enabling it to provide quicker and cheaper transportation during all seasons of the year will greatly promote the public welfare.

Even if this Act specifically directed that the tunnel be leased to the Moffat Road for railroad purposes (a just rental based on the cost of constructing and maintaining the tunnel being provided), as the tunnel would be operated by the railroad as a public highway for the carriage of passengers and freight, it would be a public improvement for a public use. The test of the public character of an improvement is the use to which it is to be put, not the person by whom it is to be operated. See *Mt. Vernon Cotton Co. v. Power Co.*, 240 U. S. 30, 32, 36 Sup. Ct. 234, 60 L. Ed. 507. A subway tunnel constructed by a city under an act authorizing its construction for the specific purpose of being leased to a designated rapid transit company, is a lawful public improvement for a public use. *Browne v. Turner*, supra, 176 Mass. 12, 13, 56 N. E. 969. As a railroad is a highway for public use, although owned by a private corporation, a state may impose or authorize a tax in aid of its construction and in furtherance of such public use. *Olcott v. Supervisors*, 16 Wall. 678, 695, 696, 21 L. Ed. 382; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 678, 22 L. Ed. 227; *Wisconsin Railroad v. Jacobson*, 179 U. S. 287, 297, 21 Sup. Ct. 115, 45 L. Ed. 194; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 292, 293, 26 Sup. Ct. 91, 50 L. Ed. 192.

"Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. * * * No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public. * * *

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If there be any purpose for which taxation would *seem to be legitimate it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them. * * * When, therefore, it is settled that a railroad is a highway for public uses, there can be no substantial reason why the power of the State to tax may not be exerted in its behalf." *Olcott v. Supervisors*, 16 Wall. 695, 696 (21 L. Ed. 382).

"Though the corporation was private, its work was public, as much so as if it were to be constructed by the State." *Township of Pine Grove v. Talcott*, 19 Wall. 676, 22 L. Ed. 227.

The use of a spur track is none the less public because it is located to reach a private industry whose proprietors contribute to the cost. *Hairston v. Danville Railway*, 208 U. S. 598, 608, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. So here, although this

tunnel be designed for lease to the Moffat Road, it will be a highway for public uses, as much so as if it were operated by the State, and a public improvement for public purposes.

Furthermore, while the saving of the Moffat Road to the people of the State seems to have been the prime motive which induced the passage of the Act, it specifically provides for the use of the tunnel by any and all railroads and other public utilities, to the extent of its capacity, each paying an annual rental apportioned to the respective values of the separate uses, and constituting a fair and just proportion of the total amount required to pay interest on the bonds, provide for their retirement and maintain the tunnel. And the evidence strongly indicates that the tunnel may and will be used, to like advantage, by the Denver & Rio Grande Railroad, extending from Denver to Salt Lake City, with a great shortening and improvement of its line. It will also serve as a means of transporting water from the Fraser River on the west of the Divide to the City of Denver, for telegraph and telephone lines and the transmission of power; and for the trans-

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portation of automobiles and vehicles, *which are now unable to cross the Divide during several months of the year. These are all public purposes of much importance.

We conclude that the purpose for which the tunnel is to be constructed is not private, but public, and such as warrants the exercise by the State of the power of taxation.

[7] 2. *Classification as to Special Benefits.* It is contended that no special benefits of a direct and immediate character will accrue from the tunnel to the lands lying within the District, as distinguished from the other lands in the State, and that hence the classification made by the Act in providing for the assessments solely upon the lands within the District, is entirely unreasonable and arbitrary. It is well settled, however, that if a proposed improvement is one which the State has authority to make and pay for by assessments on property benefited, the legislature in the exercise of the taxing power has authority to determine by the statute imposing the tax, what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the courts and cannot be assailed under the Fourteenth Amendment unless it is wholly unwarranted and a flagrant abuse, and by reason of its arbitrary character is mere confiscation of the particular property. *Spencer v. Merchant*, 125 U. S. 345, 356, 8 Sup. Ct. 921, 31 L. Ed. 763; *Fallbrook Irrigation District v. Bradley*, supra, 164 U. S. 174, 17 Sup. Ct. 56 (41 L. Ed. 369); *Wagner v. Baltimore*, 239 U. S. 207, 218, 220, 36 Sup. Ct. 66, 60 L. Ed. 230; *Houck v. Drainage District*, 239 U. S. 254, 262, 265, 36 Sup. Ct. 58, 60 L. Ed. 266; *Branson v. Bush*, 251 U. S. 182, 190, 40 Sup. Ct. 113, 64 L. Ed. 215.

[8] The legislature not only provided for the assessment of the lands within the District, but specifically declared that the tunnel would be of especial benefit to such lands and that the special benefits accruing to them are in excess of the cost of the tunnel and of the assessments provided for against them.

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*The District consists of the City and County of Denver on the east; a strip of land from six to eight miles in width extending through four counties on both sides of the Moffat Road to the crest of the Divide; and three entire counties and a portion of another county, which are traversed and reached by the Moffat Road and extend to the northwestern corner of the State. In short, the District includes the lands contiguous to the Moffat Road. The lands lying in the strip extending from Denver to the Divide are mainly agricultural lands; those lying to the west of the Divide, while largely devoted to stock raising, have valuable timber, and the two counties lying farthest to the northwest have valuable coal deposits. The testimony in the trial court fairly indicates that the lands within this District, on both sides of the Divide, including those owned by the plaintiffs in error, will, generally speaking, by reason of their proximity to the Moffat Road and the increased facilities of transportation across the Divide by which the western counties may be able to market their products to the east and the eastern counties obtain an outlet to the northwest, receive special benefits from the operation of the tunnel, of a reasonably direct and immediate character, resulting in increased value of the lands, in excess of those received by other lands in the State, and that the legislative classification is, on the whole, substantially just and reasonable.

The legislature declared that there will be such special benefits. The trial court, familiar with local conditions, after hearing evidence on this question, found that there would be such special benefits and sustained the legislative classification; and the Supreme Court of the State has affirmed its action. To the extent that there may be inequalities in the benefits received by the several parcels of land within the District, they are to be apportioned by the Commission in the manner provided by the Act, with a right of appeal to the local courts for the correction of errors in such apportionments.

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*And certainly, under all the circumstances, and regarding the District as a whole, the evidence does not justify us in setting aside the conclusion reached by the trial court upon the weight of the evidence, or in characterizing the action of the legislature in creating this separate District upon which the assessments should be made, as arbitrary, capricious or confiscatory. The legislative determination and classification must, accordingly, be upheld.

[9] 3. *Appraisal of Benefits.* It is contended that the Commission arbitrarily adopted an ad valorem basis of appraisal for the apportionment of benefits to the several parcels of land within the District, without reference to the actual benefits to each. This argument erroneously assumes that the Commission had finally adopted such an ad valorem basis for its appraisal. This is not the case. It had merely adopted a tentative ad valorem basis, subject to modification and corrections, before final confirmation, after the hearing of objections filed by landowners; of which public notice was given. These landowners did not seek to have the Commission modify or correct this tentative basis of apportionment or file any objections to the appraisal of benefits to their properties. Presumably if the tentative appraisal was made on an erroneous basis it would have been modified upon a proper showing. Having failed to object to the tentative ad va-

lorem basis adopted by the Commission or to appear before it for the purpose of obtaining modifications or corrections as to their lands before the final adoption of such basis, they have here no sufficient ground of complaint. Where a city charter gives property owners an opportunity to be heard before a board respecting the justice and validity of local assessments for proposed public improvements and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to com-

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*plain of such assessments as unconstitutional. *Farncomb v. Denver*, 252 U. S. 7, 11, 40 Sup. Ct. 271, 64 L. Ed. 424.

The judgment of the Supreme Court of Colorado was plainly right; and as the questions presented do not require further argument, the alternative motion of the defendants in error is granted, and the judgment is Affirmed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1922.

(262 U. S. 731)

No. 409. *UNION STOCK YARDS COMPANY OF OMAHA (Limited)*, plaintiff in error, v. *MAYHALL & NEIBLE et al.* May 21, 1923. In error to the Supreme Court of the State of Nebraska. For opinion below, see 185 N. W. 326. Mr. Norris Brown, of Omaha, Neb., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U. S. 1, 5-6, 40 Sup. Ct. 255, 64 L. Ed. 421.

(262 U. S. 731)

No. 556. *William C. OLANDER*, plaintiff in error, v. *T. P. HOLLOWELL*. May 21, 1923. In error to the Supreme Court of the State of Iowa.

PER CURIAM. For opinion below, see 193 Iowa, 979, 188 N. W. 667. Mr. Robert Healy, of Fort Dodge, Iowa, for plaintiff in error. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; *Toop v. Ulysses Land Co.*, 237 U. S. 580, 583, 35 Sup. Ct. 739, 59 L. Ed. 1127; *Piedmont Power & Light Co. v. Town of Graham*, 253 U. S. 193, 195, 40 Sup. Ct. 453, 64 L. Ed. 855.

(262 U. S. 732)

No. 629. *A. N. LEECRAFT*, plaintiff in error, v. *The TEXAS COMPANY*. May 21, 1923. For opinion below, see 281 Fed. 918.

Messrs. C. W. King and Geo. F. Short, both of Oklahoma City, Okl., for plaintiff in error. In error to the United States Circuit Court of Appeals for the Eighth Circuit.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 311, 23 Sup. Ct. 123, 47 L. Ed. 190; *Merriam Company v. Syndicate Publishing Company*, 237 U. S. 618, 621, 35 Sup. Ct. 708, 59 L. Ed. 1148; (2) *Southern Railway Co. v. Green*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; *American Smelting Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393, 9 Ann. Cas. 978.

(262 U. S. 739)

No. 915. *The YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO*, et al., petitioners, v. *Ora DAVIS et al.* May 21, 1923. For opinion below, see 140 N. E. 114. Mr. Frank Davis, Jr., of Washington, D. C., for petitioner. Petition for rehearing (262 U. S. 739, 43 Sup. Ct. 521, 67 L. Ed. —) granted and petition for a writ of certiorari to the Supreme Court of the State of Ohio granted.

(262 U. S. 753)

No. 916. *J. P. HUGHES*, petitioner, v. *UNITED STATES BORAX COMPANY*. May 21, 1923. For opinion below, see 286 Fed. 24. Mr. Albert E. Sherman, of Los Angeles, Cal., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and motion to waive rule 37 denied.

(262 U. S. 732)

No. 919. **FIRST NATIONAL BANK IN ST. LOUIS**, plaintiff in error, v. **The STATE OF MISSOURI** at the information of **Jesse W. BARRETT**, Attorney General. May 21, 1923. For opinion below, see 249 S. W. 619. Messrs. James C. Jones and Frank H. Sullivan, both of St. Louis, Mo., for plaintiff in error.

Order.—It is ordered that this cause be restored to the docket for reargument, at the next term, on the issue whether the State had authority to institute and maintain a proceeding to question compliance by a national bank with its charter.

(262 U. S. 751)

No. 973. **CITY OF LOS ANGELES** et al. petitioners, v. **MONO POWER COMPANY** et al. May 21, 1923. For opinion below, see 284 Fed. 784. Mr. W. B. Mathews, of Los Angeles, Cal., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(262 U. S. 751)

No. 977. **Frederick M. DYER** et al., petitioners, v. **The COMMONWEALTH OF MASSACHUSETTS**. May 21, 1923. For opinion below, see 138 N. E. 296. Mr. Boyd B. Jones, of Boston, Mass., for petitioners. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied.

(262 U. S. 751)

No. 988. **The THOSMIL HOLDING CORPORATION**, petitioner, v. **INTERSTATE COAL & DOCK COMPANY**. May 21, 1923. For opinion below, see *Luhrig Collieries Co. v. Interstate Coal & Dock Co.*, 287 Fed. 711. Mr. Howard Thayer Kingsbury, of New York City, for petitioner. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 751)

No. 1001. **Morris S. RACHMIL**, petitioner, v. **The UNITED STATES of America**. May 21, 1923. For opinion below, see 288 Fed. 782. Mr. Charles C. Paulding, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 740)

No. 1004. **James C. DAVIS**, Agent, etc., petitioner, v. **R. L. CORNWELL**. May 21, 1923. For opinion below, see 213 Pac. 218. Mr. I. Parker Veazey, Jr., of Great Falls, Mont., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Montana granted.

(262 U. S. 751)

No. 1006. **IMPORTERS STEAMSHIP COMPANY**, claimant, etc., et al., petitioners, v. **HOUSTON MARINE ENGINEERING WORKS** et al. May 21, 1923. For opinion below, see 285 Fed. 868. Mr. James B. Stubbs, of Galveston, Tex., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 740)

No. 1008. **CHUNG FOOK**, petitioner, v. **Edward WHITE**, as Commissioner of Immigration, etc. May 21, 1923. For opinion below, see 287 Fed. 533. Mr. George W. Hott, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(262 U. S. 752)

No. 1010. **PERKINS GLUE COMPANY**, petitioner, v. **STANDARD FURNITURE COMPANY**. May 21, 1923. For opinion below, see 287 Fed. 109. Messrs. Thomas Ewing and Gorham Crosby, both of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 739)

No. 1012. **WESTERN UNION TELEGRAPH COMPANY**, petitioner, v. **J. A. CZIZEK**. May 21, 1923. For opinion below, see 286 Fed. 478. Messrs. Francis R. Stark, of New York City, and Beverly L. Hodghead, of San Francisco, Cal., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(262 U. S. 752)

Nos. 1019 and 1020. **Claude A. P. TURNER**, petitioner, v. **FLAT SLAB PATENTS COMPANY**. May 21, 1923. For opinion below, see 285 Fed. 257. Mr. Frank A. Whiteley, of Minneapolis, Minn., for petitioner. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(262 U. S. 752)

No. 1026. **Gustave PORGES**, on Behalf of Himself and Others, etc., petitioners, v. **James R. SHEFFIELD**, Trustee, etc. May 21, 1923. For opinion below, see *In re Interborough Consol. Corporation*, 288 Fed. 334. Mr. Henry G. Gray, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 752)

No. 1027. **Baron Edmond James de ROTHSCCHILD** et al., petitioners, v. **James R. SHEFFIELD**, Trustee, etc. May 21, 1923. For opinion below, see *In re Interborough Consol. Corporation*, 288 Fed. 334. Messrs. Sol. M. Stroock and George Zabriskie, both of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 752)

No. 1028. **FRIEDLANDER BROTHERS** etc., et al., petitioners, v. **The CITY OF MOULTRIE** et al. May 21, 1923. For opinion below, see 116 S. E. 845. Mr. I. J. Hofmayer, of Albany, Ga., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied.

(262 U. S. 757)

No. 1092. Ethel JAMES, petitioner, v. James C. DAVIS, as Agent, etc. May 21, 1923. For opinion below, see 95 South. 346. Mr. W. A. Denson, of Clanton, Ala., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied.

(261 U. S. 753)

No. 1087. GRAHAM, CHISHOLM & COMPANY et al., petitioners, v. John FIRTH, MAY 21, 1923. For opinion below, see In re Rossmussen, 287 Fed. 890. Mr. Ralph Wolf, of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied, because of failure to file the petition within the time prescribed by the statute.

(262 U. S. 739)

No. 1041. Louis B. MACKENZIE, petitioner, v. A. ENGELHARD & SONS COMPANY, MAY 21, 1923. For opinion below, see 286 Fed. 813. See, also, 262 U. S. 739, 43 Sup. Ct. 701, 67 L. Ed. —. Mr. William Marshall Bullitt, of Louisville, Ky., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

(262 U. S. 753)

No. 1048. BURNS BROS., petitioner, v. THE STEAM TUG INTERSTATE NO. 1, HER ENGINES, ETC. May 21, 1923. For opinion below, see 290 Fed. 926. Messrs. Mark Ash and Edward Ash, both of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 739)

No. 1052. A. ENGELHARD & SONS COMPANY, petitioner, v. Louis B. MACKENZIE, MAY 21, 1923. For opinion below, see 286 Fed. 813. See, also, 262 U. S. 739, 43 Sup. Ct. 701, 67 L. Ed. —. Mr. R. A. McDowell, of Louisville, Ky., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

No. —, original. Ex parte in the matter of The UNITED STATES, Owner, etc., petitioner. June 4, 1923. Motion for leave to file petition for a writ of mandamus and/or prohibition herein granted, and a rule to show cause ordered to issue returnable on Monday, October 1 next.

(262 U. S. 733)

No. —, original. Ex parte in the matter of Henry WOODHOUSE, petitioner. June 4, 1923. Mr. Henry Woodhouse, in pro per. Motions for leave to file petitions for writ of mandamus herein denied.

(262 U. S. 734)

No. —, original. Ex parte in the matter of Jesse C. RUMSEY, petitioner. June 4, 1923. Motion for leave to file a petition for a writ of habeas corpus herein denied.

(262 U. S. 505)

No. 18, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States, intervener. June 4, 1923. See, also, 261 U. S. 345, 43 Sup. Ct. 377, 67 L. Ed. —. The commissioners heretofore designated herein to run, locate, and mark portions of the boundary between the States of Texas and Oklahoma on and along the south bank of Red River are hereby ordered and directed also to survey and run upon the ground and to delineate upon a suitable plat the medial line between such State boundary and the northerly bank of such river for a total length of 3 miles at and in the vicinity of the river bed oil wells. In so surveying, running, and platting such medial line the commissioners shall conform to the fifth paragraph of the decree entered herein March 12, 1923, entitled "Supplement to partial decree of June 5, 1922," and shall ascertain and show on such plat the exact location of all oil wells which are within 300 feet of such medial line. The commissioners shall make a separate report of their action under this order, and shall include therein a statement of the time employed and the expenses incurred in that work. The work and report of the commissioners hereunder shall be subject to the approval of the court. Copies of the report shall be promptly delivered to the two States and the United States, and exceptions or objections thereto, if there be such, on the part of either State, the United States, or any private intervener herein, shall be presented to the court or, if it be not in session, filed with the clerk within 40 days after the report is made. The cost of executing this order shall be borne and paid as part of the expenses of the receivership.

(262 U. S. 733)

No. 552. GUARANTY TITLE & TRUST CORPORATION, Receiver of Vue de L'Eau Company, appellant, v. The UNITED STATES, June 4, 1923. For opinion below, see 57 Ct. Cl. 620. Mr. R. B. Tunstall, of Norfolk, Va., for appellant. Motion of Norfolk Hampton Roads Company for leave to intervene as a party appellee in this case granted. The appellant to give bond in the amount of \$3,000, bond to run in the name of The United States for the benefit of the Norfolk Hampton Roads Company to secure the payment of costs of the appeal as well as interest on \$33,000, constituting that part of the judgment recovered by the Norfolk Hampton Roads Company, payment of which has been withheld in consequence of the appeal.

(262 U. S. 733)

No. 574. LION BONDING & SURETY COMPANY, petitioner, v. A. H. KARATZ; and No. 467. DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA et al., petitioners, v. A. J. HERTZ et al., etc., Receivers, etc. June 4, 1923. Motion to modify decree (262 U. S. 77, 43 Sup. Ct. 480, 67 L. Ed. —) denied. See, also, 262 U. S. 640, 43 Sup. Ct. 641, 67 L. Ed. —. Messrs. H. F. Rose and A. R. Wells, both of Omaha, Neb., for petitioners.

(262 U. S. 762)

No. 835. Joseph PHIPPS et al., petitioners, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. June 4, 1923. On

writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 284 Fed. 945. See, also, 261 U. S. 611, 43 Sup. Ct. 363, 67 L. Ed. —. Mr. John G. Parkinson, of St. Joseph, Mo., for petitioners. Messrs. John E. Dolman, of St. Joseph, Mo., and M. L. Bell and W. F. Dickinson, both of Chicago, Ill., for respondent. Dismissed, per stipulation.

(262 U. S. 734)

No. 876. James C. DAVIS, as Agent, etc., plaintiff in error, v. W. M. SCROGGINS. June 4, 1923. For opinion below, see 284 Fed. 760. Mr. Ras Young, of Longview, Tex., for plaintiff in error. In error to the United States Circuit Court of Appeals for the Fifth Circuit.

PER CURIAM. Dismissed for the want of jurisdiction, upon the authority of section 3 of the act of September 6, 1916, c. 448, 39 Stat. 726, 727 (Comp. St. § 1120a).

(262 U. S. 753)

No. 887. The BROMWELL BRUSH & WIRE GOODS COMPANY, plaintiff in error, v. The STATE BOARD OF CHARITIES AND CORRECTIONS OF KENTUCKY. June 4, 1923. For opinion below, see 288 Fed. 1018. Mr. Harvey Myers, of Covington, Ky., for plaintiff in error. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(262 U. S. 754)

No. 964. Albert EICKEL, Bankrupt, petitioner, v. A. ROBINSON. June 4, 1923. For opinion below, see 285 Fed. 732. Mr. T. W. Gregory, of Washington, D. C., for petitioner. Trustee of the ESTATE of Albert EICKEL, Bankrupt. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 747)

No. 995. GALVESTON CAUSEWAY CONSTRUCTION COMPANY et al., petitioners, v. GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY et al. June 4, 1923. Messrs. Presley K. Ewing and Wilmer S. Hunt, both of Houston, Tex., for petitioners. The per curiam announced in this case Monday, April 30 (262 U. S. 747, 43 Sup. Ct. 503, 67 L. Ed. —), is modified by striking out all therein contained after the words "the petition for certiorari in this case is denied," for the reason that the criticism of the petitioner for a failure to file a statement in accordance with paragraph 3 of rule 37 was undeserved.

(262 U. S. 754)

No. 1005. J. L. LANCASTER et al., Receivers of Texas & Pacific Railway Company, petitioner, v. Ben E. FITCH. June 4, 1923. For opinion below, see 246 S. W. 1015. Mr. F. H. Prendergast, of Marshall, Tex., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied.

(262 U. S. 740)

No. 1018. ERIE RAILROAD COMPANY, petitioner, v. Martin KIRKENDALL. June 4, 1923. Mr. Edward A. Foote, of Cleveland,

Ohio, for petitioner. Petition for a writ of certiorari to the Court of Appeals, Eighth Judicial District of the State of Ohio, granted.

(262 U. S. 740)

No. 1031. GREAT NORTHERN RAILWAY COMPANY, petitioner, v. GALBREATH CATTLE COMPANY et al. June 4, 1923. For opinion below, see Phelps v. Great Northern R. Co., 213 Pac. 610. Mr. I. Parker Veazey, Jr., of Great Falls, Mont., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Montana granted.

(262 U. S. 754)

No. 1033. The LILLEY BUILDING & LOAN COMPANY, petitioner, v. Newton M. MILLER, as Collector, etc. June 4, 1923. For opinion below, see 285 Fed. 1020. Messrs. Oscar W. Newman, of Columbus, Ohio, Province M. Pogue, of Cincinnati, Ohio, and John F. Wilson, of Columbus, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(262 U. S. 754)

No. 1034. Jacques ROUSSO, petitioner, v. FIRST NATIONAL BANK IN DETROIT et al. June 4, 1923. For opinion below, see 287 Fed. 273. Mr. Joshua R. H. Potts, of Chicago, Ill. (Messrs. Brayton G. Richards, of Chicago, Ill. and Thomas S. Donnelly, of Detroit, Mich. of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(262 U. S. 740)

No. 1035. MISSOURI PACIFIC RAILROAD COMPANY, petitioner, v. R. L. HANNA. June 4, 1923. For opinion below, see 247 S. W. 1044. Mr. Thomas B. Pryor, of Fort Smith, Ark., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas granted.

(262 U. S. 754)

No. 1038. G. S. SWANSON et al., petitioners, v. Jack SARJA. June 4, 1923. For opinion below, see Sarja v. Pittsburgh Steel Co., 191 N. W. 742. Messrs. Henry C. Clark, of Washington, D. C., and G. S. Swanson and H. A. Swanson, both of Brainerd, Minn., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied.

(262 U. S. 741)

No. 1039. Clarence D. KELLER et al., etc., petitioners, v. ADAMS-CAMPBELL COMPANY (Inc.) et al. June 4, 1923. For opinion below, see 287 Fed. 838. Mr. Charles E. Townsend, of San Francisco, Cal., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(262 U. S. 755)

No. 1040. The UNITED STATES of America, petitioner, v. Guiseppe GANCI. June 4, 1923. For opinion below, see 287 Fed. 60. The Attorney General, for the United States. Petition for a writ of certiorari to the United

States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 755)

No. 1043. The FARMERS' LOAN & TRUST COMPANY of NEW YORK, petitioner, v. WILCOX COUNTY, GEORGIA. June 4, 1923. For opinion below, see 287 Fed. 809, which affirms judgment 284 Fed. 856. Mr. John R. L. Smith, of Macon, Ga., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 757)

No. 1045. T. R. BENNETT, Superintendent of Banks for the State of Georgia, petitioner, v. John E. SCHWARZ et al. June 4, 1923. For opinion below, see 116 S. E. 306. Messrs. George M. Napier, of Atlanta, Ga., and Paul E. Seabrook, of Savannah, Ga., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied for lack of a final decree.

(262 U. S. 755)

No. 1046. The LONDON & LANCASHIRE INDEMNITY COMPANY OF AMERICA, petitioner, v. BOARD OF COUNTY COMMISSIONERS OF COLUMBIANA COUNTY, OHIO, et al. June 4, 1923. For opinion below, see 140 N. E. 672. Messrs. Bert W. Gearheart, of Columbus, Ohio, and Geo. T. Farrell, of Lisbon, Ohio, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied.

(262 U. S. 755)

No. 1047. The AETNA CASUALTY & SURETY COMPANY, petitioner, v. BOARD OF COUNTY COMMISSIONERS OF COLUMBIANA COUNTY, OHIO, et al. June 4, 1923. For opinion below, see 140 N. E. 672. Messrs. Bert W. Gearheart, of Columbus, Ohio, and Geo. T. Farrell, of Lisbon, Ohio, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied.

(262 U. S. 755)

No. 1053. GOLDWYN PICTURES CORPORATION et al., petitioners, v. HOWELLS SALES COMPANY et al. June 4, 1923. For opinion below, see 287 Fed. 100. Mr. Charles E. Kelley, of New York City (Mr. William J. Hughes, of Washington, D. C., of counsel), for petitioners. Mr. Charles J. Katzenstein, of New York City (Mr. Charles H. Tuttle, of New York City, of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 755)

No. 1056. Grace PEMBERTON, petitioner, v. MORRIS FERTILIZER COMPANY. June 4, 1923. For opinion below, see 287 Fed. 517. Mr. George C. Bedell, of Jacksonville, Fla., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 757)

No. 1060. Willis A. MURRAY, petitioner, v. The UNITED STATES of America. June 4,

1923. For opinion below, see 53 App. D. C. —, 288 Fed. 1008. Mr. H. S. Barger, of Washington, D. C., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied, and motion for leave to proceed in forma pauperis in this case granted as to costs incurred.

(262 U. S. 756)

No. 1062. MORSE DRY DOCK & REPAIR COMPANY, petitioner, v. John DANIELSON, an Infant, etc. June 4, 1923. For opinion below, see 235 N. Y. 439, 139 N. E. 567, which affirms judgment 202 App. Div. 812, 195 N. Y. Supp. 91. Mr. Charles J. McDermott, of New York City, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(262 U. S. 756)

No. 1063. MORSE DRY DOCK & REPAIR COMPANY, petitioner, v. Eilen S. WARREN, Administratrix of Francis J. Warren, deceased. June 4, 1923. For opinion below, see 235 N. Y. 445, 139 N. E. 569, which affirms judgment 204 App. Div. 891, 197 N. Y. Supp. 955. Mr. Charles J. McDermott, of New York City, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(262 U. S. 756)

No. 1064. MORSE DRY DOCK & REPAIR COMPANY, petitioner, v. William J. CONNELLY. June 4, 1923. For opinion below, see 235 N. Y. 602, 139 N. E. 752, which affirms judgment 204 App. Div. 836, 196 N. Y. Supp. 921. Mr. Charles J. McDermott, of New York City, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(262 U. S. 756)

No. 1065. Benjamin F. ZUCKER, petitioner, v. The UNITED STATES of America. June 4, 1923. For opinion below, see 288 Fed. 12. Messrs. Samuel S. Koenig and Elijah N. Zoline, both of New York City, for petitioner. Mr. James M. Beck, Sol. Gen., of Washington, D. C., and Mrs. Mabel Walker Willebrandt, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(262 U. S. 756)

No. 1071. Edward FOX et al., petitioners, v. The UNITED STATES of America. June 4, 1923. Mr. Charles B. Stafford, of Chicago, Ill., for petitioners. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(262 U. S. 756)

No. 1075. Rudolph SCHLIEFER, petitioner, v. The UNITED STATES of America. June 4, 1923. For opinion below, see 288 Fed. 368. Mr. Frank A. Harrigan, of Philadelphia, Pa., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(262 U. S. 757)

No. 1076. **THE NEW YORK CENTRAL RAILROAD COMPANY**, petitioner, v. **Flor-ence M. CUDDEBACK**, as Administratrix, etc. June 4, 1923. For opinion below, see 204 App. Div. 901, 197 N. Y. Supp. 907. Mr. Daniel M. Beach, of Rochester, N. Y., for petitioner. Mr. Arthur E. Sutherland, of Rochester, N. Y., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(262 U. S. 757)

No. 1077. **ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS**, petitioner, v. **John HOSEY**. June 4, 1923. For opinion below, see 247 S. W. 327. Mr. J. Q. Mahaffey, of Texarkana, Tex., for petitioner. Mr. S. P. Jones, of Marshall, Tex. (Messrs. Jones, Sexton & Jones, of Marshall, Tex., of counsel), for respondent. Petition for a writ of certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas denied.

(262 U. S. 762)

No. 1091. **James C. DAVIS**, Director General of Railroads, etc., plaintiff in error, v. **Michael J. HANLON**. June 4, 1923. In error to the Supreme Court of the State of Pennsylvania. For opinion below, see 276 Pa. 113, 119 Atl. 822. Dismissed with costs, on motion of counsel for the plaintiff in error.

(262 U. S. 762)

No. 1114. **J. W. RUSSELL**, plaintiff in error, v. **James E. SEARGEANT**, Trustee in Bankruptcy, etc. June 4, 1923. In error to the Supreme Court of the State of Washington. For opinion below, see 110 Wash. 216, 188 Pac. 466. Mr. J. W. Cox, of Washington, D. C., for defendants in error. Docketed and dismissed with costs and mandate granted on motion of Mr. J. W. Cox for the defendant in error.

(262 U. S. 734)

No. —. **W. J. BLAIR**, plaintiff in error, v. **F. RORER'S Administrator et al.** June 11, 1923. For opinion below, see 116 S. E. 767. Mr. Aubrey E. Strode, of Lynchburg, Va., for petitioner. Motion for leave to file a petition for a writ of error herein to the Supreme Court of Appeals of the State of Virginia denied.

(262 U. S. 724)

No. 18, original. **THE STATE OF OKLAHOMA**, complainant, v. **THE STATE OF TEXAS**, defendant; **The United States**, intervener. June 11, 1923. See, also, 262 U. S. 505, 43 Sup. Ct. 701, 67 L. Ed. —. On consideration of the motion of the United States for a release from the existing receivership of the following-described lands lying on the north side of the medial line of Red River, that is to say:

(1) Lot 4 of section 34 in township 4 south of range 14 west embraced in allotment No. 3385, Comanche, 1910, to Day Tah-Too-Ah-Ni-Pah;

(2) Lot 1 of section 33 in township 4 south of range 14 west embraced in allotment No. 3303, Kiowa, 1910, to Ray Do-Yah;

(3) Lot 6 of section 5 in township 5 south of range 14 west embraced in allotment No. 3293,

Kiowa, 1910, to Maggie Turtle Mountain Reid; and

(4) Lot 5 of section 5 and lot 3 of section 8 in township 5 south of range 14 west embraced in allotment No. 3413, Comanche, 1910, to Robert To-Quothy,

It is ordered as to each of these tracts that the same, including so much of the bed of Red River as lies in front thereof and north of the medial line of the river, be released from the receivership and the possession be surrendered by the receiver upon fulfillment as to such tract of the following conditions, and not otherwise:

(a) The execution and presentation to the receiver of satisfactory agreements, approved by the Secretary of the Interior, establishing the side lines from the surveyed upland on the north bank to such medial line between such tract and the adjoining tracts on either side; and

(b) The payment to the receiver of such sum or balance as may at the time be owing to the receiver on account of oil wells (whether productive or otherwise) drilled or completed on such tract and within such side lines under the supervision or administration of the receiver—such sum or balance to include all expenditures and advancements of the receiver, whether for materials, labor, receivership expenses, or otherwise, in respect of such wells.

(262 U. S. 735)

No. 87. **McLane TILTON**, appellant, v. **Felix M. DRENNEN**, as Receiver, etc. June 11, 1923. For opinion below, see Cogswell v. Drennen, 271 Fed. 289. Mr. Forney Johnston, of Washington, D. C., for appellant. On consideration of the stipulation to reinstate this cause on the docket and reverse on confession of error, it is now here ordered that said cause be reinstated on the docket; and that the decree be reversed upon such confession of error.

(262 U. S. 734)

No. 274. **William RANDALL et al.**, plaintiffs in error, v. **THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA**. June 11, 1923. See, also, 261 U. S. 252, 43 Sup. Ct. 252, 67 L. Ed. —. Mr. Otto Gresham, of Chicago, Ill., for plaintiffs in error. Motion for leave to file a petition for a writ of error to the Appellate Court of the State of Indiana denied.

(262 U. S. 735)

No. 640. **THE UNITED STATES of America ex rel. Catani TISI**, alias Lista Cortina, appellant, v. **Robert E. TOD**, Commissioner of Immigration at the Port of New York. June 11, 1923. See, also, 261 U. S. 626, 43 Sup. Ct. 359, 67 L. Ed. —. Messrs. Walter Nelles and Isaac Shorr, both of New York City, for appellant. Motion to reinstate this case on the docket granted.

(262 U. S. 736)

No. 656. **EIGHTH AVENUE RAILROAD COMPANY**, appellant, v. **Job E. HEDGES**, as Receiver of the New York Railways Company; and

No. 657. **NINTH AVENUE RAILROAD COMPANY**, appellant, v. **Job E. HEDGES**, as Receiver of the New York Railways Company. June 11, 1923. Appeals from the United States Circuit Court of Appeals for the Second Cir-

cuit. For opinion below, see *In re Eighth Ave. R. Co.*, 282 Fed. 523. Mr. M. J. O'Brien, of New York City, for appellant. Mr. Bronson Winthrop, of New York City, for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Shulthis v. McDougal*, 225 U. S. 561, 568, 32 Sup. Ct. 704, 56 L. Ed. 1205; *Hull v. Burr*, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; *Dela-ware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397; *Begg v. City of New York*, 262 U. S. 196, 43 Sup. Ct. 513, 67 L. Ed. —.

(262 U. S. 758)

No. 967. **A. J. HILLEGASS et al.**, petitioners, v. **Bertha ROHM**, Administratrix of **M. J. Rohm**, deceased. June 11, 1923. For opinion below, see *Hay v. Hillegass*, 275 Pa. 497, 119 Atl. 588. Mr. Jo. V. Morgan, of Washington, D. C., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

(262 U. S. 741)

No. 1054. **James C. DAVIS**, Agent, etc., petitioner, v. **J. M. CURRIE**. June 11, 1923. Mr. Douglas McKay, of Columbia, S. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted.

(262 U. S. 741)

No. 1059. **James C. DAVIS**, Agent, etc., petitioner, v. **John O'HARA**. June 11, 1923. For opinion below, see 192 N. W. 215. The Attorney General, for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska granted.

(262 U. S. 758)

No. 1066. **Simon A. MILLER**, petitioner, v. **The UNITED STATES of America**, June 11, 1923. For opinion below, see 287 Fed. 864. Mr. Joseph H. Stewart, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 758)

No. 1067. **NATIONAL SURETY COMPANY**, petitioner, v. **Edward H. CHILDS**, Trustee in Bankruptcy of **J. MENIST COMPANY (Inc.)**. June 11, 1923. For opinion below, see 290 Fed. 947. Mr. Frank M. White, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 758)

No. 1069. **William B. MOSES**, petitioner, v. **LALIME & PARTRIDGE (Inc.) et al.** June 11, 1923. For opinion below, see 287 Fed. 37. Messrs. Frederic P. Warfield, of New York City, and Jesse A. Holton, of Boston, Mass., for petitioner. Mr. Marcus B. May, of Boston, Mass., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(262 U. S. 758)

No. 1078. **SUNRISE PICTURES CORPORATION**, petitioner, v. **Isaac SILVERMAN**. 43 Sup.Ct.—45

June 11, 1923. For opinion below, see 290 Fed. 804. Mr. J. Joseph Lilly, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 759)

No. 1079. **FEDERAL TRADE COMMISSION**, petitioner, v. **The MENNEN COMPANY**. June 11, 1923. For opinion below, see 288 Fed. 774. The Attorney General, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 741)

No. 1082. **Herman G. GERDES**, as Trustee in Bankruptcy of **Abraham Lustgarten**, Bankrupt, petitioner, v. **Abraham LUSTGARTEN**. June 11, 1923. For opinion below, see 289 Fed. 481. Mr. Moses Cohen, of New York City, for petitioner. Mr. Lawrence J. Bershad, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(262 U. S. 759)

No. 1085 to 1089, inclusive. **The UNITED STATES OF AMERICA**, Owner, of the Steamship **ANNA A. MOORE**, petitioner, v. **Morris E. HENDERSON et al.**, Trading as **Phoenix Paint & Varnish Company**. June 11, 1923. For opinion below, see 286 Fed. 794. Mr. James M. Beck, Sol. Gen., of Washington, D. C. (Mr. F. R. Conway, of Washington, D. C., of counsel), for petitioner. Messrs. Lewis Adler & Laws, of Philadelphia, Pa. (Mr. Otto Wolff, Jr., of Philadelphia, Pa., of counsel), for respondents. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(262 U. S. 759)

No. 1093. **The SANDUSKY CEMENT COMPANY**, petitioner, v. **A. R. HAMILTON & COMPANY**. June 11, 1923. For opinion below, see 287 Fed. 609. Messrs. A. C. Dustin and C. M. Horn, both of Cleveland, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(262 U. S. 759)

No. 1094. **Mary E. McCAMPBELL**, petitioner, v. **NEW YORK LIFE INSURANCE COMPANY**. June 11, 1923. For opinion below, see 288 Fed. 465. Mr. Henry P. Burney, of San Antonio, Tex., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(262 U. S. 759)

No. 1098. **LOCOMOTIVE STOKER COMPANY**, petitioner, v. **The ELVIN MECHANICAL STOKER COMPANY**. June 11, 1923. For opinion below, see 286 Fed. 309. Messrs. Louis K. Gillson, of Chicago, Ill., Paul Synestvedt, of Philadelphia, Pa., and Frederic D. McKenney, of Washington, D. C., for petitioner. Messrs. J. Snowden Bell, Drury W. Cooper, and Frederick P. Whitaker, all of New York

City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(262 U. S. 760)

No. 1101. JOSE TAYA'S SONS COMPANY, Claimant of THE STEAMSHIP ASUARCA, etc., petitioner, v. Jean B. M. DUCHE et al. June 11, 1923. For opinion below, see 291 Fed. 77. Messrs. John M. Woolsey and Robert S. Erskine, both of New York City, for petitioner. Messrs. D. Roger Englar and T. Catesby Jones, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 760)

No. 1105. The UNITED STATES of America ex rel. Joseph FELD, by next friend, Samuel Feld, petitioner, v. Robert L. BULLARD, Major General, United States Army. June 11, 1923. For opinion below, see 290 Fed. 704. Messrs. E. F. Colladay and B. B. Pettus, both of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(262 U. S. 741)

No. 1110. The PEOPLE OF THE STATE OF NEW YORK, petitioner, v. Louis JERSAWIT, as Trustee in Bankruptcy of AJAX DRESS COMPANY (Inc.). June 11, 1923. For opinion below, see 290 Fed. 950. Mr. Robert P. Beyer, of New York City, for petitioners. Mr. Henry B. Singer, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(262 U. S. 760)

No. 1112. Merl B. INKS, petitioner, v. The UNITED STATES of America. June 11, 1923. For opinion below, see 290 Fed. 203. Mr. Charles P. R. Macaulay, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(262 U. S. 742)

No. 1113. Thomas A. DELANEY, petitioner, v. The UNITED STATES of America. June 11, 1923. Mr. M. M. Doyle, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

(262 U. S. 729)

No. 978. MAGNUM IMPORT COMPANY (Inc.), petitioner, v. Francis Joseph de Spoturno COTY;

No. 979. Max L. COHN, trading as The Maclen Import Company (Inc.), petitioner, v. Francois Joseph de Spoturno COTY;

No. 980. Arthur BAUM et al., trading as The Beautex Company, petitioner, v. Francois Joseph de Spoturno COTY;

No. 981. MANGUM IMPORT COMPANY (Inc.), petitioner, v. HOUBIGANT (Inc.); and

No. 982. IVORY NOVELTIES TRADING COMPANY (Inc.), petitioner, v. Francois Joseph de Spoturno COTY. April 17, 1923. See, also, 289 Fed. 1020; 262 U. S. 159, 43 Sup. Ct. 531, 67 L. Ed. —; 262 U. S. 738, 43 Sup. Ct. 524, 67 L. Ed. —. Mr. Charles H. Tuttle, of New York City (Messrs. Isaac Reiss, of New York City, and William J. Hughes, of Washington, D. C., on the briefs), for petitioners. Mr. Asher Blum, of New York City (Mr. Hugo Mock, of New York City, on the brief), for Coty. Mr. George S. Hornblower, of New York City (Messrs. Lindley M. Garrison and Raoul E. Desvernine, both of New York City, on the brief), for Houbigant, Inc.

Order.—On consideration of the petitions for suspending orders herein, and of the argument of counsel thereupon had, it is now here ordered by this court that the said petitions be, and the same are hereby, denied.

(262 U. S. 735)

No. 498. James K. COCHRAN and Harris KOBEY, plaintiffs in error, v. Coulton M. BECKER. June 11, 1923. For former decision, see 261 U. S. 607, 43 S. Ct. 363, 67 L. Ed. —. Mr. Harris Kobey, pro se. Mr. Oliver J. Miller, of St. Louis, Mo., for defendant in error. Motion to rescind judgment and for stay of mandate herein denied.

(262 U. S. 734)

No. —, original. The UNITED STATES, complainant, v. The STATE OF OKLAHOMA. June 11, 1923. The Attorney General, Messrs. Solicitor General James M. Beck, of Washington, D. C., and Alfred A. Wheat, of New York City, for the United States. Motion for leave to file bill of complaint herein denied.

(262 U. S. 757)

No. 409. UNION STOCK YARDS COMPANY OF OMAHA, plaintiff in error, v. MAY-HALL & NEIBLE et al., etc. June 11, 1923. For former decision, see 260 U. S. 742, 43 Sup. Ct. 98, 67 L. Ed. —. Messrs. Norris Brown and Irving F. Baxter, both of Omaha, Neb., for plaintiff in error. Messrs. A. A. McLaughlin, of Washington, D. C., Francis A. Brogan, Alfred G. Ellick, and Anan Raymond, all of Omaha, Neb., and R. Bruce Scott and Byron Clark, both of Chicago, Ill., for defendants in error. Motion to reinstate petition for a writ of certiorari herein denied.







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